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44th Annual Judge Robert H. Staton Indiana Law Update

Indiana Continuing Legal Education Forum (ICLEF)

44th Annual Judge Robert H. Staton Indiana Law Update
September 13-14, 2022
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44th ANNUAL

JUDGE ROBERT H. STATON

INDIANA

LAW UPDATE™

September 13 - 14, 2022

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DISCLAIMER

The information and procedures set forth in this practice manual are subject to constant change and therefore should serve only as a foundation for further investigation and study of the current law and procedures related to the subject matter covered herein. Further, the forms contained within this manual are samples only and were designed for use in a particular situation involving parties which had certain needs which these documents met. All information, procedures and forms contained herein should be very carefully reviewed and should serve only as a guide for use in specific situations.

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44TH ANNUAL JUDGE ROBERT H. STATON INDIANA LAW UPDATE™

Agenda – Day 1

8:30 A.M. Registration & Coffee

8:55 A.M. Welcome & Introduction
- Hon. Melissa S. May, Indiana Court of Appeals - Chair

9:00 A.M. Ethics
- Margaret M. Christensen, Charles M. Kidd

10:00 A.M. Appellate Practice Update
- Maggie L. Smith

10:30 A.M. Coffee Break

10:45 A.M. Probate, Wills, Trusts and Elder Law
- Todd I. Glass, Robert W. Fechtman

11:45 A.M. Business, Contracts and Banking
- Kiamesha-Sylvia G. Colom

12:15 P.M. Lunch Break

1:30 P.M. Family Law
- Hon. Vicki L. Carmichael, James A. Reed

2:15 P.M. Real Estate
- Mary A. Slade

3:00 P.M. Refreshment Break

3:15 P.M. Insurance Law
- Anna E. Mallon

4:00 P.M. Torts
- Sarah Graziano

4:45 P.M. Adjournment

September 13 - 14, 2022

44TH ANNUAL JUDGE ROBERT H. STATON INDIANA LAW UPDATE™

Agenda – Day 2

8:30 A.M. Registration & Coffee

8:55 A.M. Welcome & Introduction
- Hon. Melissa S. May, Indiana Court of Appeals – Chair

9:00 A.M. Evidence – Criminal and Civil
- Hon. Robert R. Altice, Jr.

9:45 A.M. Employment Law / Workplace Issues
- Gregory W. Guevara

10:30 A.M. Coffee Break

10:45 A.M. State and Federal Tax Update
- Richard L. Bartholomew

11:35 A.M. Cyber Security
- Paul J. Unger

12:15 P.M. Lunch Break

1:30 P.M. Internet Law / Social Media
- Jessica L. Ballard-Barnett, Seth R. Wilson

2:15 P.M. Constitutional Law
- Kenneth J. Falk

3:00 P.M. Refreshment Break

3:15 P.M. Criminal Law
- Kathie A. Perry, Maxwell B. Wiley

4:00 P.M. Bankruptcy Law
- Thomas P. Yoder

4:45 P.M. Adjournment

44TH ANNUAL JUDGE ROBERT H. STATON INDIANA LAW UPDATE™

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Hon. Melissa S. May, Judge, Indiana Court of Appeals, Indianapolis

Judge May was appointed to the Indiana Court of Appeals by Governor Frank O'Bannon in April of 1998. She was born in Elkhart, Indiana. She earned a B.S. in criminal justice from Indiana University-South Bend in 1980, a J.D. from Indiana University School of Law-Indianapolis in 1984. She is also a graduate of the Graduate Program for Indiana Judges. Judge May is currently the Presiding Judge of the Fourth District.

Prior to her appointment to the Court, Judge May practiced law for fourteen years in Evansville, Indiana, where she focused on insurance defense and personal injury litigation.

Judge May has been active in local, state, and national bar associations and bar foundations. She served the Indiana Bar Association on the Board of Managers from 1992-1994, as Chair of the Litigation Section from 1998-1999, as Counsel to the President from 2000-2001, as Chair of the Appellate Practice Section from 2007-2008, and as Secretary to the Board of Governors in 2008-2009. She is also a member of the Indianapolis Bar Association and the Evansville Bar Association. In addition, she was a member of the Board of Directors of the Indiana Continuing Legal Education Forum from 1994-1999 and has been a co-chair of ICLEF's Indiana Trial Advocacy College from 2001 to present. She is a fellow of the Indiana Bar Foundation, as well as for the American Bar Association, and she is a Master Fellow of the Indianapolis Bar Association.

From 1999 until December 2004, Judge May was a member of Indiana's Continuing Legal Education Commission, where she chaired the Specialization Committee. She is currently on an Advisory Panel to the Specialization Committee. In 2005, she was named to the Indiana Pro Bono Commission and in July 2008, she was named as Chair of that Commission. While chair, she worked with the fourteen pro bono d istricts to train lawyers and mediators on how to assist homeowners who are facing foreclosure. Judge May also serves on the Civil Instruction Committee, an Indiana Judicial Conference Committee, which has been working to translate all of the civil jury instructions into "plain English." She frequently speaks on legal topics to attorneys, other judges, schools, and other professional and community organizations.

In 2003, Judge May was named to the American Bar Association's Standing Committee on Attorney Specialization. She is now special counsel to that committee. In the spring

of 2004, Judge May became adjunct faculty at Indiana University School of Law-Indianapolis, where she teaches a trial advocacy course.

Also in the spring of 2004, she was awarded an Honorary Doctor of Civil Law from the University of Southern Indiana.

Hon. Robert R. Altice, Jr., Judge, Indiana Court of Appeals, Indianapolis

Judge Altice was appointed to the Court of Appeals by Governor Mike Pence and began his service on Sept. 2, 2015.

Judge Altice earned his undergraduate degree from Miami University, Oxford, OH. Subsequently, he obtained a master's degree in criminal justice administration from the University of Central Missouri, where he was honored as "Graduate Student of the Year" in his department. He received his law degree from the University of Missouri-Kansas City School of Law.

Judge Altice's legal career began in Jackson County, MO, handling felony cases as a deputy prosecutor before being promoted to Chief Deputy Prosecutor for the Drug Unit. He then practiced with a Kansas City civil law firm, focusing on medical malpractice defense. After moving to Indianapolis, he joined the law firm of Wooden McLaughlin & Sterner, concentrating on insurance defense.

In 1994, Judge Altice returned to prosecution, handling a major felony caseload as a deputy prosecutor for the Marion County Prosecutor's Office. He served as Chief of the Felony Division from 1997 to 2000, prosecuting a number of high-profile felonies while also providing management support to 35 deputy prosecutors. Judge Altice briefly served as the Office's Chief Counsel, working with the Indiana General Assembly to amend laws on domestic battery and possession of firearms by violent felons. As a prosecutor, he tried more than 100 major felony jury trials, including 25 murder cases and countless bench trials.

Judge Altice was elected to the Marion County bench in 2000 and presided over both criminal and civil dockets. As judge of Marion Superior Court, Criminal Division 2 from 2001 to 2012, he presided at 250 major felony jury trials, including 75 murder trials (seven death penalty cases).

While presiding over some of the most serious criminal matters in the state, Judge Altice also served as chair of the Marion Superior Court Criminal Term from 2005 to 2007, as a member of the Executive Committee for the Marion Superior Court from 2007 to 2009, and as Presiding Judge of the Marion Superior Court from 2009 to 2011. As the Presiding Judge, he was responsible for the administration of the Marion Superior Court, with an annual budget of $50 million, and managed a court staff of

more than 850 employees. He also hosted a TV show on the government access channel, titled “Off the Bench,” in which other civic leaders appeared as guests to discuss public affairs.

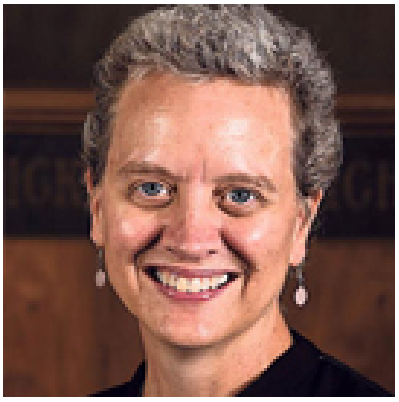
Judge Altice moved to the civil division of the Marion Superior Court in 2013, where he officiated at 15 civil jury trials in Superior Court 5. Judge Altice was appointed chair of the Marion Superior Court Civil Term in January 2015.
Throughout his judicial career, Judge Altice has held leadership roles in organizations that improve the administration of justice. He accepted special assignments from the Indiana Supreme Court on the Judicial Performance Task Force, which examined whether judicial evaluations might be useful in Indiana, and the Cameras in the Courtroom project, which allowed cameras in certain courtrooms under limited conditions. During Judge Altice’s tenure on the Marion County Community Corrections Advisory Board, the Duval Work Release Center in Marion County was built and opened.

Judge Altice is a member of the Indiana Judges Association, the Indiana State Bar Association, and the Indianapolis Bar Association. He served on the Board of Directors of the Judicial Conference of Indiana, is a member and past president of the Sagamore American Inn of Court, was a member from 2010 to 2015 of the Indiana Judicial Conference Civil Bench Book Committee, and was a member and former chair of the Indiana Judicial Conference Community Relations Committee. In April 2015, Judge Altice was appointed to serve on an ad hoc Indiana Tax Court Advisory Task Force. He currently serves on the Tax Court Advisory Committee. Judge Altice is President of the Board of Directors for the Heartland Pro Bono District.

His community activities include prior service on the Board of Directors of these organizations: Indianapolis Police Athletic League; the Martin Luther King Community Development Corp.; and Coburn Place Safe Haven, a transitional housing facility for domestic abuse victims. Judge Altice also participated on the Super Bowl Legal Subcommittee. He is on the board of the Benjamin Harrison Presidential Site. He has presented on legal and ethical issues for the Indiana Continuing Legal Education Forum, the Indiana Judicial Center, and various Indiana bar associations. In his spare time, he enjoys gardening, golf and reading.

He and his wife, Kris, an attorney who is General Counsel for Shiel Sexton, have two adult children.

Hon. Vicki L. Carmichael, Judge, Clark Circuit Court 4, Jeffersonville



Judge Carmichael began her service as Judge of Clark Circuit Court No. 4 (formerly Superior Court No. 1) on January 1, 2007. The Clark Circuit Court handles a general jurisdiction caseload and all of the juvenile matters for Clark County, including delinquency and CHINS cases. The Court also has a major felony docket and a civil docket. She implemented a Family Court Project, an Attendance Court Project and began a Family Treatment Drug Court focusing on addressing substance abuse issues of parents. Prior to her election to Superior Court, Judge Carmichael served as Judge of Jeffersonville City Court from January 1, 2000 until December 31, 2006. In that position, she presided over criminal misdemeanors and traffic infractions. She started many new programs for alcohol related offenses, including an Alcohol Court, a Victim Impact Panel, an Alcohol Awareness Program and a Defensive Driving Class. She also started the use of the Ignition Interlock Device for drunk drivers in Clark County.

Before her full-time judge's position, Judge Carmichael maintained a private practice in Jeffersonville, where she focused on family law issues, including divorces, child support matters and child custody cases. She was a family law mediator in Indiana before taking the bench. Judge Carmichael was appointed as the first full-time Public Defender for Clark County in January 1989. She served as the Chief Public Defender and later as an Assistant Public Defender for twelve years. As Chief Public Defender, she had a trial caseload, including a capital murder case, and perfected all of the indigent appeals for the County.

Judge Carmichael also teaches numerous classes at Ivy Tech Community College in the Criminal Justice program at the Sellersburg, Indiana campus. Some of Ms. Carmichael's civic interests and activities include speaking to Government classes in the Clark County Schools, participating in the Clark-Floyd County Pro Bono Project, volunteering with the American Cancer Society, the American Red Cross, Rotary Club and holding the position of past chair of the Leadership Southern Indiana program.

Robert C. Allega is a judicial law clerk for Judge Melissa S. May on the Indiana Court of Appeals. He is a graduate of Hanover College (B.A. English, 2010) and the Indiana University Maurer School of Law (J.D. 2013). Prior to his clerkship with Judge May, Allega worked as a deputy attorney general in the Office of the Indiana Attorney General and as a staff attorney for the Indiana Department of Correction.

Jessica L. Ballard-Barnett, Judicial Law Clerk, Indiana Court of Appeals, Indianapolis

Jessica L. Ballard-Barnett is the Judicial Law Clerk to the Honorable Melissa S. May, Judge on the Indiana Court of Appeals.

Education:

- JD, Robert McKinney School of Law - Indianapolis (2010)
- BS, Psychology, Purdue University (2004)

Legal Experience:

- Judicial Law Clerk, The Honorable Melissa S. May, Judge, Indiana Court of Appeals (2010 – present) Bar Admissions: State of Indiana

Other Experience:

- Adjunct Instructor, Harrison College, Columbus Campus and Online, various courses (July 2012 - Present)
- Presenter/Collaborator, CLE, “Internet Law,” Indiana Law Update (September 2011 - Present)
- Adjunct Professor, University of Indianapolis, Copyright Law, Legal, Ethics, Etiquette (July 2016 - Present)
- Secretary, SENSE Charter School Board (October 2015 - Present)
- Program Chair, CLE, “Appellate Writing” (June 2016)
- Deputy Captain, Operations Team, GenCon (August 2015)
- Presenter, CLE, “Utilizing Electronic Discovery in Modern Lawyering” (April 2014)
- Presenter, CLE, “Emerging Issues in Social Media: Can Lawyers and Judges be Friends?” (November 2013)
- Presenter, CLE, “Modern Lawyering: Utilizing Social Media” (April 2013)
- Presenter, CLE, “Ethics, Internet, and Business Law” (February 2013)
- Columnist, HistoricIndianapolis.com (February 2013 - July 2014)

Richard L. Bartholomew, Girardot, Strauch & Co., Lafayette

Richard L. Bartholomew graduated from Indiana University with a BS in Business in 1978 and a JD from Indiana University School of Law in 1981. He joined the firm in 1991 and became a shareholder in 1996. His specialty areas include all areas of tax, estate planning, mergers, acquisitions and spin-off tax consulting, succession planning, continuing education presenter to the AICPA Federal Tax Conference, Indiana Continuing Legal Education Seminars, Annual Tax Symposiums in Minnesota, North Carolina, Ohio and North Dakota and Bisk Continuing Education DVD's distributed nationwide.

Richard has been actively involved in various organizations in the Lafayette community including Community Foundation of Greater Lafayette, Lafayette Rotary Club Foundation, Indiana CPA Society Litigation Services, Westminister Village Foundation, Lafayette Rotary Club,and East Tipp Summer Rec.

Richard has many interests outside of the firm including woodworking (he built all of the cabinets in his house as well as various pieces of furniture), snow skiing, fishing, golf, creating Power Point presentations for weddings and birthdays, drawing and playing with his dog, Zoe.

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Margaret M. Christensen, Dentons Bingham Greenebaum LLP, Indianapolis

Meg Christensen concentrates her practice on three main areas of law: lawyer ethics, appeals and business litigation. Since 2017, she has served as co-chair for Dentons Bingham Greenebaum's Recruiting Committee.

Her focus includes:
- Ethics – Meg has represented lawyers in all stages of the disciplinary process pending before the Indiana Supreme Court. Additionally, she has represented other professionals in front of various state licensing boards, and the IRS Office of Professional Responsibility.
- Appellate – Meg brings a fresh perspective to identifying and analyzing issues on appeal. Meg's experience includes representing clients in the appellate phase of complex business disputes, contract and insurance coverage disputes, and shareholder liability.
- Business Litigation – Meg assists clients in litigation in both state and federal courts in claims involving multi-million dollar contract disputes, shareholder liability, enforcement of employee restrictive covenants, inter-governmental disputes, unfair competition claims, dissolutions, administrative enforcement and licensing. She is experienced in media law issues including defamation defense, reputation management, and social media harms. Meg also represents the media in pursuing access to public records and enforcing open door laws.
- Meg's clients are primarily concerned about the impact their legal disputes will have on their business or personal lives. Recognizing that litigation introduces uncertainty into her client's plans, Meg prides herself in clearly communicating with clients about the practical effect of various strategies. Meg's goal is to help busy clients focus on what they do best while she works to present their strongest arguments in pursuit of the best possible result.
- Between the Indiana State Bar Association (ISBA), the Indiana Continuing Legal Education Forum (ICLEF) and Association of Professional Responsibility Lawyers (APRL), Meg presents on ethics at over a dozen continuing legal education seminars each year. As part of ISBA's Ethics Committee, she considers and issues advisory opinions, recommends rule changes and facilitates lawyer education events. Meg is an active member of the APRL and devotes her time to researching trends in disciplinary

enforcement and lawyer ethics.
- In her free time, Meg enjoys cooking, hosting dinner parties, and attending yoga or barre class. She's an avid NPR listener, loves old homes and house rehabs and attending camp with her two children. She has a vested interest in voting advocacy and once served as a member of the United Nations Election Protection Delegation, monitoring the polls in El Salvador's National Election.

Kiamesha-Sylvia G. Colom, Taft Stettinius & Hollister LLP, Indianapolis

Kiamesha-Sylvia Colom focuses her practice in the areas of real estate transactions (acquisitions, dispositions, development, leasing, sale leaseback transactions and real estate municipality work), real estate lending and commercial finance transactions and related business transactions.

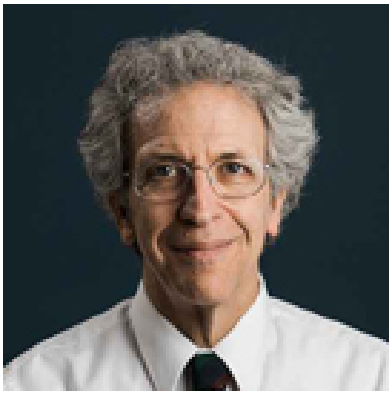
Kiamesha helps developers, corporate real estate departments, municipalities, tenants and landlords achieve their real estate goals related to development projects, drafting and negotiating of lease documents, negotiating transfer documents and ultimately getting the deal done.

Kiamesha has closed numerous SBA, USDA and conventional commercial loans for commercial lenders and borrowers related to real estate, equipment, machinery and C&I lending.

Kiamesha's extensive base of knowledge covers an array of commercial loan types, including government guaranteed lending, asset based line of credits, term loans, real estate transactions and construction loans. Additionally, she has assisted banks with recovery of yearly financial documents, past due funds, liquidation and government guaranteed purchasing processes.

Kiamesha also assists minority, women, veteran and disabled owned businesses with attaining state and city certifications.

Kenneth J. Falk, American Civil Liberties Union of Indiana, Indianapolis



Since 1996, Kenneth Falk has been the legal director of the ACLU of Indiana. A 1977 graduate of Columbia Law School in New York City, Mr. Falk was employed by Legal Services Organization of Indiana (now Indiana Legal Services) from 1977 to 1996. At the time he left Legal Services he was the Litigation Director of the organization. Since 2000, Mr. Falk has also served as an Adjunct Professor of Law at the Robert H. McKinney School of Law in Indianapolis.

In his work with the ACLU, Mr. Falk has litigated and argued numerous cases in Indiana and federal appellate courts, including the United States Supreme Court.

In 1996 Mr. Falk was named a Sagamore of the Wabash and in 2004 he was awarded the David M. Hamacher Public Service Award by the Indiana State Bar Association. In 2006 he was named a “Distinguished Barrister” by the Indiana Lawyer. In 2016 he received the David W. Peck Senior Medal for Eminence in the Law from Wabash College. Also, in 2016 he was named a Fellow of the American College of Trial Lawyers.

Robert W. Fechtman, Fechtman Law Office, Indianapolis

Bob Fechtman is a life-long resident of Indiana. He graduated from Northwestern University with a degree in music and a major in economics, and he received his JD from Rutgers School of Law. He also attended the University of San Diego's Institute on International and Comparative Law at Magdalen College, Oxford University. In 6th and 7th grade, Mr. Fechtman went away to school to sing with the American Boychoir in Princeton, New Jersey.

Mr. Fechtman focuses his practice on the problems of older and disabled persons, particularly special needs trusts, estate planning and trusts, health law, Medicaid planning, guardianships and decedents' estates. He is a frequent writer and speaker on a variety of estate planning, disability and elder law topics. He has been certified as an elder law attorney by the National Elder Law Foundation.

He is a member of the National Academy of Elder Law Attorneys, and he is a two-time Past President of the Indiana Chapter of the National Academy of Elder Law Attorneys. He is a member and a Past President of the Special Needs Alliance, which is a national, non-profit, invitation-only network of lawyers dedicated to disability and public benefits law. He is also a member of the Elder Law Section and the Probate, Real Property and Trusts Section of the Indiana State Bar Association, and a member of the Indianapolis Bar Association. Mr. Fechtman is a sustaining member of the Indiana Trial Lawyers Association. He is currently serving on the Boards of Directors of the National Elder Law Foundation, which is the accrediting organization for elder law attorneys, and of the Indianapolis Bar Association Estate Planning and Administration Section Executive Council, and the current President of the Board of The Indianapolis Children's Choir.

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Todd I. Glass

Mr. Glass joined Fine & Hatfield in 1995 after practicing seven years in Muncie, Indiana. Since joining the firm, Mr. Glass has represented individuals and businesses with significant focus on estate planning and administration, trust planning and administration, guardianships, agribusiness and business planning coupled with succession strategies. His practice now concentrates in complex trust planning and wealth transfer techniques.

He represents businesses of all sizes, especially closely-held family owned businesses in a variety of markets and industries. He is active in the Warrick County community and has an active municipal law practice representing local government officials and boards as County Attorney for Warrick County, Indiana.

Mr. Glass has been certified as an Indiana Trust and Estate Lawyer since 2007 as a specialist in the areas of estate and trust planning and administration by the Indiana Trust and Estate Specialty Board, having served as Co-President 2019-2020. He has served as an adjunct faculty member at the University of Evansville where he taught Probate Law in the Department of Legal Studies, and in 2022 was inducted as a Fellow of the American College of Trust and Estate Counsel (ACTEC).

Contact Info:
Phone: 812.425.3592
Fax: 812.421.4269
Email: tig@fine-hatfield.com

Education Summary:
Wabash College, B.A. 1984
University of Dayton, J.D. 1988

Bar Admissions:
Indiana, U.S. District Court, Northern and Southern Districts Indiana, 1988
U.S. Court of Appeals, Seventh Circuit 1990

Professional Associations and Honors:
Indiana Trust and Estate Specialty Board (2017-2021, Co-Chair 2019-2021)
Evansville Bar Association, (Board Member 2005-2011, President 2011-2012)
Evansville Bar Association, Probate, Elder Law and Guardianship Section (Chair 2002-2003)
Indiana Bar Association
Indiana Probate, Trust and Real Property Section (Council Member, 2005-2012)
Evansville Estate and Financial Planning Council

Community Involvement:
Castle High School Band Boosters, Inc., Board member (2014-2021) and President (2016 and 2020)
Newburgh Museum Foundation Corp., Board Member and Past President (2013-2019, 2022-)
Warrick County Community Foundation, Board Member (2012-2018)
Warrick County Community that Cares Coalition, Board member and Past President (2013-2014)
Indiana Supreme Court Disciplinary Commission, EBA Grievance Committee (Chair 2012-2020)
Reitz Home Preservation Society, Inc., Past Board member and President (2007-2011)

Sarah Graziano, Hensley Legal Group, PC, Fishers

Sarah Graziano was born and raised in Milwaukee, Wisconsin, but has called Indiana her home since graduating from Valparaiso University School of Law, with honors, in 1999. Sarah began her career focusing on litigation for a well respected defense firm in Indianapolis, but she quickly realized that her true focus was to help people who have disputes with corporations, insurance companies and the like. Since 2002, Sarah has focused her practice on helping individuals who have been injured at the hands of others. In addition, she has helped individuals with employment matters, including discrimination, wrongful termination, contractual disputes, and other issues involving the employment relationship.

Sarah has been extremely fortunate to have a large number of civil jury trials in her nearly eleven years of practice.

Sarah is an active member in good standing with the Indiana Bar Association and also holds membership with the Indiana Trial Lawyers Association. As part of her membership with the Indiana Trial Lawyers Association (ITLA) she has had the privilege to speak at seminars hosted by ITLA both on employment matters and issues involving claims for injuries.

Greg Guevara, Partner
gguevara@boselaw.com / (317) 684-5257

Greg Guevara is a partner in the Labor and Employment Group at Bose McKinney & Evans. As a highly responsive business advisor and employment litigator, Greg helps his clients by understanding their objectives and offering practical legal advice tailored to their unique situations and desired outcomes. He provides aggressive and ethical advocacy to a broad range of clients, including privately held businesses, non-profit organizations, and national companies, as well as executives, physicians, and other professionals.

Greg concentrates his practice on labor and employment law and litigation, including:

- Non-competition, non-solicitation and confidentiality agreements
- Emergency injunctions
- Defense of discrimination/EEO claims
- Wage/hour compliance and litigation
- Disability/reasonable accommodation
- FMLA/leaves of absence
- Sexual harassment and workplace investigations
- Severance and executive employment agreements
- Personnel policies/employee handbooks
- Reductions-in-force
- Union avoidance, unfair labor practices, and collective bargaining

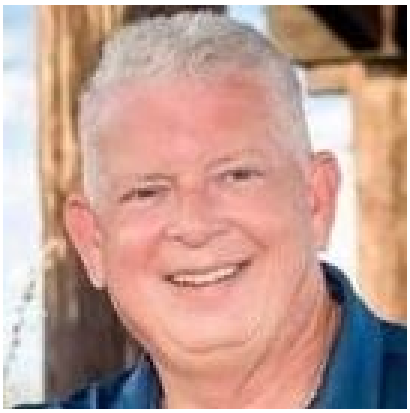
Greg practices in the federal and state courts in Indiana and Ohio, federal and state agencies (EEOC, NLRB, ICRC, IOSHA, etc.), and other jurisdictions as needed.

He began his law career with Bose McKinney & Evans then practiced with the Columbus, Ohio office of Jones Day. Before returning to BME in August 2006, he spent seven years working as an executive for Reliant (formerly GCM), an international Christian mission organization based in Orlando, Florida. His experience in private practice, board governance and non-profit management gives him the ability to provide practical guidance and sound management advice to businesses dealing with a full range of employment-related issues.

Education
University of Michigan Law School (J.D., cum laude, 1992)
University of Michigan (B.A., high honors/high distinction, 1989)
Member, Phi Beta Kappa

Honors / Awards
Best Lawyers® 2023 Indianapolis Labor Law – Management Lawyer of the Year
Best Lawyers® 2021 Indianapolis Employment Law – Management Lawyer of the Year
Best Lawyers® 2020 Indianapolis Litigation – Labor and Employment Lawyer of the Year
The Best Lawyers in America® 2011-2023
Chambers USA 2010-2020 (Labor and Employment-Indiana)

Charles M. Kidd, Indiana Supreme Court Disciplinary Commission, Indianapolis



Chuck Kidd is Deputy Executive Director, of the Indiana Supreme Court Disciplinary Commission. Admitted to bar, 1988, Indiana, Northern and Southern Federal Districts of Indiana. Education: Butler University, B.S. 1979; Indiana University School of Law--Indianapolis, J.D. 1987. Member: American Bar Association, Indiana State Bar Association and Indianapolis Bar Association (Distinguished Fellow); Roster of the National Organization of Bar Counsel. Former Master member, Sagamore American Inn of Court. Former Indiana Deputy Attorney General (1988-1991). Author of numerous continuing legal education works including the Survey of Recent Developments in Professional Responsibility in volumes 26 through 28 and 30 through 36 of the Indiana Law Review. AV Rated by Martindale-Hubbell.

Anna Mallon, Paganelli Law Group LLC, Indianapolis

Anna Mallon concentrates her practice in the areas of insurance bad faith, insurance coverage, third–party defense of insureds, and personal injury defense. Anna regularly practices in state and federal courts handling trials, summary judgment hearings, mediations and arbitrations. Prior to attending law school, Anna taught high school government.

When not practicing law, Anna enjoys traveling, ballet, and cheering on the Fighting Irish of Notre Dame and the Chicago Cubs. Anna is married and has two children.

Indiana Super Lawyers® 2013-2020 (Employment Litigation: Defense; Employment Law)

Tyler Moorhead, Associate
tmoorhead@boselaw.com / (317) 684-5130

Tyler Moorhead is an associate in the Labor and Employment and Litigation Groups of Bose McKinney & Evans LLP. Tyler assists clients with a wide array of labor and employment matters at the local, state, and federal levels. His practice encompasses labor and employment law topics such as:

- Discrimination and wrongful termination defense
- Wage / hour compliance and defense
- Non-compete, confidentiality, and non-solicitation agreements
- Independent contractor and employee classification
- Affirmative action plans and analysis
- ADA compliance and reasonable accommodation
- Workplace investigations and sexual harassment claims
- Employee handbooks and personnel policies
- NRLB compliance and unfair labor practice charge defense
- Federal and state employment agency charges
- Management training
- FMLA compliance and leave
- Class action litigation

Tyler also dedicates his practice to representing clients in a wide variety of litigation matters. Although Tyler employs a cost effective and practical approach to resolve cases before trial when appropriate, he has experience handling matters in both state and federal courts. His practice encompasses litigation matters such as:

- Complex commercial litigation
- Contract disputes
- Fraud
- Breach of fiduciary duty
- Partnership disputes
- Cannabusiness
- Fraternity and sorority law
- Real estate litigation
- Municipality litigation

Education
Indiana University Robert H. McKinney School of Law – Indianapolis (J.D., *summa cum laude*, 2017)
Indiana University Kelley School of Business (B.S. in business, *magna cum laude*, 2014)

Honors / Awards
Founders Scholar, Indiana University
Norman Lefstein Award of Excellence for Pro Bono Service
IndyBar Bar Leader Series Class XVIII

Kathie A. Perry, Baldwin Perry & Kamish, PC, Indianapolis

Kathie Perry: My entire career has been spent exclusively defending the accused, except for a 9 month period in 2014 when I briefly ventured into other areas of law. It was a miserable 9 months, but it helped me realize a very basic fact about myself: I am a criminal defense attorney. Period. Joining The Criminal Defense Team of Baldwin Perry & Kamish, PC with our exciting style of aggressive, creative and strategic defense and dedication to the criminally accused was a perfect fit. For those who are dedicated to criminal defense, like all of the lawyers in our firm, dealing with the hectic pace and constant pressures of representing clients accused of committing a variety of crimes is simply a way of life. I realized very quickly upon joining the firm that my history as a criminal defense attorney mirrored the experiences of all of our firm's lawyers.

1 of only 6 Board Certified Criminal Law Specialists in Indiana

AREAS OF PRACTICE

- 100% criminally related law, primarily all phases related to criminal defense, including pre-arrest advocacy, trial, appellate and post-conviction relief work.

CRIMINAL DEFENSE EXPERIENCE

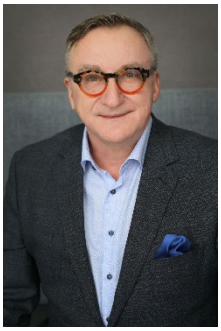
- Monroe County Public Defender Agency, 1999-2001, Certified Legal Intern
- Marion County Public Defender Agency, 2001-2014, Deputy Public Defender
- Baldwin Perry & Kamish, P.C., 2015 – present, Partner

EDUCATION

- Maurer School of Law - Indiana University- (Juris Doctorate, 2001) Bloomington, Indiana

Merit Scholarship Award Winner

James A. Reed
Cross Glazier Reed Burroughs, P.C., Carmel



Jim Reed has dedicated his nearly 40-year legal career to all aspects of relationship transitions, from the needs of a couple entering a new relationship to the legal and financial matters involved in the dissolution of a relationship. His practice includes counseling cohabitating partners in implementing plans for estate transitions, health care decision-making, joint ownership and survivorship as well as representing partners in the conclusion of relationships, custody and support of their children, and the division of property and assets.

Mr. Reed's clients are often high-profile individuals in entertainment, sports and politics, professionals, business owners and executives, and the spouses/partners of these individuals. For many business owners, their business is their most valuable asset. Mr. Reed works with business owners and their partners to identify how to protect the business in the beginning of a relationship. He also understands the complexities that often arise in divorce involving business owners, such as dividing a business, ownership questions, and business valuation.

Mr. Reed has been consistently selected for inclusion in the Indiana Super Lawyers and The Best Lawyers in America in the field of Family Law. He is a sought-after source for insight on matrimonial and family law matters in Indiana and beyond.

Mary A. Slade, Endpoint, Indianapolis

Mary Slade is National Title Operations Manager for Endpoint providing national underwriting solutions and management logistics for Endpoint's multi-state title professionals. Previously, she was the National Underwriter and Vice President for PGP Title and Premier Land Title Insurance Company. As Indiana State Counsel for First American Title Insurance Company, Ms. Slade provided underwriting analysis and support to aid customers and their counsel in completing commercial and residential transactions. She has seven years of experience in private practice in creditor's rights, bankruptcy, and real estate litigation and transactions. Ms. Slade has also served as a regional counsel in claims and underwriting for three national title insurance carriers in 16 states and the District of Columbia; as well as a deputy prosecuting attorney for Marion County, Indiana. She was a co-founder and the executive production editor for the Indiana International & Comparative Law Review. Ms. Slade is also an active member and co-founder of the Indianapolis chapter of CREW; Commercial Real Estate for Women. Ms. Slade has served three years as the education chair for the Indiana Land Title Association. Her programs on title insurance and real estate have been accredited for title insurance license or attorney license credit in Indiana, Pennsylvania, Ohio, Maryland, Virginia, and West Virginia. Ms. Slade is a member of the Indiana State Bar Association previously serving as the 2017-2018 Chair for the Probate, Trust, and Real Property Section (the "Section"). She is currently serving her third term as real estate committee chair for the Section and she continues as a co-editor of the Indiana State Bar Association's Probate, Trust, Property and Death Tax newsletter. She earned her undergraduate degree from Butler University and her J.D. degree from the Indiana University School of Law- Indianapolis.

Maggie L. Smith

Member

mlsmith@fbtlaw.com | 317.237.3223

201 North Illinois Street
Suite 1900
Indianapolis, IN 46204-4236

Industries

Mobility & Transportation

Logistics

Practice Areas

Appellate

Business & Commercial Litigation

Bar Memberships

Indiana

Maggie is recognized as one of the top appellate attorneys in the country. In addition to being named by *Super Lawyers*® as one the top 25 Women Attorneys in the state of Indiana, Maggie has been selected as one of *The Best Lawyers in America*® in the field of appellate practice every year since 2009, and this year she has been named the 2021 "Lawyer of the Year" by Best Lawyers for appellate practice.

She also has been identified as an *Indiana Super Lawyers*® appellate attorney, listed as a *Chambers USA*® *Top Tier* Appellate Litigator, and recently was celebrated for fifteen years as a Martindale Hubbell AV Preeminent Rated Lawyer with the "Highest Possible Peer Review Rating in Legal Ability & Ethical Standards."

Maggie has been involved in hundreds of appeals, and has represented businesses, individuals, and groups in all types of appellate proceeding at every level of the state and federal appellate courts. She also has significant experience representing *amicus curiae* parties before Indiana's appellate courts.

Her clients say that her appellate "writing skills are great" and she also has "fantastic" oral advocacy skills arguing before appellate courts—a combination that makes Maggie "the complete package."

In addition to representing parties on appeal, Maggie has been actively involved in drafting the Indiana Appellate Rules, is a leader in the state and national appellate practice communities, and is a regular presenter and author on appellate topics.

Prior to entering private practice, she served as a judicial law clerk with the Indiana Supreme Court and was an Adjunct Professor of Law at Indiana University, teaching legal writing and reasoning and appellate advocacy.

The Indiana Supreme Court appointed Maggie to an eight-year term on its Committee on Rules of Practice and Procedure in 2009, and in this capacity, she

was engaged in the continuous study of all the Indiana Rules of Procedure (Trial Rules, Evidence Rules, Jury Rules, Appellate Rules, Professional Conduct Rules, etc.). Maggie was actively involved in the e-fling projects, Administrative Rule 9(G) overhaul, and the appellate rules.

Other Info About Maggie

Experience

Member — Frost Brown Todd

Successfully defended the constitutionality of the original Indiana wine shipping statute on appeal in the federal courts.

Successfully represented Dolby Laboratories on appeal in patent challenge to Dolby Surround Sound systems.

Successfully prosecuted appeal resulting in long-dormant cause of action for Title by Acquiescence being recognized.

Adjunct Professor — The Master's Study
Instructed tutelage program students in dual-college credit course on "Rhetoric: The Art of Persuasive Argument."

Adjunct Professor — Indiana University School of Law
Instructed first-year law students in legal reasoning, legal writing, and oral advocacy.

Law Clerk — Honorable Justice Brent E. Dickson, Indiana Supreme Court
Assisted Indiana Supreme Court Justice in drafting opinions.

Instructor — Indiana University: Law Program for Gifted Students
Taught basic legal concepts to gifted and talented high school students.

Education

Indiana University Maurer School of Law, visiting student, 1995-1996

University of Arizona, James E. Rogers College of Law, J.D., 1994, *magna cum laude*

University of Arizona, B.A., 1991, *cum laude*

Paul J. Unger, Affinity Consulting Group, LLC, Columbus, OH

Paul J. Unger is a nationally recognized speaker, author and thought-leader in the legal technology industry. He is an attorney and founding principal of Affinity Consulting Group, a nationwide consulting company providing legal technology consulting, continuing legal education, and training.

He is the author of dozens legal technology manuals and publications, including recent published books, *Tame the Digital Chaos – A Lawyer's Guide to Distraction, Time, Task & Email Management* (2017) and *PowerPoint in an Hour for Lawyers* (2014). He served as Chair of the ABA Legal Technology Resource Center (2012-13, 2013-14)(www.lawtechnology.org/), Chair of ABA TECHSHOW (2011)(www.techshow.com), and served as Planning Chair for the 2016 ACLEA Mid-Year Conference in Savannah, GA. He is a member of the American Bar Association, Columbus Bar Association, Ohio State Bar Association, Ohio Association for Justice, and New York State Bar Association, and specializes in document and case management, paperless office strategies, trial presentation and litigation technology, and legal-specific software training and professional development for law firms and legal departments throughout the United States, Canada and Australia. Mr. Unger has provided trial presentation consultation for over 400 cases. In his spare time, he likes to run and restore historic homes.

Maxwell B. Wiley, Baldwin Perry & Kamish, P.C., Indianapolis

Maxwell B. Wiley: Two innocent men had been convicted of a crime they didn't commit. When I was a student at IU McKinney School of Law, I participated in their Wrongful Convictions Clinic. Roosevelt Glenn and Daryl Pinkins were innocent men who had already served long prison sentences. They were both ultimately exonerated, but helping out on the case had a huge impact on me. I realized how high the stakes are in criminal law. Simply put, there is no room for error.

I knew from then on that I wanted to help with high-stakes cases. My career began at the Marion County Public Defender Agency, and I worked my way into the Major Felony Division. There, I took more than 90 cases to trial, handling cases ranging from petty theft to homicide.

When I moved on to the Marion County Prosecutor's office, it was as a prosecutor. There, I handled major felony cases, which honed my skilled at trial and gave me an in-depth understanding of how both sides think. Viewing cases through the lens of a prosecutor has made me a better criminal defense lawyer because I bring that perspective to every case.

I've tried 26 jury trials as a prosecutor. Handled 9 murder trials and 2 trials regarding attempted murder. Coupled with my work as a criminal defender, I've been to trial more than 100 times and gone before a jury on more than 50 occasions.

Defending those accused of serious crimes has given me a better understanding of the human side of legal practice and motivated me to keep our clients from experiencing the unfair consequences of an unjust criminal justice system. In addition to being a good lawyer, I do my best to treat people well and use my experience to fight for my clients' best interests on every occasion and at every turn.

It started with fighting for Roosevelt Glenn and Daryl Pinkins in law school, and it continues with fighting every day for each of our clients and their family and friends.

Seth R. Wilson, Adler Attorneys, Noblesville

Seth Wilson's legal practice includes civil litigation, personal injury (automobile accidents, slip and falls, worker's compensation, etc), estate planning and probate services. He also provides legal technology and marketing consulting for individual lawyers and law firms.

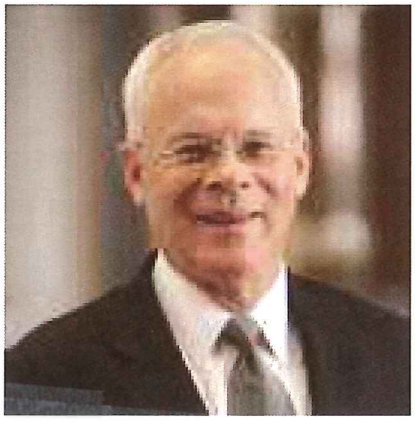
Seth has taught as an Adjunct Professor with the IU School of Informatics and Computing at IUPUI since 2014.

Mr. Wilson has spoken for many continuing legal education seminars and conferences and writes a regular column in *TheIndiana Lawyer*, called Start Page.

He earned his undergraduate degree in Mass Communications and Journalism, with a Pre-Law minor, from Taylor University and went on to earn his law degree from Regent University, serving as Editor-in-Chief of Law Review.
Mr. Wilson has been awarded a Rising Star ranking for Indiana Super Lawyers every year since 2013. He lives in Noblesville with his wife and children and serves on the Board of Legacy Christian School and Hamilton Hills Church in Fishers, Indiana.

Read more about Seth and follow his work:
Blog: http://sethrwilson.com
Twitter: https://twitter.com/seth_r_wilson
LinkedIn: https://www.linkedin.com/in/sethrwilson/
Indiana Lawyer: https://www.theindianalawyer.com/

Thomas P. Yoder, Attorney at Law, Fort Wayne



Thomas P. Yoder is a retired partner from the law firm of Barrett McNagny LLP in Fort Wayne, Indiana, and concentrated his practice for 42 years in business bankruptcy, creditors' rights and general insolvency matters. He now concentrates his practice, when he feels like working, in the area of commercial and business mediations and is an Indiana mediator. He is a *cum laude* graduate of Hanover College (B.A. History, 1974) and the Indiana University School of Law at Bloomington (J.D. 1977). He is a Past President of the Indiana State Bar Association (1999-2000), a former member of the Board of Directors of the American Bankruptcy Institute (1994-2000), a former director of the Allen County Bar Association (2005-2008), and is a Fellow of the American College of Bankruptcy (2003). He has also written and lectured extensively on bankruptcy and insolvency-related topics and is a co-author of *Bankruptcy- A Survival Guide for Lenders* (First ed. 1997; Second ed. 2008), published by the American Bankruptcy Institute and winner of the ABI's Outstanding Publications Award (1997). Until retiring, he had been listed in the last twenty-plus (20+) editions of "*The Best Lawyers in America*" and in every edition of "*The Indiana Super Lawyers*", as well as in certain separate specialty listings published by both. In 2000, he was awarded the Sagamore of the Wabash distinction by the Governor of Indiana, the State's most prestigious recognition of citizenship.

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Margaret M. Christensen
Dentons Bingham Greenebaum LLP
Indianapolis, Indiana

Charles M. Kidd
Indiana Supreme Court Disciplinary Commission
Indianapolis, Indiana

Section One

Ethics…….. Margaret M. Christensen
Charles M. Kidd

大成DENTONS BINGHAM GREENEBAUM

Recent Ethics Opinions (Last Updated August, 2022)

Meg Christensen[1]

In the Matter of Dunnuck, October 7, 2021 (Failure to Communicate; Neglect)

In **Matter of Dunnuck, 173 N.E.3d 1042 (Ind. 2021)**, Respondent was appointed as a public defender to a client charged with battery and other criminal charges in September 2017. On multiple occasions, the client expressed to Respondent that he desired a speedy trial and asked for information regarding his case. Respondent never responded and rarely met with the client. Without the client's knowledge or consent, Respondent obtained several continuances over the next three years while the client remained incarcerated and unable to meet the bail set. Respondent officially withdrew in August 2020.

Respondent violated Rule 1.2(a) (failing to consult with a client about the means of achieving an objective and to abide by a client's decisions concerning the objectives of representation), Rule 1.3 (failing to act with reasonable diligence and promptness), Rule 1.4(a) (failing to keep a client reasonably informed about the status of a matter and respond promptly to reasonable requests for information), 1.4(b) (failing to explain a matter to the extent reasonably necessary to permit a client to make informed decisions), Rule 3.2 (failing to expedite litigation consistent with the interests of a client), and Rule 8.4(d) (engaging in conduct prejudicial to the administration of justice). The Supreme Court suspended Respondent for 120 days, with automatic reinstatement.

In the Matter of Wheeler, October 22, 2021 (Criminal Conduct)

In **Matter of Wheeler, 174 N.E.3d 1079 (Ind. 2021)**, Respondent had three different acts of operating while intoxicated committed over the span of several months in 2020. As a result, Respondent was convicted of three level 6 felony counts of OWI pursuant to a global guilty plea in January 2021. Respondent had two prior OWI convictions: one conviction in 2019 and another in 1988, predating his bar admission.

Respondent was found to have violated Rule 8.4(b) (prohibits committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer). As a result of the Respondent's misconduct, the Court suspends Respondent from the practice of law for a period of 180 days, with 120 days actively served and the remainder stayed subject to completion of at least two years of probation with JLAP monitoring.

[1] Meg is a partner at Dentons, where she focuses her practice on attorney ethics, appellate advocacy, and business litigation.

In the Matter of Mark R. Waterfill, October 28, 2021 (Conflict of Interest)

In **Matter of Waterfill, 174 N.E.3d 1181 (Ind. 2021)**, Respondent represented "Seller" who was negotiating to sell his company to "Buyer." Prior to Respondent's representation, Buyer and Seller entered into an exclusivity agreement that limited Seller's ability to negotiate with any other potential buyer for a period of 150 days. Seller ultimately rejected Buyer's final offer. Respondent entered his last billing entry in the matter on November 25, 2015. Two days later, Respondent, on behalf of the company he owned, sent a proposed purchase agreement to Seller. Respondent failed to advise Seller that his representation had terminated and that he was not representing Seller in the proposed purchase agreement. November 30, three days after the proposed purchase agreement was sent, Seller sought legal advice from Respondent and Respondent provided despite being materially limited by his own personal interest.

Respondent violated Rule 1.7(a)(2) (representing a client when the representation may be materially limited by the attorney's responsibilities to another client, a former client, or a third person, or by a personal interest of the lawyer) and Rule 1.9(a) (representing a client in a matter in which that client's interests are materially adverse to the interests of a former client without the former clients informed consent. The Supreme Court issued a public reprimand for Respondent's misconduct.

In the Matter of Ginn, November 2, 2021 (Conflict of Interest; Delay in Terminating Representation)

In **Matter of Ginn, 175 N.E.3d 279 (Ind. 2021)**, Respondent was dating "Father" during at all relevant times. Respondent represented Father in an estate matter in November 2018. Two months later, Respondent represented "Son 1" in two criminal matters. By March 2019, Respondent was representing Son 1 for all his pending criminal matters. In January 2020, Father was arrested after an altercation with Son 1 and "Son 2," charged with 13 felony counts, and ordered to have no unauthorized contact with Sons 1 and 2. Respondent continued to represent Father and Son 1 for months, including at one point attempting to modify a no-contact order to allow Son 1 to work for Father. Respondent withdrew from Son 1's representation in July of 2020, but did not withdraw from Father's representation until August of 2021.

Respondent violated Rule 1.3 (failing to act with reasonable diligence and promptness), Rule 1.7 (representing a client when the representation involves a concurrent conflict of interest) and Rule 1.16(a) (failing to withdraw from representation when the representation will result in violation of the Rules of Professional Conduct or other law). The Supreme Court issued a public reprimand.

In the Matter of Comstock, November 2, 2021 (Competence; Communication; Diligence)

In **Matter of Comstock, 175 N.E.3d 280 (Ind. 2021)**, Respondent was hired to represent the client in a dispute against the client's employer. The client struggled to get in contact with Respondent. When there was communication between the two, Respondent incorrectly advised the client of the statute of limitations, stating it was two years when it was actually six months. The opposing party moved to dismiss the complaint due to untimeliness and failure to state sufficient facts. Respondent requested and received extensions and eventually was sent a court order to file a response "forthwith" and then a response "immediately" after it was still not filed. The Court dismissed the client's compliant with prejudice, resulting in Respondent filing on behalf of the client a motion for relief from judgment due to his health issues that amounted to excusable neglect. Respondent sent a letter to client about the dismissal, yet it doesn't appear that the client received this letter. Years later, Respondent and the client had a conversation where the client learned of the dismissal and Respondent promised to refund the unearned $10,000 fee, but had not refunded any portion of the fee prior to his disciplinary hearing. After the hearing, Respondent made partial restitution to the client in the amount of $2,500.

Respondent violated Rule 1.1 (failure to provide competent representation), Rule 1.3 (failure to act with reasonable diligence and promptness), Rule 1.4(a)(2) (failure to reasonably consult with a client about the means by which the client's objectives are to be accomplished), Rule 1.4(a)(3) (failure to keep the client reasonably informed about the status of a matter), Rule 1.4(a)(4) (failure to comply promptly with a client's reasonable requests for information), Rule 1.16(a)(2) (failure to withdraw from representation when the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client) and Rule 1.16(d) (failure to refund advance payment of fees and expenses that have not been earned or incurred). As a result of the Respondent's misconduct, the Court suspended Respondent from the practice of law for a period of 120 days. Further, reinstatement was conditioned upon payment of the remaining $7,500 refund due to the client no later than Mach 29, 2022. If Respondent failed to meet that repayment deadline, the suspension would be without automatic reinstatement and Respondent would be required to comply with Admission and Discipline Rule 23(18)(b) in order to resume practice.

In the Matter of Davis, November 15, 2021 (Trust Account Mismanagement; Competence; Diligence; Litigation Delay; Conflict of Interest; Bypassing; Dishonesty)

In **Matter of Davis, 176 N.E.3d 457 (Ind. 2021)**, involves two separate disciplinary complaints against the Respondent. In the first complaint, Respondent was charged with five rule violations, and admitted to four out of the five charges. Specifically Respondent admitted to trust account mismanagement and the inadequate supervision of a paralegal. Respondent commingled his own funds with client funds in his trust account, mainly by failing to withdraw earned fees. Additionally, through his paralegal, he made several cash withdrawals and non-client

disbursements from the trust account. There is no evidence that Respondent misappropriated or misapplied client funds.

For this conduct, Respondent was found to have violated Rule 1.15(a) (commingling client and attorney funds), Rule 5.3(c) (ordering and ratifying the misconduct of a nonlawyer assistant), Rule 23(29)(c)(2) (paying personal or business expenses directly from a trust account, and failing to withdraw fully earned fees and reimbursed expenses from a trust account), and Rule 23(29)(c)(5) (making cash disbursements from a trust account). The Commission failed to prove its charge that Respondent violated Rule 8.1(b).

Respondent failed to respond to the second disciplinary complaint, and the Hearing Officer entered judgment on the eight rule violations alleged therein, relating to two separate representations.

- With respect to Count 1, Respondent represented a closely held LLC and its principals. During the representation, he withheld material facts about one of his joint clients from another of his clients. He asserted frivolous claims and engaged in abusive tactics such as making scandalous and irrelevant accusations that one defendant had given his former girlfriends sexually-transmitted diseases and issuing subpoenas to two of those girlfriends. Even after Respondent withdrew his appearance, he filed motions in the matter and initiated an appeal.
- With respect to Count 2, Respondent represented an entity attempting to purchase an LLC and switched sides mid-transaction to represent two members of the LLC. Although the third LLC member was represented and objected to the sale, Respondent contacted him directly during the transaction. After the third member filed a lawsuit, Respondent continued to represent the LLC and the majority members who sold the LLC, and engaged in extensive discovery misconduct, in addition to multiple false representations in motions for extensions of time. During the appellate phase of the litigation, Respondent submitted briefing that was riddled with errors and contained unsupported and false factual assertions as well as personal attacks on opposing counsel. The Court of Appeals referred Respondent's conduct to the Commission.

For this misconduct, the Court concluded that the Respondent violated eight of the following Indiana Rules of Professional Conduct:

Rule 1.1 – Failing to provide competent representation
Rule 1.3 – Failing to act with reasonable diligence and promptness
Rule 1.7 – Representing a client when the representation involves a concurrent conflict of interest
Rule 3.1 – Asserting a position for which there is no non-frivolous basis in law or fact
Rule 3.2 – Failing to expedite litigation consistent with the interest of a client

Rule 4.2 – Improperly communicating with a person the lawyer knows to be represented by another lawyer in the matter
Rule 8.4(c) – Engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation
Rule 8.4(d) – Engaging in conduct prejudicial to the administration of justice

As a result of the misconduct, the Respondent was suspended for one year without automatic reinstatement.

In the Matter of J. Johnson, December 16, 2021 (Criminal Conduct)

In **Matter of Johnson, 177 N.E.3d 434 (Ind. 2021)**, Respondent was convicted of battery resulting in moderate bodily injury, a level 6 felony. Respondent was a deputy prosecutor when the crime was committed and resigned from his position following the arrest. He has no prior discipline, has been fully cooperative with the Commission, and has been engaged with individual counseling and the Judges and Lawyers Assistance Program (JLAP).

Respondent violated Rule 8.4(b) (prohibits committing a criminal act that reflects adversely on Respondent's trustworthiness or fitness as a lawyer) and Rule 8.4(d) (prohibits engaging in conduct prejudicial to the administration of justice). The Supreme Court suspended Respondent for 120 days with 90 days actively served and the remainder stated subject to completion of at least one year of probation including participation in ongoing JLAP programming.

In the Matter of Brown, January 6, 2022 (Criminal Conduct)

In **Matter of Brown, 177 N.E.3d 1198 (Ind. 2022)**, Respondent was convicted of OWI with a prior conviction, charged as a level 6 felony but entered as a class A misdemeanor. Respondent had two prior OWI convictions and was also charged with public intoxication, although the public intoxication charge was dismissed after Respondent successfully completed a pretrial diversion program.

Respondent violated Rule 8.4(b) (prohibits committing a criminal act that reflects adversely on Respondent's trustworthiness or fitness as a lawyer), and was suspended for 180 days, with 60 days actively served and the remainder stayed subject to completion of at least two years of probation with monitoring by the Indiana Judges and Lawyers Assistance Program (JLAP).

In the Matter of Seth B. Haynes, February 24, 2022 (Diligence; Communication; Dishonesty)

In **Matter of Haynes, 180 N.E.3d 943 (Ind. 2022)**, Respondent was hired by a client to pursue a civil lawsuit concerning an alleged breach of a verbal lease. The client's father paid a $1,000 retainer. Respondent never filed the lawsuit, but told the client that he did and claimed that there was a $7,000 judgment awarded to her. The Client wondered why the judgment had not been paid and contacted the clerk, only to learn that no lawsuit was ever filed. She requested a refund of the $1,000 retainer and an additional $8,000 remittance. Respondent refunded the $1,000 retainer, but made no other payment. Before ending the representation, Respondent failed to inform the client of the statute of limitations applicable to her claim or that she may have an actionable malpractice claim against him.

Respondent violated Rule 1.3 (failing to act with reasonable diligence and promptness), Rule 1.4(a)(3) (failing to keep a client reasonably informed about the status of a matter), 1.4(b) (failing to explain a matter to the extent reasonably necessary to permit a client to make informed decisions), Rule 1.16(d) (failing to take steps to the extent reasonably practicable to protect a client's interests upon termination of representation), and Rule 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation). The Supreme Court suspended Respondent for one year, without automatic reinstatement.

In the Matter of Smith, February 25, 2022 (Disparaging the Judge)

In **Matter of Smith, 181 N.E.3d 970 (Ind. 2022)**, Respondent represented a client at the trial court level where the judge ruled in favor of the opposing party. On appeal, the Respondent wrote a brief that made multiple unjustified and groundless attacks on the integrity of the judge who conducted most of the trial court proceedings. The Supreme Court found that Respondent's attacks were unsupported and that he had violated Rule 8.2(a) (a lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office). As a result, the Respondent was suspended from the practice of law for 30 days, with automatic reinstatement.

In the Matter of Steele, March 4, 2022 (Bypassing)

In **Matter of Steele, 181 N.E.3d 976 (Ind. 2022)**, Respondent represented himself in a financial dispute with a long-time friend. Although the friend was represented by counsel, Respondent communicated directly with the friend about the dispute, even after the friend's lawyer instructed Respondent to stop communicating directly to the friend, because he was a represented party. Indeed, just a week after being instructed not to contact the friend, Respondent sent the friend a profanity-laced email threatening to visit the friend in person.

Respondent was charged with violated Rule 4.2 (a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter). Respondent argued that he was permitted to contact friend directly because he was not "representing a client," but was representing himself. The Supreme Court reasoned that self-representation is still representation, and that the over-arching purpose of Rule 4.2 is "to prevent lawyers from taking advantage of laypersons and to preserve the integrity of the lawyer-client relationship." Moreover, bypassing the attorney-client relationship "undermines the representative adversarial system . . . and it makes little difference (nor should it) that [Respondent] did so while representing himself and not someone else." The Court imposed public reprimand for Respondent's conduct.

In the Matter of Kyres, March 31, 2022 (Improper Advocacy Tactics)

In **Matter of Kyres, 183 N.E.3d 299 (Ind. 2022)**, Respondent was defending his client against a protective order. During a hearing on the protective order petition, Respondent alleged that he had obtained evidence showing that opposing counsel had a sexual relationship with the police sergeant who handled the petitioner's report and the subsequent investigation. Respondent claimed to have "had a source" for his allegation.

Respondent violated Rule 4.4(a) (prohibits using means in representing a client that have no substantial purpose other than to embarrass, delay, or burden a third person). The Supreme Court issued a public reprimand against Respondent.

In the Matter of Williams, April 21, 2022 (Criminal Conduct)

In **Matter of Williams, 184 N.E.3d 1158 (Ind. 2022)**, Respondent pled guilty to Possession of a Legend Drug, a level 6 felony, Driving While Suspended with a Prior Judgment, a class A misdemeanor, and Operating Without Financial Responsibility, an infraction. After completion of a veterans court treatment program, the trial court sentenced Respondent, entering his possession conviction as a class A misdemeanor. In addition, Respondent was subject to orders of indefinite suspension for noncooperation and suspension without automatic reinstatement for prior discipline.

Respondent violated Rule 8.4(b) (prohibits committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer) and was suspended for one year, without automatic reinstatement.

In the Matter of Thomas, April 21, 2022 (Criminal Conduct; Trust Account Violations)

In **Matter of Thomas, 184 N.E.3d 1157 (Ind. 2022)**, Respondent, who was already under an interim suspension order arising from a conviction for check deception, engaged in attorney misconduct by criminally managing his trust account, falsifying at least one document, and forging a judge's signature. The Respondent wrote checks from his trust account to his operating account and vice versa, resulting in his trust account being overdrawn. Respondent also took an equalization payment of $6,000 that was intended to be paid to a client and placed it into the overdrawn account. The $6,000 had not been paid to the client by the time the account closed and served to reduce the loss written off by the bank instead.
Respondent admitted that he fraudulently created a document appearing to be an order granting a sentence modification to a client and forged the presiding judge's signature on the document.

The Respondent accepted responsibility and the imposition of the criminal sanctions against him. Respondent violated Rule 1.15(a) (a lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property), 8.4(b) (commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects), 8.4(c) (engage in conduct involving dishonesty, fraud, deceit or misrepresentation), and 8.4(d) (engage in conduct that is prejudicial to the administration of justice). Respondent was disbarred for his conduct.

In the Matter of S. Johnson, May 5, 2022 (Diligence; Communication)

In **Matter of Johnson, 185 N.E.3d 864 (Ind. 2022)**, Respondent and his son were both partners in their firm at the same time. The firm represented a transportation company in two separate matters and Respondent led the CEO of the transportation company to believe that he would have primary responsibility over the two matters and the son would assist. Instead, Respondent delegated all responsibility to his son. Respondent's son neglected the matters, was nonresponsive to the CEO, and misrepresented the status of the case. Due to the neglect of Respondent and his son, one matter resulted in two five-figure sanction awards and a default judgment of approximately $1.8 million against the CEO. The Client/CEO first learned of this when its bank account was seized during garnishment proceedings. Successor counsel later appeared for the Client and moved to set aside the default judgment due to Respondent and son's neglect. The second matter had a similar outcome. Respondent knew that his son failed to timely file an answer, noncompliance with discovery and a resulting order to show cause, yet Respondent did not increase attention towards the matter.

Respondent violated Rule 1.3 (failing to act with reasonable diligence and promptness), Rule 1.4(a)(3) (failing to keep a client reasonably informed about the status of a matter, 1.4(a)(4) (failing to comply promptly with a client's reasonable requests for information, and Rule 1.4(b) (failing

to explain a matter to the extent reasonably necessary to permit a client to make informed decisions) and was suspended for 30 days, with automatic reinstatement.

In the Matter of Lackey, May 5, 2022 (Criminal Conduct)

In **Matter of Lackey, 185 N.E.3d 866 (Ind. 2022)**, Respondent plead guilty to operating a vehicle while intoxicated (OWI) with a BAC of .15% or greater. Respondent also has a prior misdemeanor OWI conviction prior to his bar admission. Respondent engaged the assistance of the Indiana Judges and Lawyers Assistance Program (JLAP) and was engaged a voluntary monitoring agreement since May 2020, shortly after his arrest.

Respondent violated Rule 8.4(b) (prohibits committing a criminal act that reflects adversely on Respondent's trustworthiness or fitness as a lawyer). As a result of the Respondent's misconduct, the Supreme Court suspended Respondent from the practice of law for a period of 90 days (all stayed subject to completion of at least two years of probation with JLAP monitoring).

In the Matter of Stidham, June 6, 2022 (Failing to Disclose Facts on Bar Application)

In **Matter of Stidham, 177 N.E.3d 1200 (Ind. 2022)**, Respondent served as the elected Clerk-Treasurer for the City of Portage from January 2012 through the end of 2019. He applied for admission to the Indiana bar during 2016 and was admitted within the same year. During his bar application (prior to his bar admission), Respondent engaged in an illegal scheme involving payments to three companies controlled by his then-girlfriend during his role as Clerk-Treasurer. The criminal conduct was revealed in 2019, Respondent was charged with official misconduct in 2020, and Respondent pled guilty to an amended charge of conflict of interest in 2021.

Respondent was found to have violated Indiana Professional Conduct Rule 8.1(b) ("failing to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority"). Respondent was suspended for 180 days, with automatic reinstatement.

In the Matter of Stout, February 3, 2022 (Dishonesty; Conduct Prejudicial to the Administration of Justice)

In **Matter of Stout, 179 N.E.3d 465 (Ind. 2022)**, Respondent was charged with two counts and multiple rule violations:

- Count I described violations of Rules 4.4(a) and 8.4(d) arising from Respondent's improper conduct toward the opposing party during a deposition and during a later

hearing. The Hearing Officer and Supreme Court concluded that Respondent's conduct, while unprofessional, did not rise to the level of the rule violations alleged.

- Count II described violations of Rules 4.1(a), 4.4(a), 8.4(b), 8.4(c), and 8.4(d) arising from Respondent's defense of a protective order petition. While deposing the petitioner, Respondent threatened that the intimate photos she had sent to her ex-boyfriend would be made part of a public record if the protective order hearing progressed. The petitioner dismissed the case immediately after the deposition, and the Hearing Officer found that Respondent later bragged to an associate about securing a dismissal by threatening to have photographs become part of the record. The Supreme Court found that Respondent deceived the petitioner by suggesting her photos would necessarily become part of a public record and that this deception was part of a plan to "coerce and bully" the petitioner into dismissing her case.

The Supreme Court concluded that there was insufficient evidence to prove the 4.4(a) and 8.4(b) charges against Respondent, but that he had Rule 4.1(a) (knowingly making a false statement of material fact or law to a third person), Rule 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation), and 8.4(d) (engaging in conduct prejudicial to the administration of justice). Respondent was suspended for 90 days, with automatic reinstatement.

2019-2020
ANNUAL REPORT

OF THE

DISCIPLINARY COMMISSION

OF THE

SUPREME COURT OF INDIANA

PUBLISHED BY THE

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I. INTRODUCTION

This is the annual report of the activities of the Disciplinary Commission of the Indiana Supreme Court for the period beginning July 1, 2019 and ending June 30, 2020. The Disciplinary Commission is the agency of the Indiana Supreme Court charged with responsibility for investigation and prosecution of charges of lawyer misconduct. The Indiana Rules of Professional Conduct set forth the substantive law to which lawyers are held accountable by the Indiana lawyer discipline system. The procedures governing the Indiana lawyer discipline system are set forth in Indiana Supreme Court Admission and Discipline Rule 23. The broad purposes of the Disciplinary Commission are to "protect the public, the court and the members of the bar of this State from misconduct on the part of attorneys and to protect attorneys from unwarranted claims of misconduct." Admission and Discipline Rule 23 § 1.

The Disciplinary Commission is not a tax-supported agency. It is funded through an annual fee that each lawyer admitted to practice law in the State of Indiana must pay in order to keep their license in good standing. The annual registration fee in this reporting year for lawyers in active status was $180.00. After paying the costs of collecting annual fees, the Clerk of the Supreme Court distributes the balance of fees to the Disciplinary Commission, the Commission for Continuing Legal Education and the Indiana Judges and Lawyers Assistance Program to support the work of those Court agencies.

The annual registration fee for inactive status lawyers in this reporting year was $90.00. The annual registration fee is due on or before October 1st of each year. Failure to pay either required fee within the established time subjects the delinquent lawyer to suspension of his or her license to practice law until such time as the fee and any delinquency penalties are paid.

Out-of-state lawyers who received court permission to practice law temporarily in the state of Indiana (*pro hac vice* admission) were required to pay a $180.00 registration fee for each year they are participating as counsel in an Indiana case.

On **July 1, 2020**, the Supreme Court issued an order suspending **257** lawyers on active and inactive status, effective **July 27, 2020**, for failure to pay their annual attorney registration fees.

II. HISTORY AND STRUCTURE OF THE DISCIPLINARY COMMISSION

The Indiana Supreme Court has original and exclusive jurisdiction over the discipline of lawyers admitted to practice law in the State of Indiana. Ind. Const. Art. 7 § 4. On June 23, 1971, the Indiana Supreme Court created the Disciplinary Commission to function in an investigatory and prosecutorial capacity in lawyer discipline matters.

The Disciplinary Commission is governed by a board of commissioners, each of whom is appointed by the Supreme Court to serve a term of five years. The Disciplinary Commission consists of seven lawyers and two lay appointees.

The Commission meets monthly in Indianapolis, generally on the second Friday of each month. In addition to acting as the governing board of the agency, the Disciplinary

Commission considers staff reports on claims of misconduct against lawyers and must make a determination that there is reasonable cause to believe that a lawyer is guilty of misconduct which would warrant disciplinary action before formal disciplinary charges can be filed against a lawyer.

The members of the Disciplinary Commission during the reporting year were:

Name	*Hometown*	*First Appointed*	*Current Term Expires*
Nancy L. Cross	Carmel	July 1, 2011	June 30, 2021
Andrielle M. Metzel	Indianapolis	July 1, 2011	June 30, 2021
Trent A. McCain	Merrillville	July 1, 2011	June 30, 2021
Leanna K. Weissmann	Aurora	July 1, 2013	June 30, 2023
Kirk White	Bloomington	July 1, 2013	June 30, 2023
Brian K. Carroll	Evansville	July 1, 2014	June 30, 2019
John L. Krauss	Indianapolis	July 1, 2014	June 30, 2019
Molly Kitchell	Zionsville	July 1, 2015	June 30, 2020
Bernard A. Carter	Crown Point	July 1, 2019	June 30, 2024

Biographies of Commission members who served during this reporting year are included in **Appendix A**.

The Disciplinary Commission's work is administered and supervised by its Executive Director, who is appointed by the Commission with the approval of the Supreme Court. The Executive Director of the Commission is G. Michael Witte, appointed June 21, 2010.

The Disciplinary Commission's offices are located at 251 North Illinois Street, Suite 1650, Indianapolis, Indiana 46204.

III. THE DISCIPLINARY PROCESS

A. The Grievance Process

The purpose of the Disciplinary Commission is to inquire into claims of attorney misconduct, protect lawyers against unwarranted claims of misconduct, and prosecute meritorious cases seeking attorney discipline. Action by the Disciplinary Commission is not a mechanism for the resolution of private disputes between clients and attorneys. Disciplinary action is independent of private remedies that may be available through civil litigation.

An investigation into lawyer misconduct is initiated through the filing of a grievance with the Disciplinary Commission. Any member of the bench, the bar or the public may file a grievance by submitting to the Disciplinary Commission an affirmed written statement on a Request for Investigation (RFI) form. Any individual having knowledge about facts relating to a complaint may submit a grievance. An RFI form is readily available from the Commission's office, from bar associations throughout the state, and on the Internet at **http://www.in.gov/judiciary/discipline/2373.htm**.

The Disciplinary Commission may also initiate a grievance concerning alleged lawyer misconduct in the absence of a grievance from a third party. Acting upon information that is brought to its attention from any credible source, the Disciplinary Commission may authorize the Executive Director to prepare a grievance in the name of the Commission. This is known as a Commission Grievance.

B. Preliminary Inquiry

The Commission staff screens each newly filed grievance to initially determine whether the allegations contained therein raise a substantial question of misconduct. If a grievance does not present a substantial question of misconduct, it may be dismissed by the Executive Director with the approval of the Commission. Written notice of dismissal is mailed to the grievant and the lawyer.

A grievance that is not dismissed on its face is sent to the lawyer involved, and a demand is made for the lawyer to submit a mandatory written response within thirty (30) days of receipt. Additional time for response is allotted in appropriate circumstances, but strictly limited. Other investigation as appropriate is conducted to develop the facts related to a grievance.

The Executive Director may call upon the assistance of bar associations in the state to aid in the preliminary investigation of grievances. Larger bar associations maintain volunteer Grievance Committees to assist the Disciplinary Commission with preliminary investigations. These bar associations include the Allen County Bar Association, the Evansville Bar Association, the Indianapolis Bar Association, the Lake County Bar Association, and the St. Joseph County Bar Association.

Upon completion of the initial inquiry and consideration of the grievance and the lawyer's response, the Executive Director may:

- Dismiss the grievance, with approval by the Commission, upon a determination that a substantial question of misconduct has not been raised;
- Determine that a substantial question of misconduct has been raised and issue a caution letter with instructions for corrective action; or
- Determine that a substantial question of misconduct has been raised, open the matter for an inquiry, and demand a written response to the allegations from the lawyer.

The grievant and the lawyer are notified in writing of each of the above actions.

Lawyers must cooperate with the Commission’s inquiry by answering grievances in writing and responding to other demands for information from the Commission. The Commission may seek an order from the Supreme Court suspending a non-cooperating lawyer’s license to practice until the lawyer cooperates. If after being suspended for non-cooperation, the lawyer does not cooperate for a period of 90 days, the Court may indefinitely suspend the lawyer’s license. An indefinitely suspended lawyer will be reinstated only after successfully completing the reinstatement process described in paragraph K below.

C. Further Investigation

A grievance that the Executive Director determines has reasonable cause to believe that a lawyer is guilty of misconduct is docketed for further investigation and, ultimately, for full consideration by the Disciplinary Commission. Both the grievant and the lawyer are notified of this step in the process. Upon completion of the investigation, the results of the investigation are composed in a written summary, and the matter is placed on the monthly agenda of the Disciplinary Commission for consideration.

D. Authorizing Charges of Misconduct

After a grievance has been investigated, it moves to the agenda of the full Disciplinary Commission. The Executive Director makes a report to the Commission, together with recommendation about the disposition of the matter. The Commission makes a final determination whether or not there is reasonable cause to believe the lawyer is guilty of misconduct that would warrant disciplinary action. If the Commission finds that there is not reasonable cause, the matter is dismissed with written notice to the grievant and the lawyer. If the Commission finds that reasonable cause exists, it directs the Executive Director to prepare and file with the Clerk of the Supreme Court a Disciplinary Complaint charging the lawyer with misconduct.

E. Filing Formal Disciplinary Charges

The Executive Director files the Disciplinary Complaint with the Clerk of the Supreme Court setting forth the facts related to the alleged misconduct. The Disciplinary Complaint also identifies the provisions of the Rules of Professional Conduct that the lawyer is alleged to have violated. The respondent must file an answer to the Disciplinary Complaint. Failure to answer the allegations will be taken as true.

F. The Evidentiary Hearing

Upon the filing of a Disciplinary Complaint, the Supreme Court appoints a hearing officer who will preside over the case. The hearing officer must be an attorney admitted to practice law in the State of Indiana and may be a sitting or retired judge. The hearing officer's responsibilities include supervising the pre-hearing development of the case including discovery, conducting an evidentiary hearing, and submitting a written report to the Supreme Court with findings of fact, conclusions of law and recommendations. The hearing officer is not a final arbiter of the facts and the law. That determination rests with the Supreme Court. A hearing may be held at any location selected by the hearing officer.

G. Supreme Court Review

After the hearing officer has issued a report to the Supreme Court, the parties may petition the Court for a review of any or all of the hearing officer's findings, conclusions and recommendations. The Court independently reviews every case, even in the absence of a petition for review by either party. The Court then issues its final order in the case.

H. Final Orders of Discipline

The conclusion of a lawyer discipline proceeding is an order from the Supreme Court setting out the facts of the case, determining the violations (if any) of the Rules of Professional Conduct, and assessing a sanction in each case where it finds misconduct. The sanction ordered by the Court is related to the seriousness of the violation and the presence or absence of mitigating or aggravating circumstances. The available disciplinary sanctions include:

- **Private Administrative Admonition (PAA).** A PAA is a disciplinary sanction that is an administrative resolution of a case involving minor misconduct. A PAA is issued as a sanction only when the Disciplinary Commission and the respondent lawyer agree to the PAA. Unlike other disciplinary sanctions, the Supreme Court does not directly issue the admonition. Instead, the Executive Director admonishes the lawyer. However, the Court receives advance notice of the parties' intent to resolve a case by way of a PAA and may reject such a proposed agreement. There is a public record made in the Office of the Clerk of the Supreme Court of every case resolved by a PAA, although the facts of the matter are not included in the public record.
- **Private Reprimand.** A private reprimand consists of a private letter of reprimand from the Supreme Court to the offending lawyer. The case does not result in a publicly disseminated opinion describing the facts of the case. The Court's brief order resolving the case by way of a private reprimand is a public record that is available through the office of the Clerk of the Supreme Court. Sometimes where a private reprimand is assessed, the Court may issue a *per curiam* opinion for publication bearing the caption *In the Matter of Anonymous*. While the published opinion does not identify the offending lawyer by name, the opinion sets out the facts of the case and the violations of the Rules of Professional Conduct involved for the edification of the bench, the bar and the public.
- **Public Reprimand.** A public reprimand is issued in the form of a publicly disseminated opinion or order by the Supreme Court setting forth the facts of the case and identifying the applicable Rule violations. A public reprimand does not result in any direct limitation upon the offending lawyer's license to practice law.
- **Short Term Suspension.** The Court may impose a short-term suspension of a lawyer's license to practice law as the sanction in a case. When the term of suspension is six months or less, the lawyer's reinstatement to the practice of law

is generally, but not always, automatic upon the completion of the term of suspension. If a short-term suspension is ordered without automatic reinstatement, then the lawyer may be reinstated to practice only after petitioning for reinstatement and proving fitness to practice law. The procedures associated with reinstatement upon petition are described later in this report. Even in cases of suspension with automatic reinstatement, the Disciplinary Commission may enter objections to the automatic reinstatement of the lawyer's license to practice law.

- **Long Term Suspension.** The Court may impose a longer term of suspension, which is a suspension greater than six months. Every suspension greater than six months is without automatic reinstatement and the lawyer must petition the Court for reinstatement. The suspended lawyer must prove fitness to re-enter the practice of law before a long-term suspension will be terminated.
- **Disbarment.** In the most serious cases of misconduct, the Court will issue a sanction of disbarment. Disbarment revokes a lawyer's license to practice law permanently, and it is not subject to being reinstated at any time in the future.

The lawyer discipline process in Indiana is not a substitute for private or other public remedies that may be available, including criminal sanctions in appropriate cases and civil liability for damages caused by lawyer negligence or other misconduct. The sanctions that are issued in lawyer discipline cases do not generally provide for the resolution of disputed claims of liability for money damages between the grievant and the offending lawyer. However, a suspended lawyer's willingness to make restitution may be considered by the Court to be a substantial factor in determining license reinstatement upon conclusion of suspension.

Occasionally, the Court includes in a sanction order additional provisions that address aspects of the lawyer's misconduct in the particular case. Examples of these conditions include participation in substance abuse or mental health recovery programs, specific continuing legal education requirements, and periodic audits of trust accounts.

I. Resolution by Agreement

In some cases that have resulted in the filing of a Disciplinary Complaint, the respondent lawyer and the Disciplinary Commission are able to reach an agreement concerning the facts of a case, the applicable Rule violations and an appropriate sanction for the misconduct in question. In these instances, the parties submit their agreement to the Supreme Court for its consideration. Any such agreement must include an affidavit from the lawyer accepting full responsibility for the agreed misconduct. The Court may accept or reject the agreement.

A lawyer charged with misconduct may also tender his or her written resignation from the practice of law. *Resignation is a discipline sanction. It is not the equivalent of retirement. It is not a graceful avoidance of discipline.* A resignation is not effective unless the lawyer fully admits his or her misconduct and the Court accepts the resignation as tendered. A lawyer who has resigned with pending misconduct allegations must wait five years before

seeking license reinstatement. Reinstatement after resignation is a very steep burden to overcome. It requires the attorney to prove to the Court worthiness of reinstatement despite the dark shadow of the misconduct previously admitted.

A lawyer charged with misconduct may also submit to the mercy of the Court by fully admitting the allegations and consenting to such discipline as the Court deems appropriate under the circumstances.

J. Temporary Suspension

While a lawyer's Disciplinary Complaint is pending, the Disciplinary Commission may seek the temporary suspension of the lawyer's license to practice law pending the outcome of the proceeding. Temporary suspensions are reserved for cases of the most serious misconduct or on-going risk to clients or the integrity of client funds. A hearing officer is responsible for taking evidence on a petition for temporary suspension and making a recommendation to the Supreme Court. The Court may grant or deny the petition for temporary suspension.

A separate temporary suspension procedure applies whenever an Indiana licensed lawyer is found guilty of a crime punishable as a felony. The Executive Director must report the finding of guilt to the Supreme Court and request an immediate temporary suspension from the practice of law. Generally, a finding of guilt by a trial court in these instances does not occur until the sentencing hearing. The Court may order the temporary suspension without a hearing, but the affected lawyer may submit to the Court reasons why the temporary suspension should be vacated. A temporary suspension granted under these circumstances is effective until there is a resolution of related disciplinary charges or further order of the Court. Trial judges are required to send a certified copy of the order adjudicating criminal guilt of any lawyer for *any crime, misdemeanor or felony*, to the Executive Director of the Commission within ten days of the finding of guilt.

Finally, the Executive Director is required to report to the Supreme Court any time the Commission receives notice that a lawyer has been found to be *intentionally* delinquent in the payment of child support. After being given an opportunity to respond, the Supreme Court may suspend the lawyer's license to practice law until the lawyer is no longer in intentional violation of the support order.

K. The License Reinstatement Process

When any lawyer resigns or is suspended without provision for automatic reinstatement, the lawyer may not be reinstated into the practice of law until the lawyer meets his or her burden of proof. The lawyer must prove by clear and convincing evidence that the causes of the underlying misconduct have been successfully addressed and demonstrate that he or she is otherwise fit to re-enter the practice of law. Additionally, the lawyer must successfully complete the Multi-State Professional Responsibility Examination, a standardized examination on legal ethics.

Lawyer reinstatement proceedings are heard by a hearing officer appointed by the Court. A past member of the Commission may serve as a hearing officer. After hearing evidence,

the hearing officer makes a recommendation to the Supreme Court. The Court reviews the recommendation of the Commission and may either grant or deny reinstatement.

L. Lawyer Disability Proceedings

Any member of the public, the bar, the Disciplinary Commission, or the Executive Director may file with the Commission a petition alleging that a lawyer is disabled by reason of physical or mental illness or chemical dependency. The Executive Director is charged with investigating allegations of disability and, if justified under the circumstances, prosecuting a disability proceeding before the Disciplinary Commission or a hearing officer appointed by the Court. The Court ultimately reviews the recommendation of the Commission and may suspend the lawyer from the practice of law until the disability has been remediated.

IV. COMMISSION ACTIVITY IN 2019-2020

A. Grievances and Investigations

An investigation into allegations of lawyer misconduct is commenced by the filing of a grievance with the Disciplinary Commission. During the reporting period, **1,142** grievances were filed with the Disciplinary Commission. Of this number, **82** were Commission Grievances. The total number of grievances filed was a **19%** decrease below the number filed the previous year. **Appendix B** presents in graphical form the number of grievances filed for each of the past ten years.

There were **18,648** Indiana lawyers in active, good-standing status and **3,766** lawyers who were inactive, good-standing as of June 30, 2020. In addition, **1,154** lawyers regularly admitted to practice in other jurisdictions were granted temporary admission to practice law by trial court orders in specific cases during the year, pursuant to the provisions of Indiana Admission and Discipline Rule 3 (commonly known as *pro hac vice* admission). The total grievances filed represent **6.1** grievances for every one hundred actively practicing lawyers. **Appendix C** presents in graphical form the grievance rate for each of the past ten years.

Distribution of grievances is not even. Far fewer than **1,142** individual lawyers received grievances during the reporting period. Many lawyers were the recipients of multiple grievances. It is important to note that the mere filing of a grievance is not, in and of itself, an indication of misconduct on the part of a lawyer.

During the reporting period, **1,040** of the grievances either received or carried over from previous years were dismissed without further investigation upon a determination that, on their face, they presented no substantial question of misconduct.

Upon receipt, each grievance that is not initially dismissed is classified according to the type of legal matter out of which the grievance arose, and the type of misconduct alleged by the grievant. The table in **Appendix D** sets forth the classification by legal matter and by misconduct alleged of all grievances that were pending on June 30, 2020, or that were dismissed during the reporting year after investigation. Many grievances arise out of more than one type of legal matter or present claims of more than one type of alleged misconduct.

Accordingly, the total numbers presented in **Appendix D** represent a smaller number of actual grievances.

Ranked in order of complaint frequency, the legal matters most often giving rise to grievances involve *Criminal, Divorce Matters, Tort, Administrative Matters, Wills/Estates, Real Estate, Guardianship, Contract Matter, Personal Misconduct, Collection Judicial Action, Bankruptcy, Patent, Workmen's Compensation, Adoption, and Corporate Formation.* To understand the significance of this data, it is important to keep in mind that criminal cases make up the largest single category of cases filed in our trial courts. Except for civil plenary filings, domestic relations cases account for the next highest category of cases filed. The high rates of grievances arising from criminal and domestic relations matters reflect the high number of cases of those types handled by lawyers in Indiana. The predominant types of legal matters out of which grievances arose during the reporting period are presented graphically in **Appendix E**.

Ranked in order of complaint frequency, the alleged misconduct types most often giving rise to grievances are *Improper Influence, Incompetence, Neglect, Improper Withdrawal, Failure to Communicate, Communication/Non-Diligence, Excessive Fees, Personal Misconduct, Conflict of Interest, Misinforming, Illegal Conduct, Lying, Conflict, Fraud, Revealing Confidences and Conversion* with complaints about Improper Influence being close to one and a half times as frequent as the next category of alleged misconduct. The predominant types of misconduct alleged in grievances during the reporting period are presented graphically in **Appendix F**.

The following is the status of all grievances that were pending before the Disciplinary Commission on June 30, 2020, or that had been dismissed during the reporting period:

	DISMISSED	OPEN
Grievances filed before July 1, 2019	**925**	**14**
Grievances filed on or after July 1, 2019	**939**	**11**
Total carried over from preceding year:	**191**	
Total carried over to next year:	**32**	

This represents a decrease of **92** files carried over into the following year.

B. Non-Cooperation

A lawyer's law license may be suspended if the lawyer has failed to cooperate with the disciplinary process. The purpose of this is to promote lawyer cooperation to aid in the effective and efficient functioning of the disciplinary system. The Commission brings allegations of non-cooperation before the Court by filing petitions to show cause. During the reporting year, the Disciplinary Commission filed **38** petitions to suspend the law licenses of **27** lawyers with the Supreme Court for failing to cooperate with investigations. The following are the dispositions of the non-cooperation matters that the Commission filed with the Court during the reporting year or that were carried over from the prior year:

Show Cause petitions filed.....37

Dismissed as moot after cooperation before show cause order 0

Petition pending on June 30, 2020, without show cause order 1

Show cause orders with no suspension.....36

- Dismissed after show cause order due to compliance **24**
- Dismissed due to disbarment, resignation or suspension.....**9**
- Show cause orders pending on June 30, 2020 .....**3**

Suspensions for non-cooperation.....15

- Non-cooperation Suspensions still in effect on June 30, 2020 .....**1**
- Reinstated due to cooperation after suspension……**1**

Non-Cooperation Suspensions Converted to Indefinite Suspensions 8

C. Trust Account Overdraft Reporting

Pursuant to Admis. Disc. R. 23 § 29, all Indiana lawyers must maintain their client trust accounts in financial institutions that have agreed to report any trust account overdrafts to the Disciplinary Commission. Upon receipt of a trust account overdraft report, the Disciplinary Commission sends an inquiry letter to the lawyer directing that the lawyer supply a documented, written explanation for the overdraft. After review of the circumstances surrounding the overdraft, the investigation is either closed or referred to the Disciplinary Commission for consideration of filing a disciplinary grievance.

The results of inquiries into overdraft reports received during the reporting year are:

Carried Over from Prior Year **20**
Overdraft Reports Received.....**53**
Inquiries Closed **64**
Inquiries Carried Over Into Following Year.....**5**
Reason for Inquiries Closed:

- Bank Error.....**10**
- Deposit of Trust Funds to Wrong Trust Account **0**
- Disbursement from Trust Before Deposited Funds Collected.....**6**
- Referral for Disciplinary Investigation **10**
- Disbursement from Trust before Trust Funds Deposited **2**
- Overdraft Due to Bank Charges Assessed Against Account.....**0**
- Inadvertent Deposit of Trust Funds to Non-Trust Account.....**3**
- Overdraft Due to Refused Deposit for Bad Endorsement **0**
- Law Office Math or Record-Keeping Error.....**14**
- Death, Disbarment or Resignation of Lawyer **2**
- Inadvertent Disbursement of Operating Obligation from Trust **8**
- Non-Trust Account Inadvertently Misidentified as Trust Account **0**
- Fraudulent Office Staff Conduct.....**0**

D. Litigation

1. Overview

In 2019-2020, the Commission filed **35** Disciplinary Complaints for Disciplinary Action with the Supreme Court, **7** more than in the previous year. These Disciplinary Complaints, together with amendments to pending Verified Complaints, represented findings of reasonable cause by the Commission in **42** separate counts of misconduct during the reporting year.

In 2019-2020, the Supreme Court issued **90** final dispositive orders, **16** less than in the preceding year, representing the completion of **90** separate discipline files, **16** less than the preceding year. Including **1** private administrative admonitions, **65** individual lawyers received final discipline in the reporting year, compared to **65** in the previous year. **Appendix G** provides a comparison of disciplinary sanctions entered for each of the past ten years.

2. Disciplinary Complaints for Disciplinary Action

a. Status of Disciplinary Complaints Filed During the Reporting Period

The following reports the status of all new Disciplinary Complaints filed during the reporting period:

Verified Complaints Filed During Reporting Period.....**35**
Number Disposed Of By End of Year **9**
Number Pending At End of Year.....**26**

The Commission filed **3** Notice of Foreign Discipline and Requests for Reciprocal Discipline with the Supreme Court pursuant to Admission and Discipline Rule 23 §20(b) and (d).

During the reporting year, the Disciplinary Commission filed Notices of Felony Guilty Findings and Requests for Suspension pursuant to Admission and Discipline Rule 23 § 11.1(a) in **3** cases.

b. Status of All Pending Disciplinary Complaints

The following reports the status of all formal disciplinary proceedings pending as of June 30, 2020:

Cases Filed; Appointment of Hearing Officer Pending.....**5**
Cases Pending Before Hearing Officers **25**
Cases Pending On Review Before the Supreme Court.....**5**
Total Verified Complaints Pending on June 30, 2020.....**30**

Of cases decided during the reporting year, **13** were tried on the merits to hearing officers at final hearings, **24** cases were submitted to the Supreme Court for resolution by way of Affidavit for Resignation, Conditional Agreement for Discipline, or Consent to Discipline, and **2** cases were submitted by hearing officer findings on an Application for Judgment on the Complaint.

3. Final Dispositions

During the reporting period, the Disciplinary Commission imposed administrative sanctions and the Supreme Court imposed disciplinary sanctions, made reinstatement determinations, or took other actions as follows:

Dismissals of Disciplinary Complaint 0

Findings for Respondent on Merits 2

Caution Letters 17

Private Administrative Admonitions 1

Private Reprimands 2

Public Reprimands 4

Suspensions With Automatic Reinstatement 5

Suspensions With Reinstatement on Conditions 9

Suspensions Without Automatic Reinstatement 4

Accepted Resignations 6

Disbarments 3

Reinstatement Proceedings

Disposed of by Final Order

Granted **4**

Denied **0**

Petition Withdrawn **0**

Findings of Contempt 0

Emergency Interim Suspension Granted 0

Emergency Interim Suspension Denied 0

Temporary Suspensions (Guilty of Felony) 2

V. SUMMARY OF DISCIPLINARY COMMISSION ACTIVITIES

	2019-20	2018-19	2017-18	2016-17	2015-16
Matters Completed	1,142	1,414	1,411	1,485	1,437
Complaints Filed	35	28	25	30	33
Final Hearings	7	12	10	19	2
Final Orders	90	106	111	93	99
Reinstatement Petitions Filed	3	4	4	2	4
Reinstatement Hearings	3	0	2	5	3
Reinstatements Ordered	3	2	2	2	3
Reinstatements Deny/Dismiss	0	2	1	3	1
Income	$4,158,435	$1,700,245	$2,214,469	$2,312,026	$2,267,417
Expenses	$2,041,689	$2,533,270	$2,391,756	$2,219,778	$2,332,029

VI. AMENDMENTS TO RULES AFFECTING LAWYER DISCIPLINE

On July 3, 2019, the Supreme Court amended Rule 9.1 of Indiana's Rules of Professional Conduct regarding the supervision of non-lawyer assistants. The new rule prohibits Independent non-lawyer assistants from establishing a direct relationship with a client to provide legal services. The amendment took immediate effect.

VII. OTHER DISCIPLINARY COMMISSION ACTIVITIES

Outreach to the bar and to the public is an important function of the Commission staff. In the past fiscal year, staff of the Disciplinary Commission appeared more than **25** times as faculty at continuing education programs and as speakers at other events. These outreach opportunities occurred both in-state and out-of-state. Staff is encouraged to serve in these capacities.

VIII. FINANCIAL REPORT OF THE DISCIPLINARY COMMISSION

A report setting forth the financial condition of the Disciplinary Commission Fund is attached as **Appendix H**.

IX. APPENDICES

BIOGRAPHIES OF DISCIPLINARY COMMISSION MEMBERS

Nancy L. Cross is a senior partner of the Cross Glazier Burroughs, P.C. firm, a Certified Family Law Specialist-Family Law Certification Board, a Registered Family Law Mediator, and has been a fellow of the American Academy of Matrimonial Lawyers since 1993. In 2011 she was appointed by the Supreme Court as a Commissioner on the State of Indiana Disciplinary Commission, is currently serving on the Legislative Committee of the Indiana State Bar Association, has served on the Board of Governors, and is a former Chairperson of the Family Law Section of the Indianapolis Bar Association. Ms. Cross has written numerous articles and lectured at family law seminars throughout her career. Ms. Cross is listed in The Best Lawyers in America (Woodward/White) and has been featured in Indianapolis Monthly magazine as one of the top ten divorce attorneys in Indianapolis. Beginning in 2005 and continuing to date, she has been recognized by Indianapolis Monthly as one of the 25 foremost female attorneys in Indiana and has consistently been named one of the state's Super Lawyers by Indianapolis Monthly since 2004. Ms. Cross has restricted her practice to family law, including divorce litigation, mediation and appellate work for more than 30 years. She is a 1979 graduate of the University of Nebraska College of Law and resides with her two sons in Zionsville, Indiana. Ms. Cross began her first five-year term on the Disciplinary Commission on July 1, 2011.

Trent A. McCain is a native of Gary, Indiana. In 1995, he graduated *cum laude* from Florida A&M University in Tallahassee where he earned a Bachelor of Science degree in Business Administration. While in college, like most of America, McCain was captivated by the O.J. Simpson trial and the unparalleled advocacy of the late Johnnie L. Cochran, Jr. Little did he know then that their paths would cross years later. After college, McCain went to work for Eastman Kodak Company as an Account Executive. In 1998, he returned to Northwest Indiana to work for the local utility company as an Industrial and Commercial Sales Representative. In 1999, McCain started law school at Valparaiso University School of Law. During his time at "Valpo," McCain was awarded the Charles R. Gromley Memorial Scholarship for service to the university for two consecutive years. In his second year, he was elected President of the Black Law Students Association and in his last year, he served on the Executive Board of the Midwest BLSA. In March 2000, Johnnie L. Cochran, Jr. announced his partnership with the law office of recognized Chicago attorney James D. Montgomery. This announcement captured McCain's attention and he began his quest to work for the man he so admired five years earlier. After one solid year of persistent telephone calls and letter writing, Cochran's Chicago partner hired McCain as a law clerk in the Summer 2001. After a stellar summer, The Cochran Firm offered McCain a permanent position when he graduated the following year. Six months after the passing of his legal mentor, McCain left the Cochran Firm to establish his own practice. Now, McCain practices in both Northwest Indiana and Chicago and is the principal of McCain Law Offices. McCain's firm concentrates on permanent and catastrophic personal injury, wrongful death, medical negligence, police misconduct, and civil rights cases. On January 1, 2012, McCain co-founded McCain & White, P.C. with attorney, Kelly White Gibson. McCain is also a founding member of the National Law Group, LLC and serves as the organization's secretary. In May 2011, McCain was admitted to practice before the Supreme Court of the United States. In the same month, the Indiana Supreme Court appointed McCain to a five-year term as Commissioner on its attorney Disciplinary Commission. The Commission consists of seven (7) attorneys statewide and two (2) lay people. McCain is a Past President (2009-10) of the James C. Kimbrough Bar Association. McCain is also a member of the Indiana State, Illinois State, and Chicago Bar Associations; the Illinois and Indiana Trial Lawyers Associations; and the Chicago Inn of Court. McCain is married to Akilia McCain, an opera singer and speech language pathologist. They reside in the Miller Beach section of Gary, Indiana with their infant daughter, Nina Lauren. Mr. McCain began his first five-year term on the Disciplinary Commission on July 1, 2011.

Andrielle M. Metzel is a partner at Taftt in the firm's Litigation Group. She represents corporate and individual clients in state and federal courts and before local and state administrative bodies and agencies. Ms. Metzel has extensive experience negotiating resolutions in complex business, personal and transactional disputes. She handles employment, dispute resolution and supply chain litigation matters for her clients. Ms. Metzel is actively involved in land use, development and strategic consulting for businesses seeking to invest and grow in Indiana. Ms. Metzel is a frequent public speaker and participant in numerous seminars concerning labor and employment law issues. Ms. Metzel also provides customized, in-house training on a variety of employment law subjects. Ms. Metzel is a 1996 graduate of Robert H. McKinney School of Law. She is admitted to practice law in Indiana, the U.S. District Court for the Northern District of Indiana, U.S. District Court for the Southern District of Indiana, and U.S. Court of Appeals for the Seventh Circuit. She is a member of the Indiana State Bar Association, American Bar Association, and Indianapolis Bar Association. Ms. Metzel has served on the Board of Directors, Indianapolis Bar Association; Legal Ethics Committee, Indiana State Bar Association; the Development Chair, Indianapolis Bar Foundation; Board of Governors, District 11 Representative, Indiana State Bar Association; Board of Directors, D.A.R.E. Indiana Board of Governors; Secretary, Indiana State Bar Association; Chair-Women in the Law Division, Indiana State Bar Association; Executive Committee - Land Use Section, Indianapolis Bar Association; Advisory Panel Member, American Bar Association; Member, IndyCREW Network of Commercial Real Estate Women; Alcohol Beverage Subcommittee Member, Indiana State Bar Association; Land Use & Zoning Section Member, Indiana State Bar Association; Employment & Labor Section Member, Indiana State Bar Association; Litigation Section member, Indiana State Bar Association; Corporate Counsel Section Member, Indiana State Bar Association; Employment & Labor Relations Committee Member, American Bar Association; Women Advocate Committee Member, American Bar Association; and International Council of Shopping Centers. Ms. Metzel is currently serving her first five-year term on the Disciplinary Commission which began July 1, 2011.

Leanna K. Weissmann is a native of Aurora, IN. She graduated from Indiana University-Bloomington in 1991 with a double major in journalism and English, and then earned her law degree from Indiana University Robert H. McKinney School of Law in 1994. From 1993-1995 she served as a law clerk for Court of Appeals Judge Robert D. Rucker (now Justice Rucker of the Indiana Supreme Court). Ms. Weissmann then engaged in the private practice of law in Rising Sun, Indiana until 1998, and served as Referee of Dearborn Superior Court No. 1 from 2000-2007. She now maintains a solo law practice in Lawrenceburg, Indiana, focused entirely on appellate practice. A veteran of appellate advocacy, Ms. Weissmann has briefed over 150 cases and participated in more than 20 oral arguments before the Indiana Court of Appeals and the Indiana Supreme Court. In 2018, Ms. Weissmann was lead appellate counsel in a case that was granted certiorari by the U.S. Supreme Court, *Zanders v. Indiana*, 138 S. Ct. 2702 (2018). In 2005 Ms. Weissmann was appointed by Governor Mitch Daniels to serve on the Indiana Criminal Justice Institute Board of Trustees for a three (3) year term. She has served as appellate counsel in the following notable cases: Louallen v. State, 778 N.E.2d 794 (Ind. 2002); Tyler v. State, 903 N.E.2d 463 (Ind. 2009); Gallagher v. State, 925 N.E.2d 350 (Ind. 2010); Ripps v. State, 968 N.E.2d 323 (Ind. 2012); and Conley v. State, 972 N.E.2d 864 (Ind. 2012). Ms. Weissmann teaches fitness and is active in youth ministry programs at her church. She founded SamieSisters.com, an Internet ministry for "tween" girls. She was appointed to the Indiana Supreme Court Disciplinary Commission in 2013.

Kirk White is Assistant Vice President for Strategic Partnerships at Indiana University. He joined the IU Office of the Vice President for Engagement in 2010 and is responsible for coordinating national defense and homeland security partnerships with state and federal government agencies and IU's mutually beneficial relationships with economic development organizations in southwest Indiana. He holds additional appointments as Military Liaison for the IU Office of the President

and as a member of the IU Emergency Management incident management team. Kirk joined the professional staff of IU in 1984 after completing the Bachelor of Science degree from the Indiana University School of Public and Environmental Affairs. He has served IU in several external, alumni and government relations assignments including: Assistant to the Vice President, Director of Alumni Chapters, Assistant Director and Director of Hoosiers for Higher Education, Coordinator of IU's Critical Incident Communications Team and most recently as Director of Community Relations. In June 2013, Kirk was appointed by the Indiana Supreme Court to serve a five-year term on the court's attorney disciplinary commission.

A former elected official, Kirk served eight years as a member of the Bloomington City Council (1988-95), and one term as Monroe County Commissioner (1997-2000). In city and county office he focused on land use planning, improving public works, utilities, public safety, emergency management, animal control and fleet management. The Association of Indiana Counties awarded Monroe County the 2001 Local Government Cooperation Award for an emergency communications system project that Commissioner White directed. Lt. Colonel White is a Field Artillery officer in the Indiana Army National Guard and currently serves as Operations Officer for 81st Troop Command, headquartered in Terre Haute. In 24 years of service, he has been assigned as Battery Fire Direction Officer, Battery Commander, Battalion Executive Officer and Battalion Commander at Headquarters, 2nd Battalion, 150th Field Artillery Regiment and G5/Chief of Plans for the 38th Infantry Division. He was called to active duty in support of Operation Enduring Freedom and served as chief of an Embedded Training Team with a light infantry battalion of the Afghanistan National Army (2004-05) where he was awarded the Meritorious Service Medal and Combat Action Badge. He served a second tour in Afghanistan (2009-10) as commander of a provisional task force responsible for base operations and force protection in Kabul and was awarded the Bronze Star Medal. He again was called to active duty in April, 2019, for service in the Middle East. Kirk serves as a member of the Monroe County Economic Development Commission and a board member of the Bloomington Economic Development Corporation. He is a former board member of the Greater Bloomington Chamber of Commerce, former chairman of the board of trustees at First United Methodist Church in Bloomington and is Past President of the Rotary Club of Bloomington North. He and his wife Janice have two daughters.

Brian K. Carroll is a partner at Johnson Carroll Norton & Ken P.C. Mr. Carroll practices in the areas of business law, estate and trust planning and administration, real estate and elder law. He is a Certified Elder Law Specialist and a Certified Estate Planning and Administration Specialist. Mr. Carroll is a fellow of the Indiana Bar Foundation as well as a fellow of the American College of Trust and Estate Counsel. Mr. Carroll graduated with a Bachelor of Science degree from Indiana University in 1978 and graduated *Cum Laude* from Indiana University Robert H. McKinney School of Law in 1982 when he was admitted to the Indiana Bar. Mr. Carroll has served as a Member of the Board of Governors and House of Delegates of the Indiana State Bar Association; and as Chair of the Indiana State Bar Association, Young Lawyer, Probate, Trust and Real Property and General Practice, Solo and Small Firm Sections. He also has served as a Director for the Evansville Bar Association and Chair of the Evansville Bar Association Probate Committee. President of the Harlaxton Society of the University of Evansville. Mr. Carroll began his first five-year term on the Disciplinary Commission on July 1, 2014.

John L. Krauss is an attorney, mediator, and arbitrator. He recently retired from Indiana University and IUPUI after 23 years. He served as the founding director of the Indiana University Public Policy Institute and a clinical professor at the IU School of Public and Environmental Affairs. Krauss is now a Clinical Professor Emeritus – SPEA. Previously, Krauss served as Deputy Mayor of

Indianapolis (1982-1991). Krauss currently serves as a senior advisor to the Chancellor of IUPUI and as adjunct professor at the Indiana University McKinney School of Law-Indianapolis. He teaches mediation and dispute resolution and has an alternative dispute resolution and mediation consultant practice. Krauss holds leadership positions with a diverse array of civic and corporate organizations, including Indiana Supreme Court Disciplinary Commission, Tourism for Tomorrow, Inc., the President Benjamin Harrison Foundation Advisory Board, Arthur Jordan Foundation and the Indianapolis Museum of Art. Past service included Chair of the Indiana Supreme Court Commission on Continuing Legal Education, Vice Chair and President of the Indianapolis Museum of Art. Krauss is a panel member for the American Arbitration Association, US Postal System, FINRA, US Institute for Environmental Conflict, National Futures Association, US Bankruptcy Court for the Southern District of Indiana. He chaired the Labor Management Committees for the closure of both Fort Benjamin Harrison and US Naval Air Warfare Center – IN and has served as a Special Mediator for the Indiana Attorney General. An avid amateur photographer. Krauss' images are in private collections and national publications.

Molly (Peelle) Kitchell was appointed to the Indiana Supreme Court Disciplinary Commission in 2015. Kitchell holds a Bachelor of Arts degree from Purdue University and a Master of Science in Occupational Therapy from the University of Indianapolis, graduating from both institutions with a 4.0 GPA. No longer practicing, her professional career in Occupational Therapy was primarily focused on Neuro rehabilitation. Raised in Kokomo, IN, she and her husband, Ryan Kitchell, returned to Indiana in 2002 after living in New Hampshire. Now residing in Zionsville, her primary role has been caregiver to their four children. She was appointed to Indiana's Interagency Coordinating Council on Infants and Toddlers by Gov. Mitch Daniels as a parent representative. In 2019, Kitchell completed her second term on the Judicial Qualifications and Nominating Commission, having been appointed by Gov. Mitch Daniels in 2011 and Gov. Mike Pence in 2017. She is actively involved with the Children's Museum Guild of Indianapolis, the Zionsville Foundations Grants Committee, and her children's schools.

Bernard A. Carter was appointed to the Indiana Supreme Court Disciplinary Commission in 2019. Prosecutor Carter assumed office as Lake County Prosecutor on December 6, 1993. He had formerly served as a deputy prosecutor and Lake County Superior Court Judge. He received his undergraduate degree from Kentucky State University and his J.D. degrees from Valparaiso University. He has long served as a board member of the Association of Indiana Prosecuting Attorneys, Inc. and serves on the executive committee of the Indiana Prosecuting Attorneys Council. Prosecutor Carter's office represents the State in all criminal cases in the County courts. Responsibilities include screening of cases, representing the State in cases before grand juries, prosecuting cases in all criminal courts in the County, investigating special white collar and economic crimes, advising police and citizens on criminal matters, and performing special services in matters such as child abuse, non-support, worthless check, welfare, gang crimes, and consumer fraud cases. Prosecutor Carter was among the founding members of the Indiana Governor's Drug Task Force honored in 2016 with Distinguished Hoosier Awards.

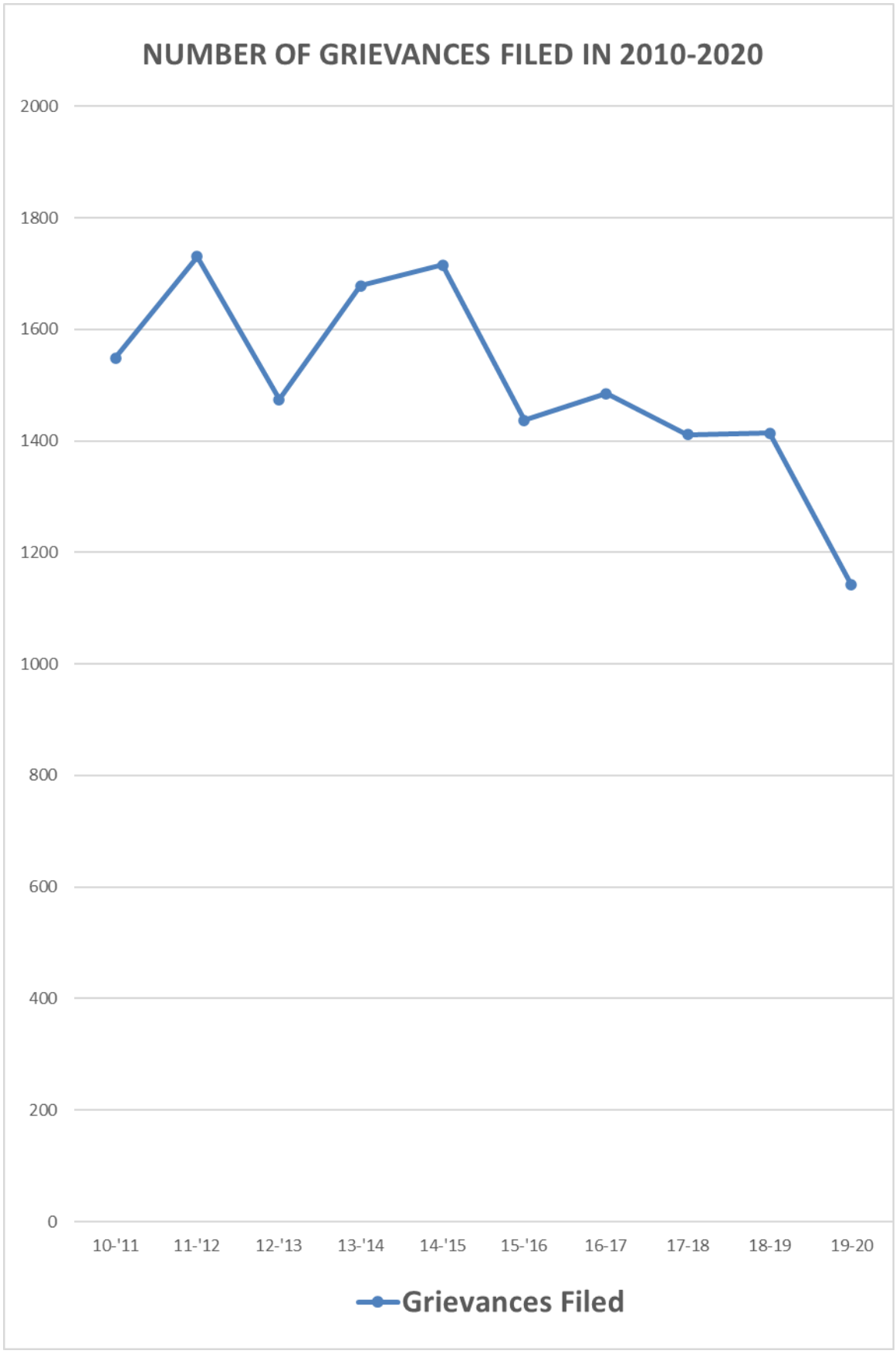

NUMBER OF GRIEVANCES FILED IN 2010-2020
2000
1800
1600
1400
1200
1000
800
600
400
200
0
10-'11
11-'12
12-'13
13-'14
14-'15
15-'16
16-17
17-18
18-19
19-20
Grievances Filed

Exhibit B

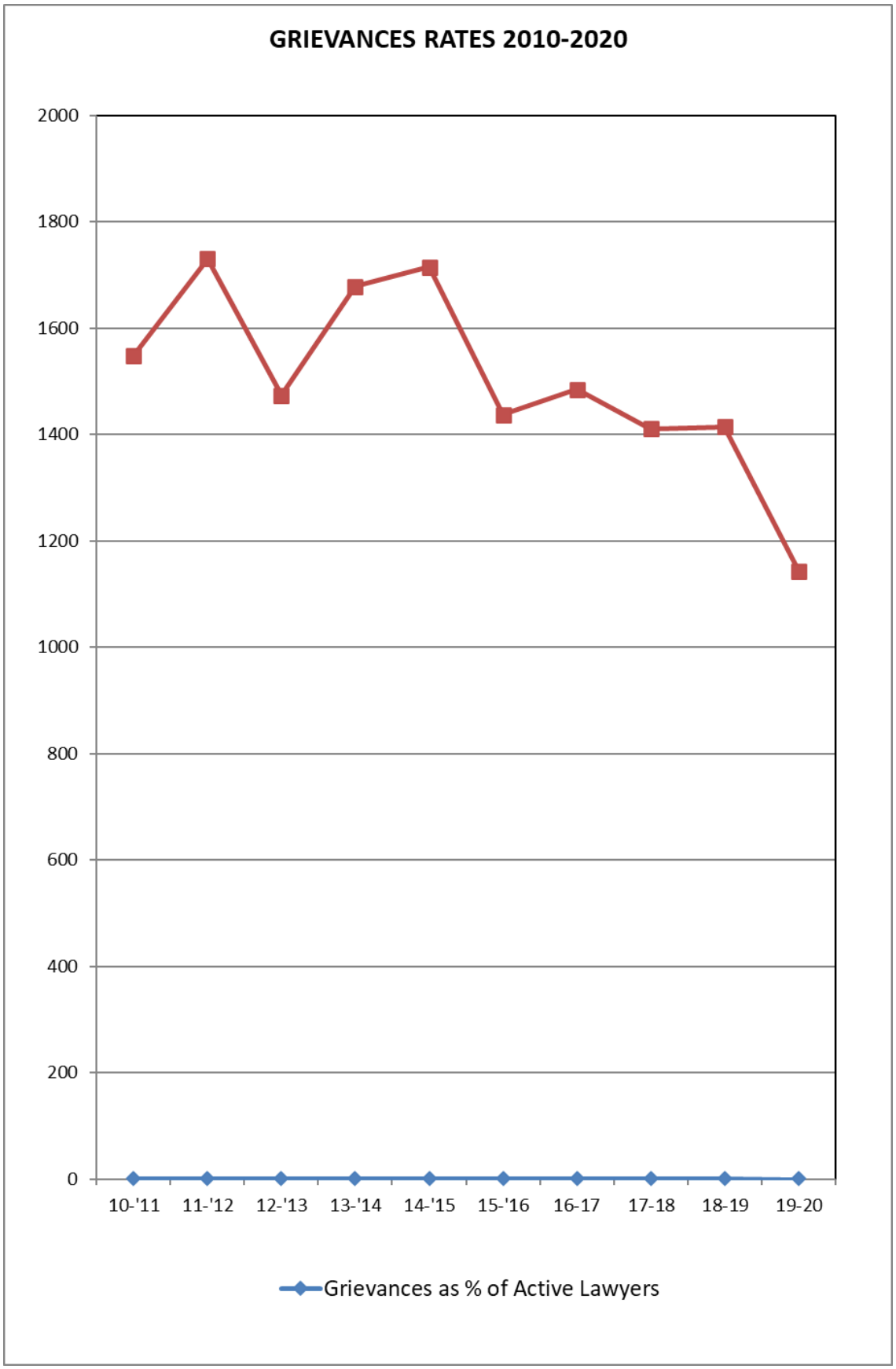

GRIEVANCES RATES 2010-2020
2000
1800
1600
1400
1200
1000
800
600
400
200
0
10-'11
11-'12
12-'13
13-'14
14-'15
15-'16
16-17
17-18
18-19
19-20
Grievances as % of Active Lawyers

Exhibit C

GRIEVANCES BY CASE TYPE AND MISCONDUCT ALLEGED 2019-2020

Case Type	Number	% of Total
Criminal	457	46.71%
Divorce Matters	182	17.90%
Tort	67	6.59%
Administrative Matters	59	5.80%
Wills/Estates	44	4.33%
Real Estate Matters	34	3.34%
Guardianship	30	2.95%
Contract Matter	29	2.85%
Personal Misconduct	29	2.85%
Collection	24	2.36%
Judicial Action	19	1.87%
Bankruptcy	9	.88%
Other	7	.69%
Patent	4	.39%
Workmen's Compensation	4	.39%
Adoption	1	.10%
Corporation Formation	1	.10%
TOTAL	1018	100%

Alleged Misconduct	Number	% of Total
Improper Influence	311	23.60%
Incompetence	291	22.08%
Neglect	180	13.66%
Improper Withdrawal	127	9.64%
Failure to Communicate	107	8.12%
Communication/Non-Diligence	86	6.53%
Excessive Fees	59	4.48%
Personal Misconduct	41	3.11%
Conflict of Interest	30	2.28%
Misinforming	22	1.67%
Illegal Conduct	16	1.21%
All other matters	14	1.06%
Lying	13	.99%
Conflict	9	.68%
Fraud	5	.38%
Revealing Confidences	4	.30%
Conversion	3	.23%
TOTAL	1647	100%

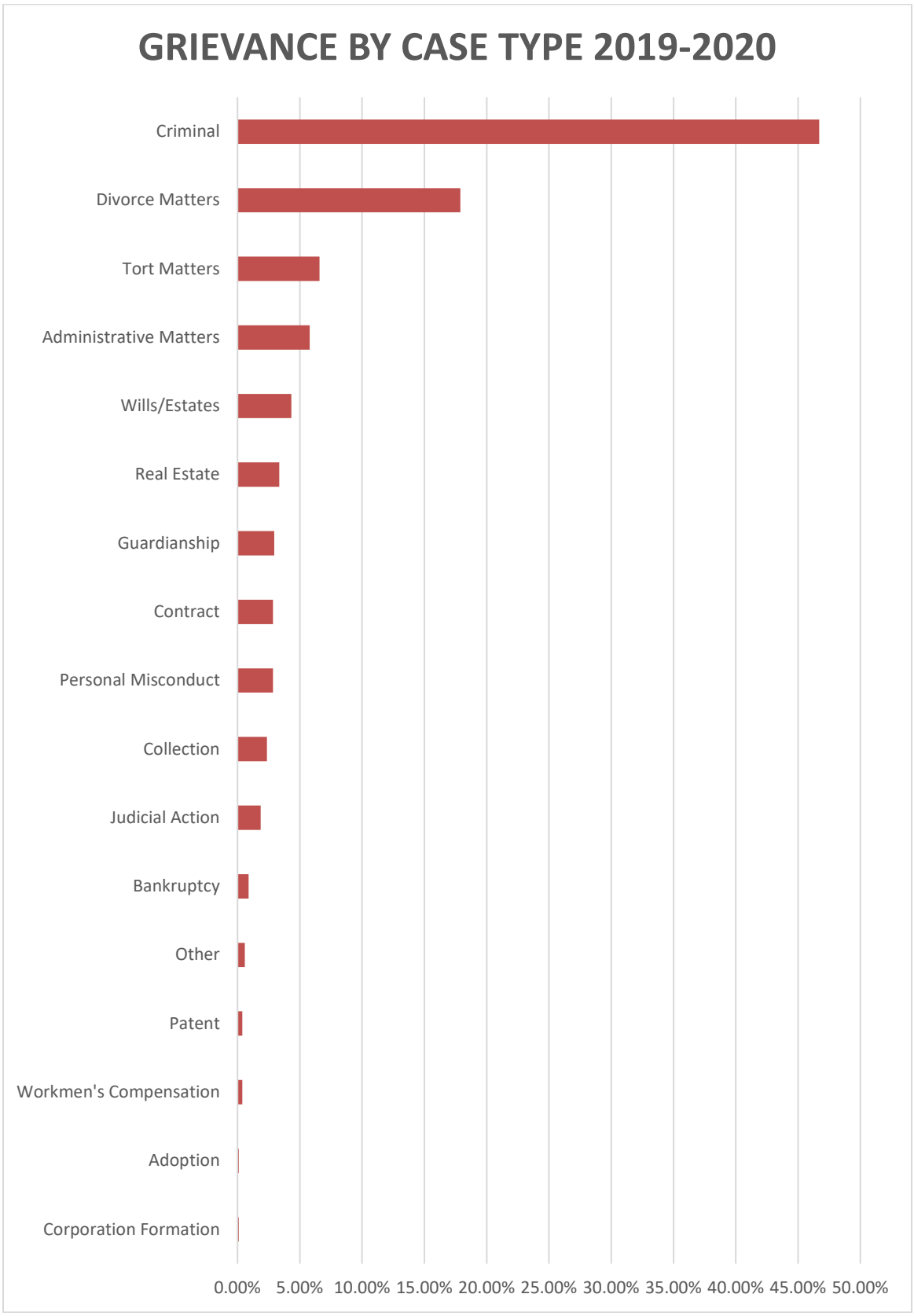

GRIEVANCE BY CASE TYPE 2019-2020
Criminal
Divorce Matters
Tort Matters
Administrative Matters
Wills/Estates
Real Estate
Guardianship
Contract
Personal Misconduct
Collection
Judicial Action
Bankruptcy
Other
Patent
Workmen's Compensation
Adoption
Corporation Formation
0.00% 5.00% 10.00% 15.00% 20.00% 25.00% 30.00% 35.00% 40.00% 45.00% 50.00%

Exhibit E

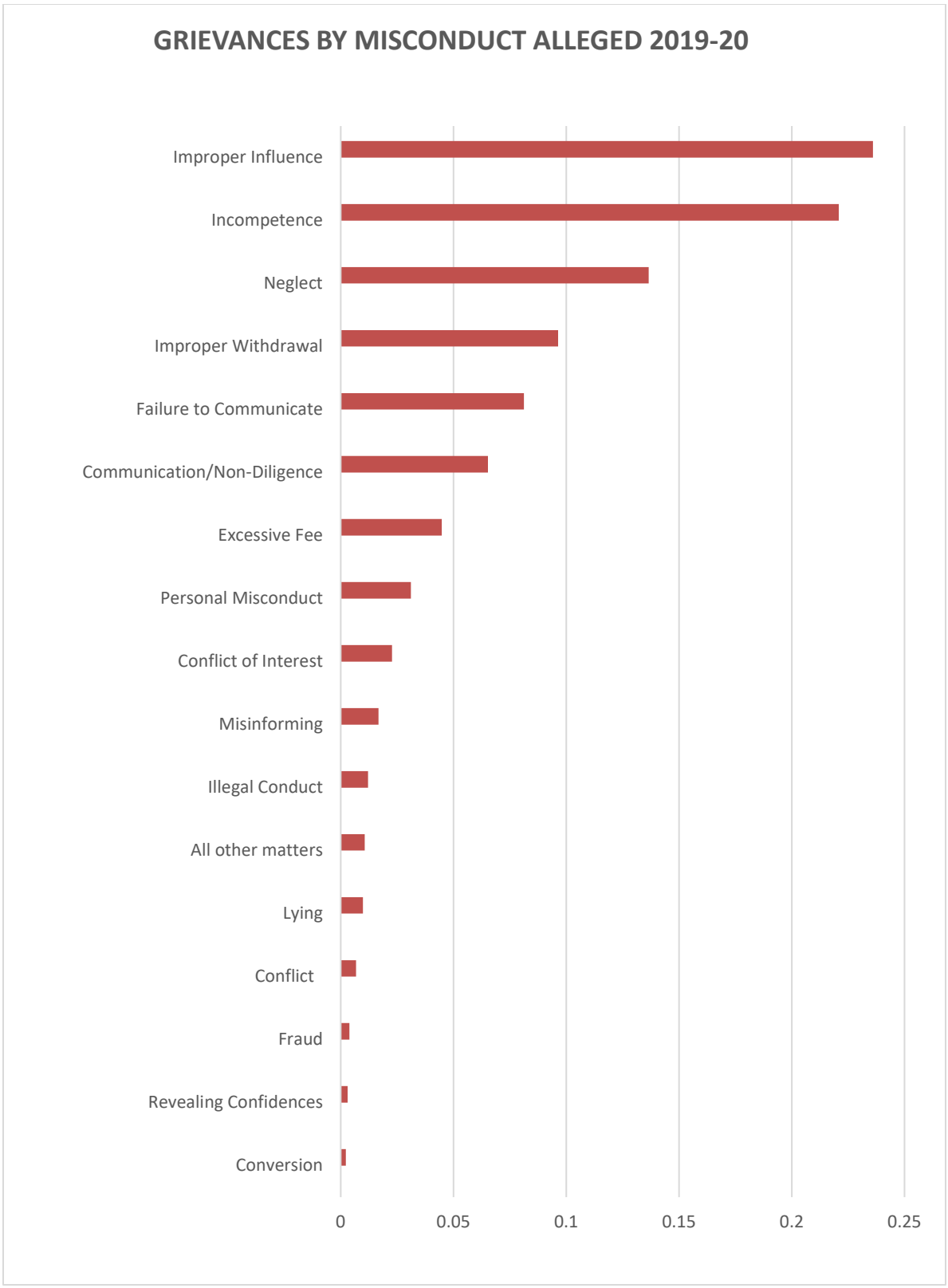

GRIEVANCES BY MISCONDUCT ALLEGED 2019-20
Improper Influence
Incompetence
Neglect
Improper Withdrawal
Failure to Communicate
Communication/Non-Diligence
Excessive Fee
Personal Misconduct
Conflict of Interest
Misinforming
Illegal Conduct
All other matters
Lying
Conflict
Fraud
Revealing Confidences
Conversion
0
0.05
0.1
0.15
0.2
0.25

Exhibit F

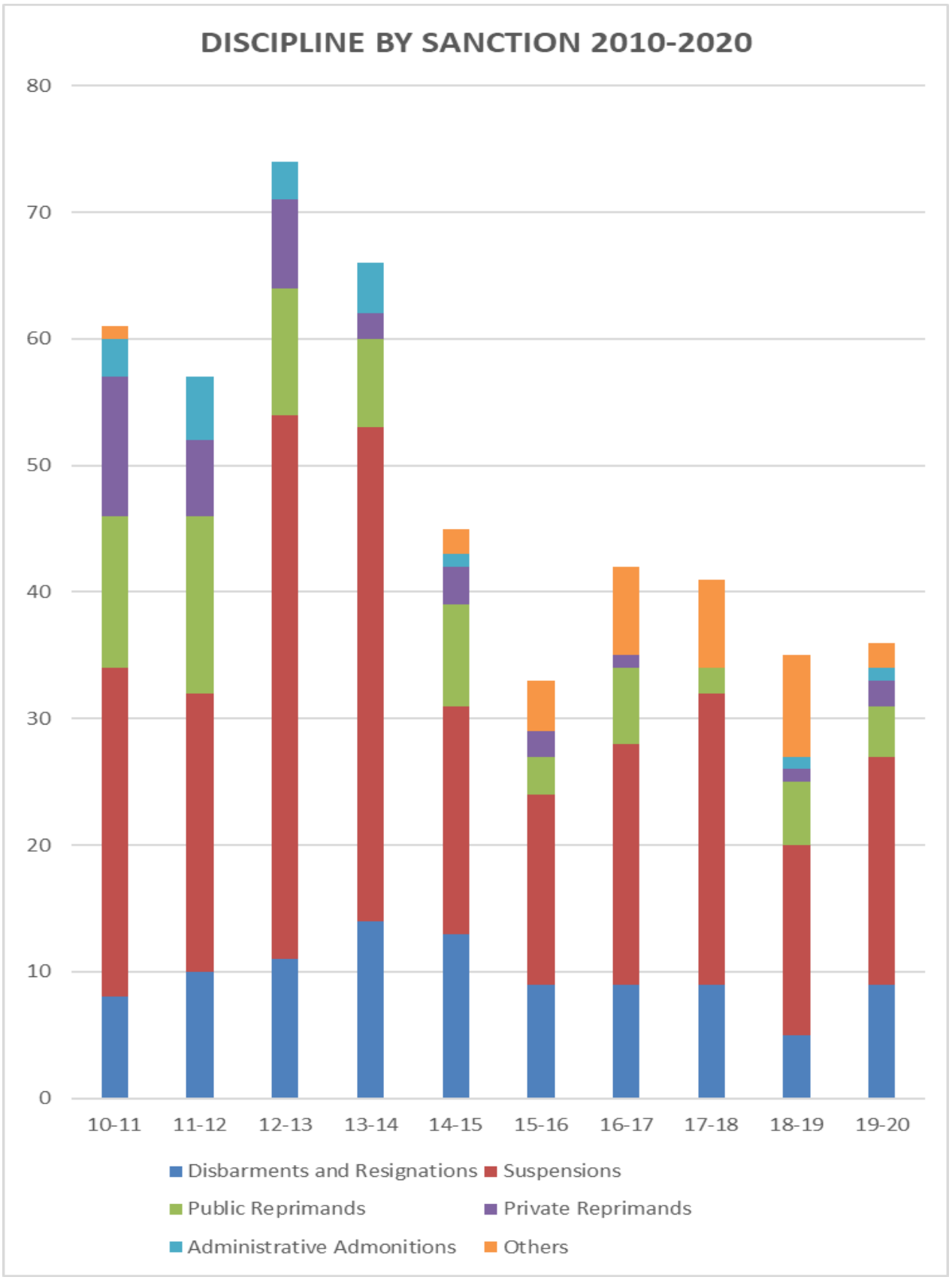

DISCIPLINE BY SANCTION 2010-2020
80
70
60
50
40
30
20
10
0
10-11
11-12
12-13
13-14
14-15
15-16
16-17
17-18
18-19
19-20
Disbarments and Resignations
Suspensions
Public Reprimands
Private Reprimands
Administrative Admonitions
Others

Exhibit G

INDIANA SUPREME COURT DISCIPLINARY COMMISSION FUND
Statement of Revenues and Expenses (Unaudited)
Fiscal Year Ending June 30, 2020

BEGINNING DISCIPLINARY FUND BALANCE		$1,462,016
REVENUES:		
TOTAL REGISTRATION FEES COLLECTED		$4,107,018
REVENUE FROM OTHER SOURCES:		
Court Costs	3,875	
Reinstatement Fees	1,500	
Rule 7.3 Filing Fees	5,150	
Trust Audit Costs Recovered	1,205	
TOTAL REVENUE FROM OTHER SOURCES		$11,730
TOTAL REVENUE		$4,118,748
EXPENSES:		
OPERATING EXPENSES:		
Personnel	1,926,299	
Travel	59,330	
Investigations/Hearings	50,377	
Dues and Library	23,321	
Postage and Supplies	22,016	
Utilities and Rent	98,861	
Maintenance	14,090	
Equipment	0	
Other Expenses	0	
TOTAL OPERATING EXPENSES		$2,194,294
TOTAL EXPENSES		$2,194,294

In the Indiana Supreme Court

Cause No. 22S-MS-1

Order Amending Indiana Rules of Professional Conduct

Under the authority vested in this Court to provide by rule for the procedures employed in all courts of this state and this Court's inherent authority to supervise the administration of all courts in this state, the Indiana Rules of Professional Conduct are **AMENDED** as follows (deletions shown by ~~striking~~ and new text shown by underlining):

Rules of Professional Conduct

Rule 1.15. Safekeeping Property

* * *

(f) Except as provided in paragraph (g) of this rule, a lawyer or law firm shall create and maintain an interest-bearing trust account for clients' funds which are nominal in amount or to be held for a short period of time so that they could not earn income for the client in excess of the costs incurred to secure such income (hereinafter sometimes referred to as an "IOLTA account") in compliance with the following provisions:

* * *

(9) All ~~interest~~ funds transmitted to the Foundation pursuant to this Rule shall be held, invested and distributed periodically in accordance with a plan of distribution which shall be prepared by the Foundation and approved at least ~~annually~~ biennially by the Supreme Court of Indiana, for the following purposes:

(a) to pay or provide for all costs, expenses and fees associated with the administration of the funds under this Rule ~~IOLTA program~~;

(b) to establish appropriate reserves;

(c) ~~to assist or establish approved pro bono programs as provided in Rule 6.6~~ to support civil legal assistance and pro bono programs in Indiana;

(d) for such other programs for the benefit of the public as are specifically approved by the Supreme Court from time to time.

* * *

(h) A lawyer, law firm, or estate of a deceased lawyer with unclaimed or unidentified funds in a client trust account shall take reasonable efforts to locate and to distribute the funds to the owner. Unclaimed funds are monies which a lawyer or firm is holding in a client trust account that should be distributed to a client or third party. Unidentified funds are monies for which the lawyer or firm cannot identify an owner.

(1) If a lawyer, law firm, or estate of a deceased lawyer cannot identify or locate the owner of funds in its IOLTA or non-IOLTA trust account, it shall pay the funds to the Indiana Bar Foundation for use in accordance with this Rule. Once the lawyer or law firm has an obligation to pay or distribute these funds, the lawyer or law firm has a period of five (5) years to identify or locate the owner of funds.

(2) A lawyer's or law firm's reasonable efforts to identify the owner of funds include a review of transaction records, client ledgers, case files, and any other relevant fee records. Reasonable efforts to locate the owner of funds include periodic correspondence of the type contemplated by the lawyer's or law firm's relationship with the client, former client, or third party. Should such correspondence prove unsuccessful, a lawyer's or law firm's reasonable efforts include efforts similar to those that would be undertaken when attempting to locate a person for service of process, such as examinations of local telephone directories, courthouse records, voter registration records, local tax records, motor vehicle records, or the use of consolidated online search services that access such records.

(3) A lawyer, law firm or lawyer's estate shall certify those reasonable efforts to locate or identify the owner before remitting such funds to the Indiana Bar Foundation. At the time such funds are remitted, the lawyer shall submit to the Indiana Bar Foundation the name and last known address of each person appearing from the lawyer's or law firm's records to be entitled to the funds, if known, along with the amount of any unclaimed or unidentified funds.

(4) If, within five (5) years of remitting unclaimed or unidentified funds to the Indiana Bar Foundation, the lawyer, law firm, or deceased lawyer's estate identifies and locates the owner of funds paid, the Indiana Bar Foundation shall refund the sum to the lawyer, law firm, or deceased lawyer's estate. The lawyer, law firm, or deceased lawyer's estate shall submit to the Foundation a verification attesting that the funds have been returned to the owner. The Indiana Bar Foundation shall maintain sufficient reserves to pay all claims for such funds.

(5) A lawyer's or law firm's remittance to the Indiana Bar Foundation under this paragraph (h) shall not constitute misconduct or grounds for discipline if the lawyer or law firm exercised reasonable efforts to locate the owner and distribute the funds, and remitted the funds to the Indiana Bar Foundation in good faith. A lawyer's or law firm's duty to locate the owner of unclaimed funds shall terminate once they have made reasonable efforts to locate the owner of those funds for a period of five (5) years, and

they have remitted the funds to the Indiana Bar Foundation. A lawyer or law firm shall include a provision in its engagement letter or fee agreement describing this Rule 1.15 process for unclaimed and unidentified funds. It is professional misconduct under Rule 8.4 of Indiana's Rules of Professional Conduct for a lawyer or law firm to remit unidentified or unclaimed funds to the Foundation prior to making reasonable efforts to locate the owner and distribute the funds.

* * *

Comment

* * *

Unclaimed or Unidentified Funds in a Client Trust Account

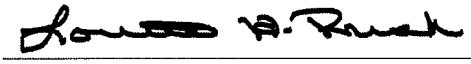
[7] For purposes of paragraph (h), unidentified funds refer to funds accumulated in an IOLTA account that cannot be reasonably documented as belonging to a client, former client, third party, or the lawyer or law firm. Unclaimed funds refer to funds for which a client, former client, or third party appears to have an interest, but has not responded to the lawyer's or law firm's reasonable efforts to encourage the client, former client, or third party to claim their rightful funds.

[8] The Indiana Bar Foundation shall make a standardized form with instructions available on the Foundation's website or by request for use by lawyers submitting unclaimed or unidentified funds to the Foundation.

[9] During the five (5) year period after unclaimed funds are remitted to the Foundation, the Foundation will strive to work with the Indiana Office of the Attorney General to continue reasonable efforts to contact the owners of these unclaimed funds.

[10] A lawyer or law firm that includes the language of 1.15(h) in their engagement letters or fee agreements shall receive protection from liability as long as they exercise reasonable efforts to identify the owner of unidentified funds and locate the owner of unclaimed funds.

This amendment is effective January 1, 2023.
Done at Indianapolis, Indiana, on 7/29/2022.



Loretta H. Rush
Chief Justice of Indiana

All Justices concur.

Section Two

Appellate Practice

Maggie L. Smith
Frost Brown Todd LLC
Indianapolis, Indiana

Section Two

Appellate Practice..... Maggie L. Smith

A. Should I—and more important, can I—appeal?

1. What are my chances of success on appeal?

Next to, "How much is this going to cost me?", the first thing your client wants to know as the appellant is, "What are my chances of success on appeal?" and, conversely, as appellee, "What are my chances of holding onto my victory"? Although there is no surefire way to know how the appellate courts will decide your particular appeal, some basic information exists that may help you make informed decisions and alert your client to the possibilities on appeal.

As a general matter, historically the Indiana Court of Appeals has reversed the trial court in civil cases approximately 35% of the time.

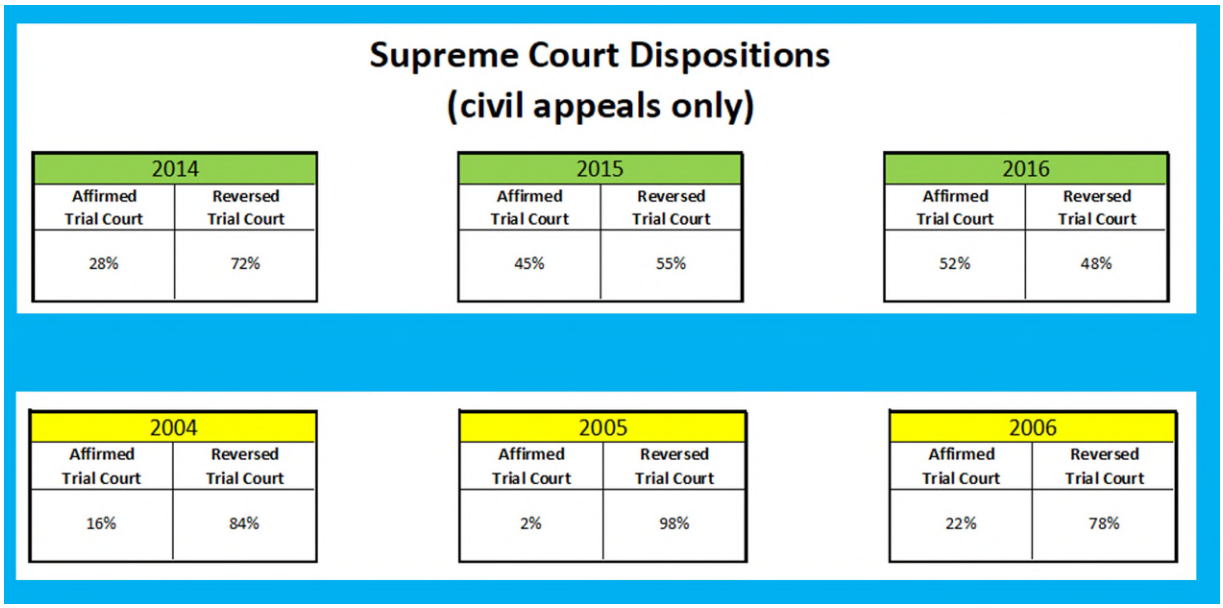
Court of Appeals Dispositions
(civil appeals only)

2014	
Affirmed Trial Court	Reversed Trial Court
69%	31%

2015	
Affirmed Trial Court	Reversed Trial Court
61%	39%

2016	
Affirmed Trial Court	Reversed Trial Court
68%	32%

In contrast, the Indiana Supreme Court's civil reversal rates are much higher, historically ranging from 48% to 98% reversal in 2005:



Of course, application of this averages will differ depending on the nature of the issue and the standard of review. For example, in a case where the issue on appeal is a fact-based error and the standard of review is abuse of discretion, there will be a much smaller chance of reversal. On the other hand, the chance of reversal should be higher for de novo review of a pure question of law or de novo review of summary judgment. Nonetheless, the fact that the reversal rate has remained relatively constant over the years is a good indication of the overall chances of success in the appellate court.

2. Do you have a final judgment?

With the exception of a few interlocutory appeals discussed below, appeals may be taken as a matter of right only from "final" orders/judgments of the trial court. The existence of a final order is jurisdictional, and the appellate court will dismiss the appeal if it finds there is no final order.

A final order/judgment is defined as one that "disposes of all issues as to all parties, to the full extent of the court to dispose of the same, and puts an end to the particular case as to all of such parties and all of such

issues. A final judgment reserves no further question or direction for future determination." *Young v. Estate of Sweeney,* 808 N.E.2d 1217, 1120 n.4 (Ind. Ct. App. 2004).

Trial Rules 54(D) and 56(C) allow a trial court to certify an otherwise interlocutory order as final. This authority, however, is constrained by the fact that "[t]o be properly certifiable . . . a trial court order must possess the requisite degree of finality, and must dispose of at least a single substantive claim." *Id.* "[A] claim consists of two elements: 1) a showing of entitlement to relief, and 2) the relief. . . ." *Id.* Thus, "a judgment that fails to determine damages is not final" and may not be certified under 54(D) or 56(C).

If there are still remaining parties or claims, merely labeling something as "final" is not sufficient. *See, e.g.*, *Cincinnati Ins. Co. v. Davis*, 860 N.E.2d 915, 920 (Ind. Ct. App. 2007) (trial court's statement that "[a]s there remain no pending issues, this shall be considered a final, appealable order" was insufficient where there were pending issues and where the orders "[did] not contain the 'magic language' of either Trial Rule 54(B) or Trial Rule 56(C)").

3. Interlocutory Appeals

An order which is not final is termed "interlocutory." The appellate rules provide for an appeal of an interlocutory order in three basic circumstances: by statute; "as of right"; and discretionary. IND. APPELLATE RULE 14.

The statutory and "of right" grounds for appeal are limited and either apply or not. IND. APPELLATE RULE 14(A)(1) through (A)(9); 14(D).

When a trial court grants or denies class certification, Appellate Rule 14(C) will allow a party to bypass the trial court certification requirement and file a Motion to Accept Jurisdiction over that interlocutory order in the

Court of Appeals within thirty days after the trial court's entry of the order granting or denying class certification. IND. APPELLATE RULE 14(C). The Court of Appeals still retains discretion to decide whether to accept the appeal. *Id.*

All other interlocutory orders are discretionary appeals, which involves a three-step process. First, the trial court must certify the order. IND. APPELLATE RULE 14(B)(1). If the trial court chooses not to do so, there can be no interlocutory appeal.

Second, if the trial court does certify the order, you must then convince the Court of Appeals to accept jurisdiction over the appeal. Discretionary interlocutory appeals are disfavored and strictly limited, representing "narrow exceptions to the final judgment rule," the purpose of which is "to prevent delay in the trial of lawsuits which would result from limitless intermediate appeals." 24 GEORGE T. PATTON, JR., INDIANA PRACTICE, Appellate Procedure § 5.7 (3d ed. 2021); Paulson v. Centier Bank, 704 N.E.2d 482, 488 (Ind.Ct.App.1998). For this reason, neither the trial courts nor the appellate courts are inclined to grant discretionary interlocutory appeals because of the concern of piecemeal litigation." *Id.*

"The reasons for that approach are both sound and longstanding. The general rule has long favored postponing appeal until a final judgment has been rendered because it promotes judicial economy by avoiding the time and expense attendant to piecemeal litigation. Indeed, many potential errors may be mooted by the final result of judgment because the result is acceptable to the party who might otherwise complain." *INB Nat. Bank v. 1st Source Bank*, 567 N.E.2d 1200, 1202 (Ind.Ct.App. 1991).

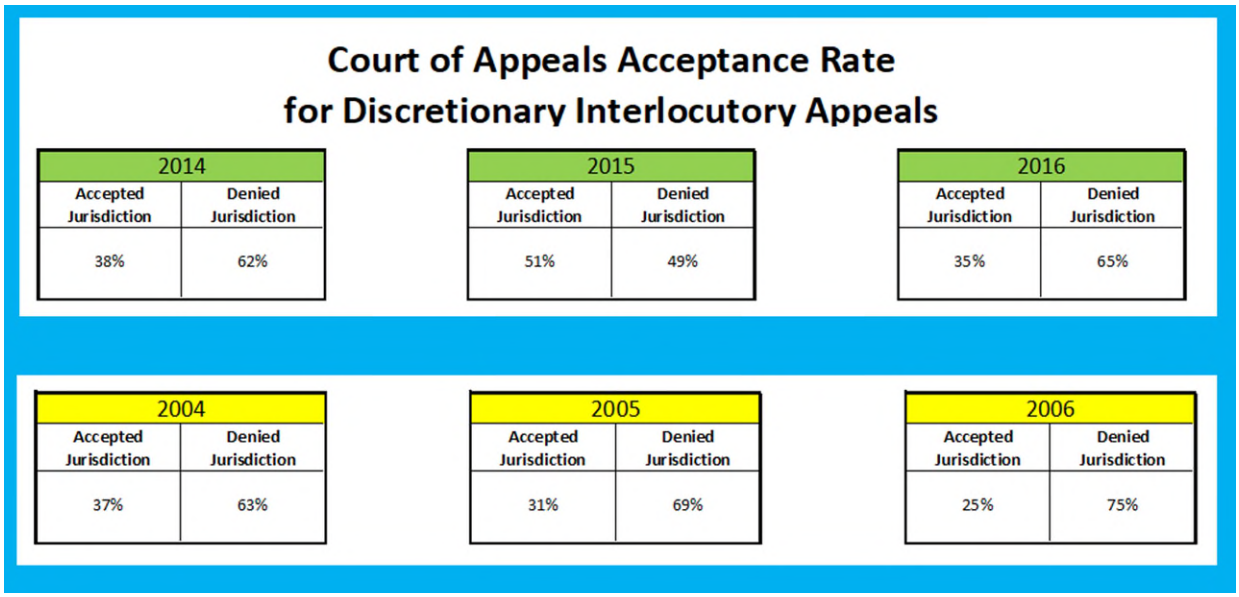
Because of the concern for piecemeal litigation, "The discretionary grant of jurisdiction is typically reserved for extraordinary cases raising important and novel legal issues, not for garden variety challenges to a trial court's factual findings that are appealable after final judgment."

HONORABLE EDWARD W. NAJAM, JR., *Interlocutory Appeals Under the Revised Rules*, APPELLATE PRACTICE, p. 10 (Indiana Continuing Legal Education Forum, May 4, 2000). Thus the potential interlocutory appeal "must be a way to resolve all or most of a pending litigation." 24 IND. PRAC., APPELLATE PROCEDURE § 5.7 (3d ed. 2005).

Although there are always exceptions to the rule, generally speaking, the Court of Appeals is more likely to accept jurisdiction over an appeal where (1) the facts are not in dispute; (2) resolution of the interlocutory issue has the potential to be case dispositive, or at least dispose of most of the issues remaining at trial; (3) the trial court's interlocutory ruling is wrong.

Some "protypical" examples of discretionary interlocutory appeals that may be accepted by the Court of Appeals include matters going to liability; subject-matter jurisdiction; personal jurisdiction; certification of a class action; statute of limitations; dispositive evidence (most often in the criminal context); and discovery orders (particularly matters involving privilege). See APPELLATE SKILLS INSTITUTE, Discretionary Interlocutory Appeals p. 16-18 (Indiana Continuing Legal Education Forum, November 2, 2006).

With this in mind, the rates for the Court of Appeals accepting jurisdiction when requested vary between 35-50% over the past ten years:



Finally, if the court accepts jurisdiction over the appeal, the parties then brief the case as if it were an appeal from a final judgment.

4. Motions to Reconsider & Motions to Correct Error

A timely Motion to Correct Error under Trial Rule 59 tolls the appeal deadline. A Motion to Reconsider under Trial Rule 53.4 *does no*t.

Trial Rule 53.3(A) sets out the time limitations for ruling on a Motion to Correct Error and provides that the Notice of Appeal must be filed with thirty days of the date of the ruling on or deemed denial of a Motion to Correct Error, regardless of whether the Motion is mandatory or permissive under Trial Rule 59. IND. TRIAL RULE 53.3(A).

A Motion to Correct Error will be "deemed denied" if any of the following occur: (1) The trial court fails to set[1] the Motion to Correct Error for a

[1] The trial court only need set the date for a hearing within the forty-five-day period, it need not actually hold the hearing within the forty-five-day period. *See Kovacik v. Kovacik*, 631 N.E.2d 509, 511 (Ind. Ct. App. 1994) ("Although the hearing did not take place until well after the forty-five (45) day period, it was set within the period. The rule specifically requires a hearing to be set within forty-five (45) days, not that a hearing actually take place within that timeframe."). In the context of rescheduling a hearing on a Motion to Correct Error after a continuance, there is a question as to whether *Kovacik* "allow[s] for a seemingly indefinite

hearing within forty-five days after its filing; (2) The trial court fails to rule on the Motion to Correct Error within thirty days after a hearing on the motion; or (3) The trial court fails to rule on the Motion to Correct Error within forty-five days if there is no hearing. IND. TRIAL RULE 53.3(A).

If the motion has been "deemed denied" the trial court cannot resurrect the appeal clock by belatedly ruling on the Motion to Correct Error. *See, e.g.*, *Garrison v. Metcalf*, 849 N.E.2d 1114, 1115-16 (Ind. 2006) (although trial court ruled on the motion to correct error thirty-six days after filing, it was deemed denied six days earlier, and appeal clock started to run from the "deemed denied" date).

A Motion to Correct Error can only be used when there is a final judgment. It cannot be used to correct interlocutory rulings (such as a partial summary judgment that was not declared final under Trial Rule 56(C). *See Cardiology Assocs. of Northwest Ind., P.C. v. Collins*, 804 N.E.2d 151, 153 (Ind. Ct. App. 2004).

5. When is my Notice of Appeal due?

The time to file a Notice of Appeal from a final judgment under Appellate Rule 9(A) is 30 days from entry of the judgment into the Chronological Case Summary ("CCS"), not from the date the judge renders judgment. IND. APPELLATE RULE 9(A).

Also, if you are appealing an Administrative Agency decision, the Notice of Appeal must be filed within 30 days after the Administrative Agency's entry of its order, ruling or decision. IND. APPELLATE RULE 9.

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period of time to elapse before a hearing on a motion to correct error need be rescheduled, so long as the original hearing was set within forty five days after the motion was filed," *Ostertag v. Ostertag*, 755 N.E.2d 686, 689 (Ind. Ct. App.2001) (Sullivan, J., dissenting), versus whether the trial court must reset the date for a new hearing within forty-five days of the continuance being granted. *See Williamson v. Williamson*, 825 N.E.2d 33 (Ind. Ct. App. 2005); *Ostertag*, 755 N.E.2d at 687; *Copenhaver v. Lister*, 852 N.E.2d 50, 57 (Ind. Ct. App. 2006).

Contrary provisions in controlling statutes or agency regulations will *not* impact or alter the filing deadlines. *See, e.g.*, *Owen County v. Indiana Dep't of Workforce Dev.*, 861 N.E.2d 1282, 1288-89 (Ind. Ct. App. 2007) (provision in statute that a Review Board decision is not final for fifteen days does not impact application of Appellate Rule 9(A)(3) that requires the Notice of Appeal to be filed within thirty days of the decision); *Citizens Industrial Group v. Heartland Gas Pipeline*, 856 N.E.2d 734, 738 (Ind. Ct. App. 2006) (provision in statute that appeal shall not be submitted prior to determination of a petition for rehearing does not toll time to file Notice of Appeal since rule required appeal within thirty days).

The 30-day deadline used to be considered jurisdictional, but that is no longer good law after *In re Adoption of O.R.*, 16 N.E.3d 965 (Ind. 2014). Now, even formerly jurisdictional requirements are not met, an appeal can proceed if there exist "extraordinarily compelling reasons." *Id.* at 971. The case law is still developing as to what constitutes "extraordinarily compelling reasons."

B. Notice of Appeal to Briefing

1. Staying execution of the judgment

Once a judgment has been handed down, the Indiana Trial Rules allow for immediate execution on that judgment. IND. TRIAL RULE 62(A); see also IND. APPELLATE RULE 39 ("An appeal does not stay the effect or enforceability of a judgment or order of a trial court or Administrative Agency unless the trial court, Administrative Agency or Court on Appeal otherwise orders.").

A party wishing to appeal is not required to post any type of bond or security to take an appeal, unless the party wants execution on that judgment stayed during the pendency of an appeal. See IND. TRIAL RULE 62(D); IND. APPELLATE RULE 18 ("No appeal bond shall be necessary to

prosecute an appeal from any Final Judgment or appealable interlocutory order.").

Trial Rule 62 provides, "The bond or letter of credit may be given at or after the time of filing the Notice of Appeal. The stay is effective when the appeal bond or letter of credit is approved by the appropriate court." IND. TRIAL RULE 62(D). The Trial and Appellate Rules grant the trial court continuing jurisdiction to enter a stay, even if the trial court is otherwise divested of jurisdiction under Appellate Rule 8. See id. ("The trial court or judge shall have jurisdiction to fix and approve the bond or letter of credit and order a stay pending an appeal[.]"); IND. APPELLATE RULE 18 ("The trial court or Administrative Agency shall have jurisdiction to fix and approve the bond, or irrevocable letter of credit, and order a stay prior to or pending an appeal.").

Governmental and court-appointed entities are entitled to a stay without posting any type of bond or security. IND. TRIAL RULE 62(E). As to all other parties, you can always ask the trial court to enter a stay without requiring any type of appeal bond or security.

The only time a stay is mandatory, however, is when the Appellant posts "an adequate appeal bond with approved sureties or an irrevocable letter of credit from a financial institution approved in all respects by the court." IND. TRIAL RULE 62(D); see also IND. APPELLATE RULE 18 ("Enforcement of a Final Judgment or appealable interlocutory order from a money judgment shall be stayed during appeal upon the giving of a bond or an irrevocable letter of credit approved by a trial court or Administrative Agency.") Thus, the question becomes, what is an "adequate" appeal bond or irrevocable letter of credit?

When the judgment is a monetary judgment, setting the bond amount can be relatively straightforward, although the trial court always has authority to exercise its discretion in setting the amount curtailed only by Appellate

Rule 18, which provides, "[t]he Court on Appeal may . . . modify the bond or letter of credit." IND. APPELLATE RULE 18.

In general, an appeal bond or letter of credit must be in an amount that will satisfy "the judgment in full together with costs, interest, and damages for delay . . . and such costs, interest, and damages as the appellate court may adjudge and award." IND. TRIAL RULE 62(D); see also id. ("When the judgment is for the recovery of money not otherwise secured, the amount of the bond or letter of credit shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the court after notice and hearing and for good cause shown fixes a different amount or orders security other than a bond or letter of credit.").

Costs and interest in this instance typically include any costs allowed under Trial Rule 54 and Appellate Rule 67, and statutory pre- and post-judgment interest. See IND. CODE § 24-4.6-1-103 ("Interest at the rate of eight percent (8%) per annum shall be allowed . . . from the date an itemized bill shall have been rendered and payment demanded on an account stated[.]"); IND. CODE § 24-4.6-1-101 ("[I]nterest on judgments for money whenever rendered shall be from the date of the return of the verdict or finding of the court until satisfaction at . . . an annual rate of eight percent (8%) if there was no contract by the parties.").

A creative appellee may try to get the court to award various additional costs as "damages for delay." With a few exceptions, however, trial courts have not included these "damages for delay" amounts in an appeal bond. The overall feeling is that the lost opportunity to use the money awarded in the judgment is compensated by the award of post-judgment interest.

The maximum amount of an appeal bond is constrained by the Indiana Code, which provides, "An appeal bond that an appellant must post to

stay execution on a judgment while an appeal is pending may not exceed twenty-five million dollars ($25,000,000) regardless of the total amount of the judgment." IND.CODE § 34-49-5-3. The only exception is "if an appellee proves by a preponderance of the evidence that an appellant is dissipating assets outside the ordinary course of business to avoid payment of a judgment, a court may enter orders that: (1) are necessary to protect the appellee; and (2) require the appellant to post a bond that is equal to the total amount of the judgment." Id.

When the judgment does not involve a monetary judgment, the trial court has the discretion to set an appeal bond at whatever amount it decides, including requiring no appeal bond at all, again curtailed only by Appellate Rule 18.

Trial Rule 62 only specifically discusses the proper amount of an appeal bond in only one type of non-monetary judgment:

> When the judgment determines the disposition of the property in controversy as in real action, replevin, and actions to foreclose liens or when such property is in the custody of the sheriff or when the proceeds of such property or a bond or letter of credit for its value is in the custody or control of the court, the amount of the appeal bond or letter of credit shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay.

IND. TRIAL RULE 62(D).

In all other cases, it is up to the parties to make arguments as to whether the appeal of the judgment involved should require an appeal bond at all or, conversely, how much bond should be required. It is not uncommon for the appellee to agree that no appeal bond should be required in some cases, but you cannot count on this.

Finally, as a practical matter, it is generally quickest and most cost-effective to have the client approach his or her own insurance company to

determine whether it provides appeal bonds. Likewise, the client's own financial institution will generally work hard for its existing clients to provide an irrevocable letter of credit. Many law firms also have established relationships with insurance companies providing such bonds.

Your client must understand that if you lose on appeal, the appellee will immediately seek tender of the proceeds of any appeal bond or letter of credit and will not be required to initiate any proceedings supplemental to get full satisfaction of the judgment. See IND. TRIAL RULE 65.1.

For this reason, insurance companies and financial institutions generally require: (1) the client have enough accessible assets and collateral to secure the full amount of any bond or letter of credit (which, as noted above can include the amount of the judgment in entirety, plus interest and costs): (2) the client execute a separate collateral agreement or personal guaranty; and (3) the assets/collateral be held in some type of escrow or trust pending the appeal so that, if the bond proceeds are in fact tendered, the bank can immediately secure payment from your client.

Because of this, many appellants have been unsuccessful in obtaining an appeal bond and have been unable to stay execution of the judgment pending appeal. Of course, appellees who proceed with enforcing their judgments do so at their own peril.

The premiums and fees for an appeal bond or a letter of credit can be very, very high. While an argument can be made that these premiums and fees should be costs recoverable in the court's discretion under Appellate Rule 67 if the judgment is ultimately reversed on appeal, some clients prefer to deposit cash with the trial court clerk and avoid paying these additional costs altogether. The Trial Rules specifically authorize this: "In any case where a surety bond, letter of credit, or security is

furnished under this rule, the right to furnish money or a check in lieu of a bond shall remain unimpaired." IND. TRIAL RULE 62(F).

2. Ordering the transcript.

You are required to order a Transcript or portions of the Transcript if it is necessary to fairly present the issues on review must be requested. IND. APPELLATE RULE 9(F)(4).

In particular, Appellate Rule 9(F)(4) provides, "If the appellant intends to urge on appeal that a finding of fact or conclusion thereon is unsupported by the evidence or is contrary to the evidence, the Notice of Appeal shall request a Transcript of all the evidence." *Id.*

Normally, the failure to include portions of a Transcript "works a waiver of any specifications of error which depend upon the evidence." *Fields v. Conforti*, 868 N.E.2d 507, 511 (Ind. Ct. App. 2007); *see also Kocher v. Getz*, 824 N.E.2d 671, 675 (Ind. 2005) (holding that, where the appellant failed to provide a Transcript of the trial court's hearing on his motion to stay execution and request for bond less than the full amount of the judgment, appellant failed to demonstrate that the trial court abused its discretion).

On the other hand, if an appellant intends to adopt the trial court's findings of fact and not contend they were unsupported by the evidence or that a conclusion is unsupported by the evidence or contrary to the evidence, a Transcript is not required.

In *Pabey v. Pastick*, 816 N.E.2d 1138 (Ind. 2004), the appellee asked the Court of Appeals to dismiss the appeal, claiming that by not requesting preparation of the Transcript of the evidentiary hearing and the exhibits introduced by the other parties, the appellant failed in his duty to present a complete record as required by Appellate Rule 4(F)(4). After the Court of Appeals dismissed the appeal, the Supreme Court granted transfer and

reversed the dismissal. In doing so, the Supreme Court noted that the appellant stated that no Transcript was necessary because he was not contending that the trial court's findings were unsupported by the evidence or that a conclusion is unsupported by the evidence or contrary to the evidence. Rather, the appellant adopted the trial court's findings of fact, and cited to them throughout the brief.

Referencing its previous decision in which it had "encourage[d] litigants and reviewing courts to employ efficient appeal procedures," the Supreme Court noted that it had "addressed the merits of the appeal, even though no Transcript had been filed as part of the record, where the appellants accepted the trial court's findings of fact and argued that those findings did not support the trial court's judgment." *Id.*

A question often arises as to whether counsel should request a Transcript of oral arguments in which no evidence is presented, such as a summary judgment hearing. Of course, if an issue on appeal relates to waiver or judicial estoppel based on conduct at that hearing, then the Transcript is needed. But if these issues are not going to be presented on appeal, Appellate Rule 9(F)(4) would appear to indicate that a Transcript of an oral argument should not be required. Nonetheless, several decisions reference the fact that the Transcript of a summary judgment hearing was not provided as if there were something incorrect about the omission. *See Progressive Ins. Co., Inc. v. Bullock*, 841 N.E.2d 238, 241 n.2 (Ind. Ct. App. 2006) (noting the parties failed to provide the court with a Transcript of the summary judgment hearing).

In light of these decisions, many appellate practitioners have adopted the practice of requesting a Transcript even if it would appear the rule would not actually require one.

3. Dealing with the Court Reporter and Clerk

The first duties of the Appellant with regard to the Transcript are: (1) to determine whether a Transcript must be ordered and, if yes, whether the entire Transcript must be ordered or just parts thereof; and (2) to make the appropriate request for the Transcript in the Notice of Appeal (or note that no Transcript is being requested). (See section III(B), (C), above)

Within 10 days after the Notice of Appeal is filed, "a party must enter into an agreement with the court reporter for payment of the balance of the cost of the Transcript. Unless a court order requires otherwise, each party shall be responsible to pay for all transcription costs associated with the Transcript that party requests." IND. APPELLATE RULE 9(H). "The Court Reporter may require from the appellant a fifty percent (50%) deposit based on the estimated cost of the Transcript, except no deposit may be charged for state or county paid Transcript." *Id.*

Make sure you do this immediately, as you subject yourself to admonition or sanctions by the Court of Appeals if the court reporter seeks an extension of time because you have failed to pay the deposit required.

The Appellate Rules require that, within forty-five days after the Appellant files the Notice of Appeal, "[t]he court reporter shall prepare, certify and file the Transcript designated in the Notice of Appeal with the trial court clerk or Administrative Agency in accordance with Rules 28 and 29. Preparation of the exhibits as required by Rule 29 is considered part of the Transcript preparation process." IND. APPELLATE RULE 11(A), (B).

> NOTE: "With the exception of the preparation of documentary exhibits pursuant to Rule 29(A), the Court Reporter may engage the services of outside transcribers or transcription services to assist in all or part of the transcription." *Id.*

"The Court Reporter shall provide notice to all parties to the appeal that the Transcript has been filed with the clerk of the trial court or Administrative Agency in accordance with Rules 28 and 29. (See Form # App.R. 11-1)." *Id.*

If the court reporter fails to file the Transcript with the trial court clerk or request an extension within the time allowed, the appellant is required to seek an order from the Court of Appeals compelling the court reporter to do so. IND. APPELLATE RULE 11(D). "Failure of appellant to seek such an order not later than seven (7) days after the Transcript was due to have been filed with the trial court clerk shall subject the appeal to dismissal." *Id.*

The trial court clerk then has five days to issue and file with the Court of Appeals a Notice of Completion of Transcript. IND. APPELLATE RULE 10(D). If the trial court clerk fails to issue and file the Notice of Completion of Transcript, the appellant is required to seek an order from the Court of Appeals compelling the trial court clerk to do so. IND. APPELLATE RULE 10(G). "Failure of appellant to seek such an order not later than seven (7) days after the Notice of Completion of Transcript was due to have been issued, filed, and served with shall subject the appeal to dismissal." *Id.*

Keep in mind . . . the preparation of the Transcript is for the benefit of the appellate court, not the parties. The Appellate Rules require only that the Transcript be filed with the trial court—nothing in the Appellate Rules requires the court reporter to provide copies of the Transcript to the parties, not even to the party who paid for the transcription in the first place.

Some court reporters nonetheless will give you a copy of the Transcript even if they don't have to. Some even voluntarily give you a disk containing an electronic version of the Transcript as well. But others

charge you $1 per page (or more) for a copy of the Transcript and also charge an additional fee for the disk (sometimes equal to what the copying charge would be, but often half of the total copying charge).

If you have an appeal from a county in which a copy of the Transcript is not provided automatically, you have two options: (1) pay the court reporter the copy fees and get a copy directly from the court reporter; or (2) utilize Appellate Rule 12 and check out the Transcript and copy it yourself back at your office:

> (B) . . . Any party may withdraw the Transcript or, at the trial court clerk's option, a copy, at no extra cost, from the trial court clerk for a period not to exceed the period in which the party's brief is to be filed. . . .
>
> (C) Unless limited by the trial court, any party may copy any document from the Clerk's Record and any portion of the Transcript. After a Transcript or Appendix has been transmitted to or filed with the Clerk, a party to the appeal may arrange to have access to that Transcript or Appendix during the time period that party is working on a brief, subject to any internal rules the Clerk may adopt to provide an accounting for the location of those materials and for ensuring fair access to the Transcript and Appendices by all parties.

IND. APPELLATE RULE 12(B, C).

Finally, if the Court Reporter is unable to provide a needed Transcript for whatever reason or if parts of a Transcript are inaudible, "a verified statement of the evidence" is to be prepared "from the best available sources, which may include the party's or the attorney's recollection." IND. APPELLATE RULE 31(A). "The party shall then file a motion to certify the statement of evidence with the trial court or Administrative Agency" with the verified statement of the evidence attached to the motion. *Id.*

Any response to the proposed statement of evidence must be verified and filed with the trial court within fifteen days. IND. APPELLATE RULE 31(B). The trial court can then hold a hearing or decide the matter based on the

statements. The trial court ultimately must certify "a statement of the evidence, making any necessary modifications to statements proposed by the parties. The certified statement of the evidence shall become part of the Clerk's Record." *Id.*

If the judge refuses to certify the moving party's statement of evidence and the statements or conduct of the trial court judge are themselves in controversy, "the trial court judge . . . shall file an affidavit setting forth his or her recollection of the disputed statements or conduct." IND. APPELLATE RULE 31(D). All of the verified statements of the evidence and affidavits then become part of the Clerk's Record. *Id.*

4. When does the trial court lose jurisdiction over the case?

The trial court loses (and the appellate court acquires) jurisdiction when the trial court clerk issues its Notice of Completion of Clerk's Record. IND. APPELLATE RULE 8. It is immaterial whether the Transcript is complete or not. It is also immaterial whether the Notice is received by either the appellate court or the parties, since the only prerequisite for jurisdiction to pass to the appellate court is that the Notice of Completion be issued.

A trial court "does not have jurisdiction to continue with a case concerning matters from which an appeal is taken as long as that appeal is pending." *Schumacher v. Radiomaha, Inc.*, 619 N.E.2d 271, 273 (Ind. 1993). "The purpose of viewing jurisdiction in this formalistic manner is to facilitate 'the orderly presentation and disposition of appeals and [prevent] the confusing and awkward situation of having the trial and appellate courts simultaneously reviewing the correctness of the judgment.'" *Id.*

A trial court does, however, retain jurisdiction to perform such ministerial tasks as reassessing costs, correcting the record, or enforcing a judgment." *City of New Haven v. Allen County Bd. of Zoning Appeals*, 694 N.E.2d 306, 310 (Ind. Ct. App. 1998) (citation omitted) (trial court had

jurisdiction to perform the ministerial task of entering an agreed judgment).

Likewise, a trial court retains jurisdiction to rule on matters unrelated to the judgment being appealed. *See, e.g.*, *In the Matter of the Guardianship of Hickman*, 811 N.E.2d 843 (Ind. Ct. App. 2004) ("[W]here the subject of the appeal is entirely independent of the issues to be tried, subsequent trial court action does not interfere with the jurisdiction of the appellate court. . . . We hardly think the trial court thereby loses jurisdiction to adjudicate those claims which remain unresolved. Therefore, we hold the trial court retained limited jurisdiction over the case to those claims left unresolved by the first judgment."); *Inlow v. Henderson, Daily, Withrow & Devoe*, 804 N.E.2d 833, 838 (Ind. Ct. App. 2004) (trial court retained jurisdiction to award attorney fees); *Smoot v. Smoot*, 604 N.E.2d 618, 621 (Ind. Ct. App. 1992) (petition for modification of custody filed while appeal from original dissolution was still pending is separate action which resulted in separate final, appealable order).

There may be instances where returning jurisdiction to the trial court is desirable. For instance, if both a Motion to Correct Error and a Notice of Appeal are filed by different parties, a trial court will often lose jurisdiction prior to ruling on the Motion to Correct Error.

Depending on what is needed, any party may file a motion requesting that the appeal be temporarily stayed or dismissed without prejudice and the case remanded to the trial court or administrative agency for further proceedings. IND. APPELLATE RULE 37(A). As set out in that Rule, the motion must be verified and demonstrate that remand will promote judicial economy or is otherwise necessary for the administration of justice. To the extent appropriate, remember to attach a certified copy of the CCS and any documents you are relying on to speed the trial court's consideration of the motion.

5. Motions Practice

Motions Practice became more rule driven by virtue of Title VI (Appellate Rules 34 through 42), but this aspect of appellate practice is still an area that is not used effectively by many practitioners. A non-exhaustive list of motions available on appeal include:

- Motions to Dismiss (Voluntary and Involuntary)
- Motions for Expedited Review
- Motions for Remand
- Motions to Compel
- Motions to Publish
- Motions to Appear as Amicus Curiae
- Motions for Oral Argument
- Motions to Strike
- Motions to Amend
- Motions for Extension of Time
- Motions for Writ in Aid of Appellate Jurisdiction
- Motions for Extension of Time to File Notice of Appeal (TR 72(E))
- Motions to Submit Additional Authority
- Motions to Stay Pending Appeal
- Motions for Emergency Transfer to Supreme Court
- Motions to Correct Record

- Motions to Submit Certified Statement of Evidence in Lieu of Evidence

Three full-time staff attorneys are employed to assist the court with motions practice, and their duties include: screening appeals for jurisdictional defects (revealed by reviewing the Appellant's Case Summary); issuing "show cause" orders if it appears that an appeal is not properly before the Court; reviewing daily motions and drafting the orders to be signed by the Chief Judge; preparing weekly memos for any motions that are to go to the Motions Panel; attending the Motions Panel and presenting the cases; drafting the orders reflecting the Motions Panel rulings; drafting other specific orders requested by judges; and providing guidance by way of telephone calls and written correspondence to trial judges, attorneys, court reporters, and case managers in the Clerk's Office regarding the Rules of Appellate Procedure and motions practice.

All Motions are decided by either (1) the Chief Judge; (2) the Motions Panel; or (3) the Writing Panel.

The Chief Judge decides the "daily" motions, which include Motions for Extension of Time; Motions to Compel the filing of the Notice of Completion of Clerk's Record and the Notice of Completion of Transcript; Motions for Temporary Admission (f/k/a Pro Hac Vice); Motions for the Transfer of the Record of Proceedings from a prior appeal; Motions requesting the setting of a briefing schedule; Motions to Consolidate Appeals; Motions to File an Oversized Brief; Motions to Amend Brief; and Motions to Withdraw Appearance.

The Motions Panel consists of three judges—two active judges and one senior judge. The two active judges serve staggered, two-month terms, while a different senior judge may sit on the panel each week. The types of motions that go before the Motions Panel include Motions to Stay; Appellees' Involuntary Motion to Dismiss; Petitions to Accept Jurisdiction

over an Interlocutory Appeal; Successive Petitions for Post-Conviction Relief; and Petitions for Rehearing of Appeals that have been dismissed.

Finally, two types of motions end up going to the writing panel (the actual three-judge panel which decides the case): (1) motions held in abeyance until the writing judge is assigned; and (2) motions received after the case is fully briefed.

The types of motions generally held "in abeyance" for the writing panel are motions for oral argument, motions to appear amicus curiae, motions to strike all or portions of a brief and/or appendix, and motions for non-involvement.

Likewise, any motion received or filed after the case is fully briefed is sent directly to the writing panel—it is not reviewed by staff attorneys unless forwarded by the writing panel.

C. Briefing

1. Your judge is a generalist, so have someone "Play Judge" with your Brief in **every** appeal.

Even if you were not trial counsel, by the time you have finished drafting the Brief, you have an incredible amount of "inherent" knowledge of both the facts and legal authorities.

What is perfectly clear to you based on this inherent knowledge (and probably perfectly clear to opposing counsel as well) may not be so perfectly clear to the “generalist” judge who not only lacks your extensive knowledge of the facts and specific legal precedent applicable to your case, but has thousands of other pages to read in the time they have set aside before having to vote on the cases.

Do not assume the judges or their law clerks know anything about the area of the law at issue in your case. Take the time to set up the relevant

"big picture" or overview of the law in general before delving into the particular subset of the law at issue in your case.

Then find an attorney in your office who has had absolutely no involvement in the case and—just as important—does not practice in this area of law, and ask her to read your Brief. The attorney will be reading it with the same inherent knowledge of the case and the law that an appellate judge has (none) and will be able to tell you where things get confusing and need factual and legal clarification or supplementation before you ever file your brief.

Given their workload, the judges cannot spend time trying to figure out what you are trying to argue. If you give them a Brief that is confusing or assumes facts that may be in the Record but are not actually put before the judge in the Brief, you may lose your chance to advocate your position prior to the vote.

2. Statement of Facts

After being involved in appellate practice for almost twenty years, I now believe most cases are won or lost in the Statement of Facts. A persuasive Statement of Facts tells a story, is balanced, and makes the judges want to rule in your favor using your legal arguments in the rest of the Brief.

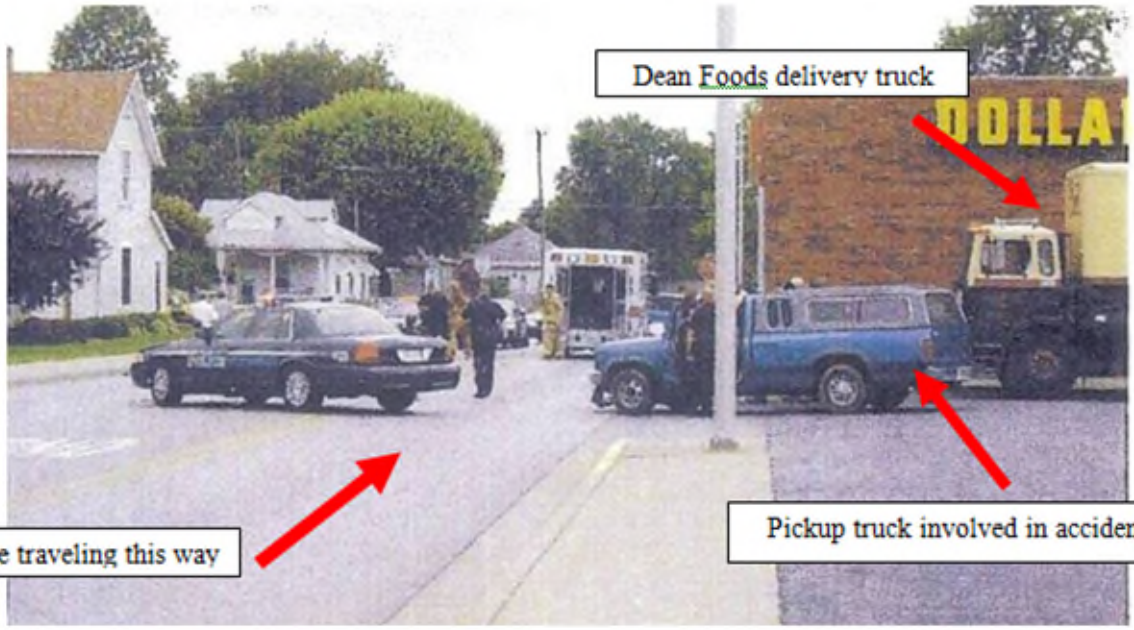
A key part of a good Statement of Facts is balance. Use this section to put your spin on the bad facts you know your opposing counsel will bring out . . . especially if you are the Appellant.

Don’t be argumentative, though, as it is prohibited. A good advocate can make an argumentative point seem merely factual.

Also make sure you give enough background for the reader to understand, but not so much that the reader gets lost in the details. If you have a long Statement of Facts, break it up with headings.

Don’t be afraid to embed pictures, charts, and graphics in your Statement of Facts. The following picture with annotations presents the “facts” in ways that words never could:

As seen in this photo taken immediately after the accident, however, the delivery truck is parked a significant distance back from the intersection and Driver has repeatedly testified that the parked delivery truck did not in any way impair or affect her ability to see the traffic on Christian Avenue and that she could see a safe distance in both directions:



(App. 143, 146-47, 153-54,159, 174, 232.)

Driver testified that the only effect the delivery truck had on her exit from the parking lot was that she briefly had to maneuver around the delivery truck as she got into position to exit onto Christian Avenue, but after she did that and then came to a complete stop before turning onto Christian Avenue, she was "able to look with an unimpeded view all the way to [the] left . . . and all the way to [the right]." (App. 154-59.)

Finally, keep in mind that the Appellate Rules provide, "The facts shall be stated in accordance with the standard of review appropriate to the judgment or order being appealed." IND. APPELLATE RULE 46(A)(6)(b). As Judge Najam has noted, this "differs from the long-standing common law

rule that the appellant shall state the facts in the light most favorable to the judgment." JUDGE EDWARD W. NAJAM JR., PRESENTATION OF FACTS ON APPEAL, November 2002, Indiana Continuing Legal Education Foundation Seminar, reproduced in 47 Res Gestae 24.

In this regard, when the issue is the grant or denial of a summary judgment, "as everyone knows, there is de novo review. The court on appeal looks at all the facts disclosed in the Trial Rule 56(C) designations, not just the facts most favorable to the summary judgment or the denial of summary judgment. The facts most favorable to the judgment rule would not apply here." *Id.*

Likewise, when the question presented on appeal involves "how the law should be applied to the facts ... all the facts are in play." *Id.* Thus, in a case where the "abuse of discretion" standard of review on appeal turns on claims that "the trial court has misinterpreted or misapplied the law" or whether "the trial court's ruling is clearly against the logic and effect of the facts and circumstances before the court," the Statement of Facts "can include virtually all the relevant facts, not just those facts most favorable to the judgment." *Id.*

"[T]he same can be said ... [where] the 'clearly erroneous' standard of review applies. Before we can reach a firm conviction that a mistake has been made, we have to look at the totality of the evidence." *Id.*

Bottom line. Be colorful, strong, and engaging . . . but balanced and non-argumentative.

3. Focus on the legal issues.

Hyperbole, purely emotional arguments, whining, and name-calling do not persuade appellate judges, and in fact so annoy most of them that it becomes a huge distraction to your arguments on the merits. It also could get you sanctioned. *See In re Wilkins*, 777 N.E.2d 714 (Ind. 2002).

In *Cochran v. Cochran*, 717 N.E.2d 892 (Ind. Ct. App. 1999), the court reminded counsel that "[o]verheated rhetoric is unpersuasive and ill-advised. Righteous indignation is no substitute for a well-reasoned argument." *Id.* at 893 n.3. A brief cannot "be used as a vehicle for the conveyance of hatred, contempt, insult, disrespect, or profession[al] discourtesy of any nature for the court of review, trial judge, or opposing counsel." *Id.*

And in *County Line Towing, Inc. v. Cincinnati Ins. Co.*, 714 N.E.2d 285 (Ind. Ct. App. 1999), the court noted, "At the outset, we point to the obvious: the judiciary, in fact and of necessity, has absolutely no interest in internecine battles over social etiquette or the unprofessional personality clashes which frequently occur among opposing counsel these days." *Id.* at 290. "Irrelevant commentary thereon during the course of judicial proceedings does nothing but waste valuable judicial time. On appeal, it generates a voluminous number of useless briefing pages which have nothing to do with the issues presented, as in this appeal." *Id.* at 290-91. "Further, appellate counsel should realize, such petulant grousing has a deleterious effect on the appropriate commentary in such a brief. Material of this nature is akin to static in a radio broadcast. It tends to blot out legitimate argument." *Id.* "On a darker note, if such commentary in appellate briefs is actually directed to opposing counsel for the purpose of sticking hyperbolic barbs into his or her opposing numbers' psyche, the offending practitioner is clearly violating the intent and purpose of the appellate rules." *Id.*

"In sum, we condemn the practice, and firmly request the elimination of such surplusage from future appellate briefs." *Id.* "A brief should not only present the issues to be decided on appeal, but it should be of material assistance to the court in deciding those issues. A brief is far more helpful to this court, and it advocates far more effectively for the client,

when its focus is on the case before the court and not on counsel's opponent." *Id.*

Finally, disorganized, poorly written, and improperly cited briefs are distracting. Given the constraints on the judges, it is not their job to try to figure out what your arguments really are. Worse, you most likely have lost your chance to advocate. *See Wright v. Elston*, 701 N.E.2d 1227, 1231 (Ind. Ct. App. 1998) ("[T]he arguments presented in the Wrights' brief were extremely difficult to follow. A brief should not only present the issues to be decided on appeal, but it should be of material assistance to the court in deciding those issues. When no cogent argument is presented, our consideration of the issue is waived.").

In addition, the Bluebook was not just a law school exercise to confound you. Appellate Rule 22 requires Appellate Briefs to conform to the Bluebook. *See Howell v. Hawk*, 750 N.E.2d 452, 457 n.3 (Ind. Ct. App. 2001) ("We ask Appellants' counsel to renew his acquaintance with the Bluebook and our Rules governing citation to cases.").

Give pinpoint citations for everything (the rules require them). Failure to do so can result in waived arguments. *Id.* ("Appellants' brief almost completely lacks pinpoint citations within the relevant cases cited, and includes numerous blank (wholly superfluous) citations to the Indiana Appellate Court Reports (Ind.App.), which ceased to exist after 1979. We prefer to resolve cases on the merits; nevertheless, we remind counsel that improper citation could amount to failure to make a cogent argument and result in waiver of our consideration of an issue, and such citation does not facilitate our review of the merits."); *Wright*, 701 N.E.2d at 1230 ("[W]e will not, on review . . . search through the authorities cited by a party in order to try to find legal support for its position.").

4. Appendix & Addendum

There are several things to remember about this aspect of appellate practice as it relates to civil cases (criminal appeals are handled differently). First, after briefing is completed, the trial court clerk will send the Transcript to the Court of Appeals, but will not send any of the documents filed in the trial court unless the appellate court specifically requests that they be transmitted (rare in civil cases).

Appellate Rule 50 therefore requires the parties to include certain specific documents and any additional documents "necessary" to resolution on appeal (but only the truly necessary documents) in an Appendix filed with the briefs. These documents need not be certified by the trial court and can instead come from your own files because Rule 50 requires that you must "verify under penalties of perjury that the documents in this Appendix are accurate copies of parts of the Record on Appeal."

Keep in mind, however that you only file one Appendix. If there are documents critical to the appeal (such as a contract) that you believe each member of the court should see to make his/her decision, or if there are instances where you want to actually provide the court with copies of relevant legal materials not easily obtainable online (old statutes, ordinances, etc.), the Rules allow you to file a separately bound "Addendum to Brief" containing those documents. See IND. APPELLATE RULE 46(H).

Unlike the Appendix, *each judge* gets his or her own copy of the Addendum. If you choose to file an Addendum, read Rule 46(H) carefully, as the requirements for this document differ from the requirements of an Appendix.

Finally, many appellate practitioners put the entire Transcript in the Appendix. DON'T. The Rules prohibit it. The Court of Appeals will *already* have the entire Transcript before it when it considers the appeal.

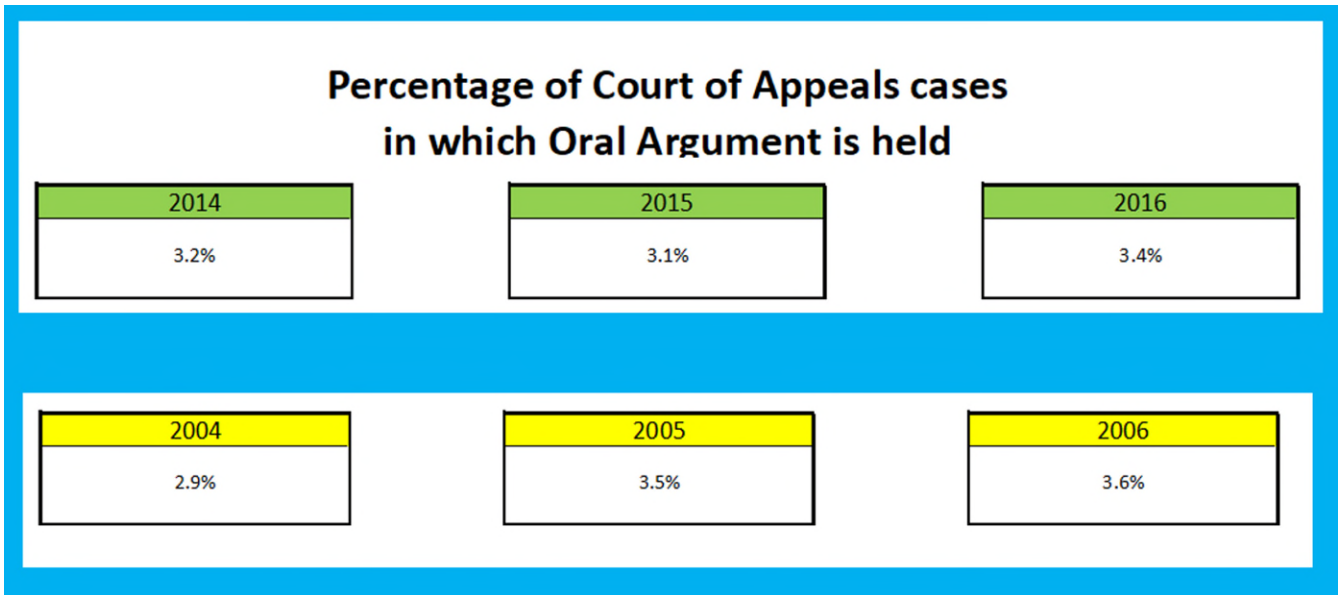
5. Oral Argument

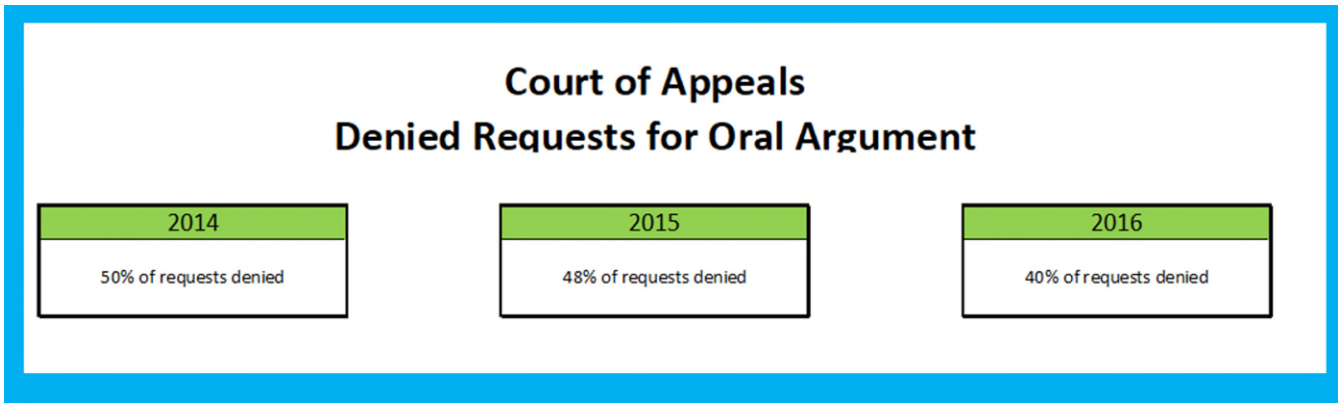
After an appeal is fully briefed, it is assigned to a Court of Appeals writing judge who sits on a three-judge panel. The exact mechanism used by each Court of Appeals panel to reach a decision differs from panel to panel and depends on the preferences of the three judges assigned to a panel.

Some panels elect to have the writing judge review the briefs and draft a proposed opinion first, and then circulate the proposed decision and briefs for review by the other judges. Other panels communicate via e-mail about the cases and reach a collective decision prior to the writing judge drafting the opinion. Some panels meet for conferences and discuss the various cases assigned to the judges in that panel and reach a collective decision prior to the writing judge drafting the opinion.

However, if oral argument is held, no decision regarding the outcome of the appeal is made until the judges have heard the oral argument. Because of this, many appellate advocates ask for oral argument in every case.

As a whole, however, oral argument in civil cases remains rare because most appellate parties do not request argument. The Court of Appeals grants around 50% of the requests it receives for oral argument, but the Court of Appeals actually held oral argument in only 3% of all cases.





D. After the Court of Appeals Rules

1. Rehearing

The appellate rules allow you to seek rehearing after a decision is handed down. Practically, however, this is a waste of time.

Although the Court of Appeals last year granted rehearing in 8% of its cases, in almost all of those instances, it granted rehearing to affirm its original decision. It is widely believed that the outcome changes on rehearing in only about 1% of cases.

The cases in which rehearing is most likely to result in a different outcome are limited to those instances where the Court of Appeals relied on a fact that ended up being incorrect or where the court applied a statute or rule that was not in existence until after the acts giving rise to the appeal occurred and thus should not have been applied.

If all you are doing is rearguing what you argued in your principal briefs, then your chances of success on rehearing are zero.

2. Certification of the decision

When an opinion is handed down by the Court of Appeals, the opinion is immediately sent to the parties and trial court. It is not a "certified" opinion of the Court of Appeals, however, until after the time for filing a Petition for Rehearing or Transfer has expired without the filing of such a petition. If such a petition is filed, then the opinion will not be certified until the disposition of the petition is determined. If a petition for transfer is granted, then the Court of Appeals' opinion is vacated unless the Supreme Court directs otherwise under Appellate Rule 58(A).

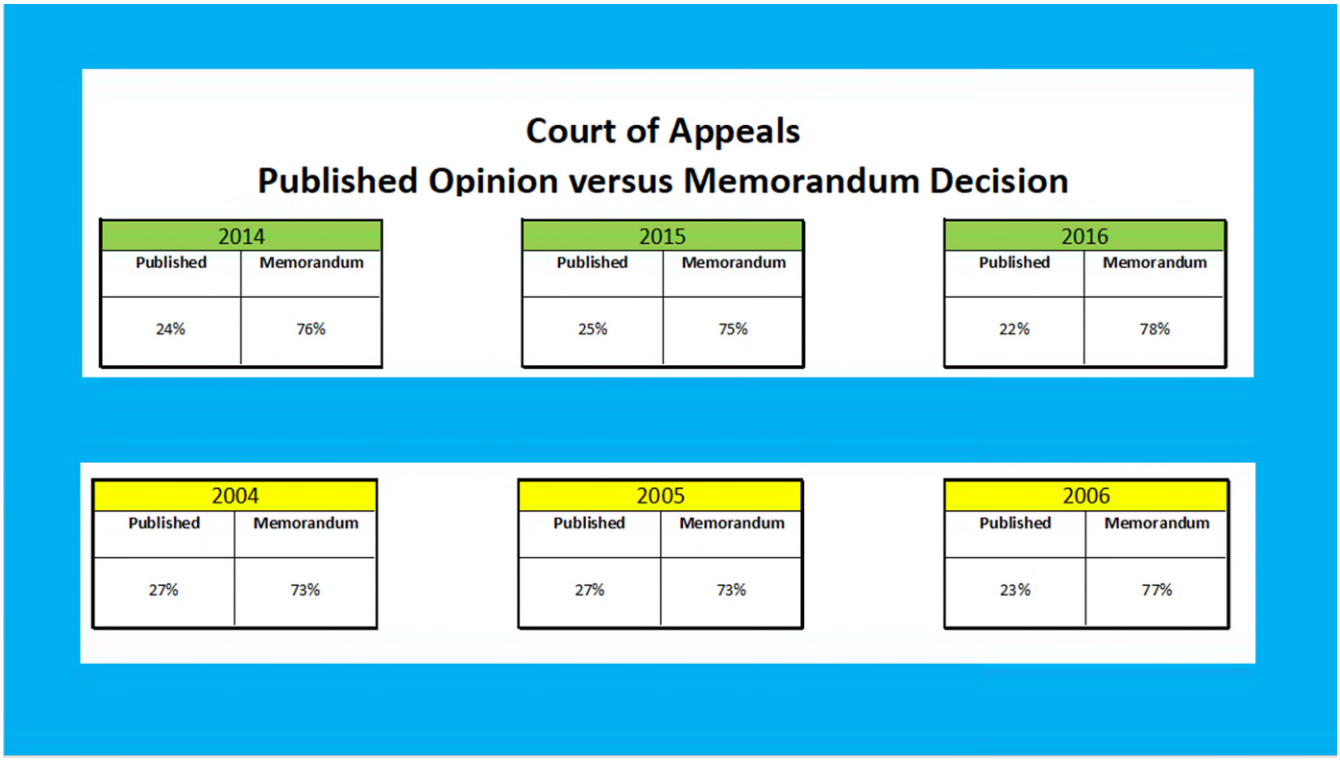
The same rule applies for Supreme Court decisions. They are not certified until the expiration of the petition for rehearing deadline. If such a petition is filed, then the opinion is not certified until final resolution of the rehearing petition.

This is relevant because the Appellate Rule 65(E) specifically provides that neither the parties, nor the trial court or Administrative Agency, may act in reliance on the opinion until it is certified. Although not specifically stated in the rules, it would seem implicit that parties in other cases also cannot rely on opinions as binding precedent until such time as the opinion is certified.

3. Published versus non-published.

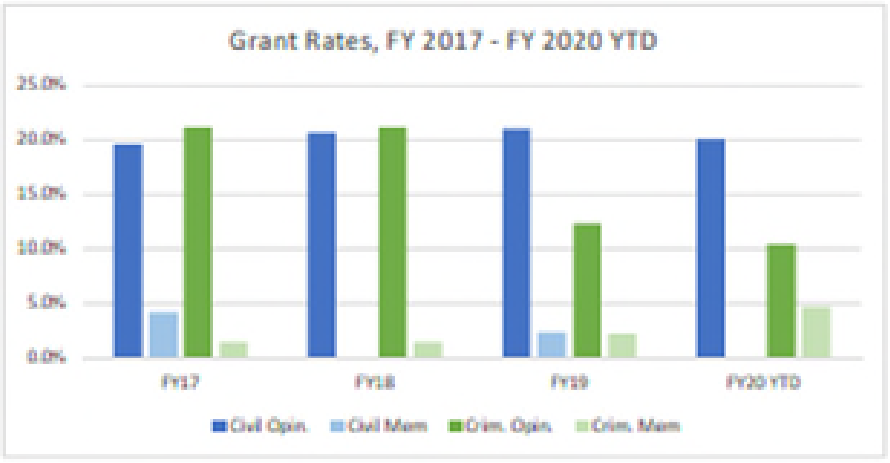
Indiana Appellate Rule 65 provides, "A Court of Appeals opinion shall be published if the case: (1) establishes, modifies, or clarifies a rule of law; (2) criticizes existing law; or (3) involves a legal or factual issue of unique interest or substantial public importance. Other Court of Appeals cases shall be decided by not for publication memorandum decision." IND. APPELLATE RULE 65(A).

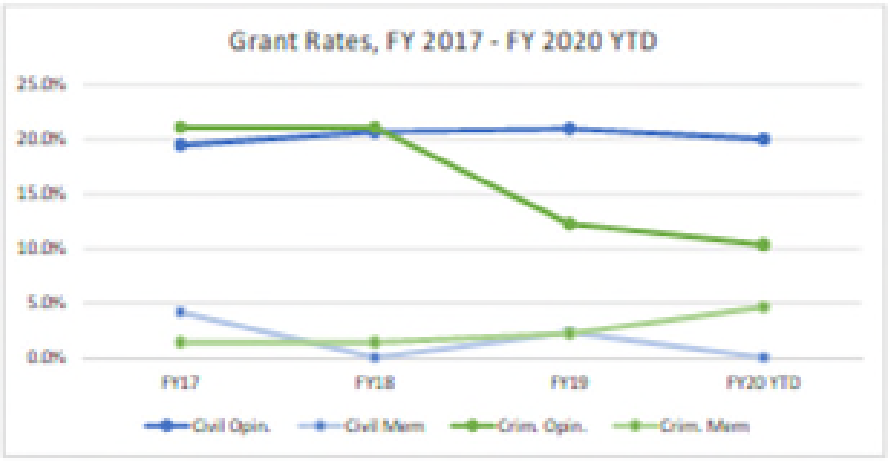
Almost 80% of the decisions from the Indiana Court of Appeals are designated as "not-for-publication memorandum."



Whether a decision is for publication has significant consequences on your chances in getting the Supreme Court to accept transfer. The Indiana Supreme Court accepts transfer of the not-for-publication decisions from 0%-4.5% (depending on the year).

	2017	2018	2019	2020
Civil Opinion	29.5%	20.7%	21%	20%
Civil Memorandum	4.13%	0%	2.3%	0%
Criminal Opinion	21.1%	21.1%	12.2%	10.3%
Criminal Memorandum	1.4%	1.4%	2.2%	4.6%





Given these statistics, parties who intend to seek transfer will often immediately move to publish the decision, whereas the party who has won at the Court of Appeals will want to have the decision remain unpublished.

The Appellate Rules provide, "Within fifteen (15) days of the entry of the decision, a party may move the Court to publish any not-for-publication memorandum decision which meets the criteria for publication." IND. APPELLATE RULE 65(D).

The Rule provides, "Unless later designated for publication, a not-for-publication memorandum decision shall not be regarded as precedent and shall not be cited to any court except by the parties to the case to establish res judicata, collateral estoppel, or law of the case." *Id.* This Rule unquestionably prohibits citation to the Indiana Court of Appeals "not-for-publication memorandum decisions." But conflicting authority exists concerning whether this Rule also prohibits citation to unpublished decisions from other jurisdictions.

There are appellate decisions where the Court of Appeals declines to consider unreported cases from other jurisdictions. *See Querrey & Harrow, Ltd. v. Transcontinental Ins. Co.*, 861 N.E.2d 719 (Ind.Ct.App. 2007) (citing Rule 65(D) and declining to rely on an "improperly" cited unreported federal case); *In the Matter of Dunn*, 848 N.E.2d 310 (Ind.Ct.App. 2006) (citing Rule 65(D) and declining to consider an unreported decision from another state); *Hartman v. Keri*, 858 N.E.2d 1017 (Ind.Ct.App. 2006) (citing Rule 65(D) and declining to consider an unreported federal decision and an unreported decision from another state).

On the other hand, other opinions from the Supreme Court and Court of Appeals not only considered unreported decisions from other jurisdictions, but oftentimes expressly adopted and applied the reasoning found in those unpublished decisions. *See Smith v. Toney*, 862 N.E.2d 656 (Ind. 2007) (relying on unpublished decision from another state); *LinkAmerica Corp. v. Albert*, 857 N.E.2d 961 (Ind. 2006) (relying on unpublished federal decision); *Schultz v. Ford Motor Co.*, 857 N.E.2d 977

(Ind. 2006) (same); *Glotzbach v. Froman*, 854 N.E.2d 337 (Ind. 2006) (same); Montgomery v. Board of Trustees of Purdue Univ., 849 N.E.2d 1120 (Ind. 2006) (relying on unpublished state and federal decisions); *Lee v. State*, 849 N.E.2d 602 (Ind. 2006) (relying on unpublished decision from another state); *Doe v. Town of Plainfield*, 860 N.E.2d 1204 (Ind.Ct.App. 2007) (relying on unpublished federal decision); *Roob v. Fisher*, 856 N.E.2d 723 (Ind.Ct.App. 2006) (same); *Rainey v. National Check Bureau, Inc.*, 849 N.E.2d 776 (Ind.Ct.App. 2006) (same); *Dewbrew v. Dewbrew*, 849 N.E.2d 636 (Ind.Ct.App. 2006) (same); *Heaton & Eadie Prof'l Svcs. Corp. v. Corneal Consultants of Indiana, PC*, 841 N.E.2d 1181 (Ind.Ct.App. 2006) (same).

One of the panels declining to consider unreported decisions from other jurisdictions noted that the appellate rules of the other state's court provided that its own unpublished opinions are "not precedential and may not be cited[.]" *In the Matter of Dunn*, 848 N.E.2d at 312 n.2 (citing Illinois's appellate rule). Thus, as to members of this particular panel, the question of whether an unpublished decision can be cited may depend on whether the rules of the state from which the unpublished decision comes allow citation to such decisions. If so, it is worth noting the recent amendment to the Federal Rules of Appellate Procedure providing that federal courts "may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been: (i) designated as "unpublished," "not for publication," "non precedential," "not precedent," or the like; and (ii) issued on or after January 1, 2007." FED.R.APP.P. 32.1(A). As to unpublished opinions issued before 2007, the Federal Circuit Local Rules differ as to the circumstances in which citation to unpublished opinions is permissible.

Bottom line: You will have to determine whether a particular unpublished decision from another jurisdiction is so favorable that the practitioner is willing to cite it in hopes that the case will come before a judge who will

consider and apply it, but understanding that the case may instead be assigned to a judge who not only declines to consider the unpublished decision, but drops a footnote reprimanding you for citing it in the first place.

E. Transfer to the Indiana Supreme Court

1. Deadlines

If you seek rehearing first in the Court of Appeals, you have 30 days to seek transfer to the Supreme Court by filing a Petition to Transfer. IND. APPELLATE RULE 57(C). If you do not seek rehearing first, you have 45 days to seek transfer. *Id.*

The briefing schedule at the Supreme Court uses different time increments than the Court of Appeals, so docket carefully. Any Response to the Petition to Transfer is due in 20 days and any Reply is due 10 days after that.

> Extensions of time are not allowed according to Appellate Rule 35(C). However, the supreme court has allowed extensions or late filings in rare circumstances (weather, severe illness—or an acknowledgement that counsel blew a deadline). An especially unusual belated request was in *Lee v. State*, 43 N.E.3d 1271, 1275 (Ind. 2015) (petition filed 8 months late)

Practice Tip: Supreme Court Advocacy begins long before transfer is ever sought. You do **not** get a chance to write another merits brief should the Supreme Court grant transfer after the Court of Appeals decides the case. The briefs you wrote in the Court of Appeals are the briefs the Supreme Court will use. Thus, make sure your arguments to the Court of Appeals are complete and appropriate for both courts.

2. Decisions Reviewable on Transfer

Rule 57(B) is explicit about the types of decisions from which transfer may be sought. Transfer may be sought from published or unpublished decisions, including amendments or modifications of those decisions (i.e., opinions on rehearing), as well as orders dismissing an appeal. IND. APPELLATE RULE 57(B). Transfer may not be sought from orders denying interlocutory appeals or orders denying permission to file a successive post-conviction relief petition.

Transfer may not be sought from any other decision from the Court of Appeals, such as a ruling on a stay or appeal bond.

3. Form and Content

A petition for transfer must include the following sections: questions presented on transfer, table of contents, background, and prior treatment of issues on transfer, argument, conclusion, and certificate of service. IND. APPELLATE RULE 57(G). If the petition exceeds ten pages, it must also include a word count certificate that it contains no more than 4,200 words. IND. APPELLATE RULE 44(D) & (E).

After the cover page, the next/second page should include the "Question(s) Presented on Transfer" and nothing else. The following/third page will be the table of contents. No table of authorities is required, although the court may find one helpful if the petition cites a significant number of cases or other authorities.

4. How do I increase my chances of getting transfer?

Every civil litigant has a constitutional right to an appeal to the Indiana Court of Appeals. IND. CONST. art. 7, § 6. After that, you must convince at least three supreme court justices that your case should be decided by Indiana's highest court. Statistically, you have a difficult road ahead of you.

First, although the supreme court's docket now contains far more civil matters than it once did—thanks to an Indiana Constitutional amendment effective in 2001—civil matters still comprise less than 50% of the supreme court's docket.

Supreme Court
Criminal versus Civil Appellate Docket

2014	
Civil	Criminal
41%	59%

2015	
Civil	Criminal
34%	66%

2016	
Civil	Criminal
33%	67%

2004	
Civil	Criminal
44%	56%

2005	
Civil	Criminal
43%	57%

2006	
Civil	Criminal
56%	44%

Combine that with the fact that, historically, the Indiana Supreme Court has granted transfer in an average of only 15% of the civil cases where transfer is sought, and you can see getting your case transferred is going to be tough.

Supreme Court Transfer Rates
(civil appeals only)

2014	
Granted Transfer	Denied Transfer
10%	90%

2015	
Granted Transfer	Denied Transfer
15%	85%

2016	
Granted Transfer	Denied Transfer
14%	86%

2004	
Granted Transfer	Denied Transfer
16%	84%

2005	
Granted Transfer	Denied Transfer
16%	84%

2006	
Granted Transfer	Denied Transfer
11%	89%

You have to convince the supreme court that your case falls into the highly selective 15% of cases they take. The supreme court cannot (and does not) engage in "error correcting." Thus, the fact that the Court of Appeals got it wrong is generally not enough to get the supreme court to take the case on transfer. *See Ellis v. Catholic Charities*, 685 N.E.2d 476 (Ind. 1997) (Dickson and Sullivan, J.J. dissenting from transfer decision and noting that judicial resources prevent the court from correcting every error made by the Court of Appeals).

Instead, you must convince the supreme court both that the Court of Appeals got it wrong and that your case will have broad policy or practice implications for large segments of this State or that the Court of Appeals opinion will have a deleterious effect on Indiana law. Of course, simply making this statement isn't enough; explain and support why it is true.

But the bottom line is, the reality of the supreme court's limited docket means the court is hesitant to get involved in cases where the outcome is fact-dependent and will probably apply only to your very specific facts. This is specifically reflected in the appellate rule dealing with transfer, which provides:

The following provisions articulate the principal considerations governing the Supreme Court's decision whether to grant transfer.

> (1) Conflict in Court of Appeals' Decisions. The Court of Appeals has entered a decision in conflict with another decision of the Court of Appeals on the same important issue.
>
> (2) Conflict with Supreme Court Decision. The Court of Appeals has entered a decision in conflict with a decision of the Supreme Court on an important issue.
>
> (3) Conflict with Federal Appellate Decision. The Court of Appeals has decided an important federal question in a way that conflicts with a decision of the Supreme Court of the United States or a United States Court of Appeals.

(4) Undecided Question of Law. The Court of Appeals has decided an important question of law or a case of great public importance that has not been, but should be, decided by the Supreme Court.

(5) Precedent in Need of Reconsideration. The Court of Appeals has correctly followed ruling precedent of the Supreme Court but such precedent is erroneous or in need of clarification or modification in some specific respect.

(6) Significant Departure From Law or Practice. The Court of Appeals has so significantly departed from accepted law or practice or has sanctioned such a departure by a trial court or Administrative Agency as to warrant the exercise of Supreme Court jurisdiction.

IND. APPELLATE RULE 57(H).

5. Oral Argument.

Unlike the Court of Appeals, the Supreme Court holds oral argument in almost every case where it has granted transfer or is seriously considering granting transfer but has more questions (it the Court issues per curiam opinions, more often than not, no oral argument is held).

When is the Supreme Court holding oral argument?

2014	
Before granting transfer	After granting transfer
29%	71%

2015	
Before granting transfer	After granting transfer
34%	66%

2016	
Before granting transfer	After granting transfer
34%	66%

6. Costs of the Appeal

After a decision is certified, the Appellate Rules provide that, "When a judgment or order is affirmed in whole, the appellee shall recover costs. When a judgment has been reversed in whole, the appellant shall recover

costs[.]" IND. APPELLATE RULE 67(C). When costs are to be taxed, Rule 67(B) provides for both mandatory costs and discretionary costs. The Deputy Appellate Clerk receives and reviews all Motions to Tax Costs filed in the Clerk's Office. If the motion is unopposed, the Deputy Clerk examines the expenses requested to be paid and prepares an order for the Clerk's signature setting forth the amount the moving party is entitled to under Rule 67(B). If the motion is opposed, the Deputy Clerk sends the motion and any responses and replies to the appropriate court which entered the final decision.

The mandatory costs allowed under the Rule are: "(1) the filing fee, including any fee paid to seek transfer or review; (2) the cost of preparing the Record on Appeal, including the Transcript, and appendices; and (3) postage expenses for service of all documents filed with the Clerk." IND. APPELLATE RULE 67(B). The discretionary costs a court may award include any "additional items as permitted by law," except "[e]ach party shall bear the cost of preparing its own briefs." *Id.* Attorney fees are not recoverable as costs under this Rule, unless the appeal is "permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay." *Commercial Coin Laundry Sys. v. Enneking*, 766 N.E.2d 433, 442 (Ind.Ct.App. 2002). As a practical matter, Indiana's appellate courts rarely find this standard is met.

As a practical note, because of the very limited nature of costs that can actually be recovered, keep in mind that if the Appellee was the prevailing party or if there was no transcript requested, the attorney time required to draft a Motion for Costs can end up being more than what the client could ever actually end up recovering as costs.

Section Three

2022 RECENT DEVELOPMENTS IN ESTATE and TRUST PLANNING

Estates, Trusts, Guardianships
Advanced Directives, Non-Probate

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Section Three

Recent Developments in Estate & Trust Planning.....Todd I. Glass

Case Law and Legislation in Estates, Trusts, Guardianships and Advance Directives……Todd I. Glass

I. ESTATE PLANNING AND ADMINISTRATION

A. PROBATE CODE STUDY COMMISSION. Senate Bill 193 provides that the chief justice of the supreme court, or the chief justice's designee, is a nonvoting member of the probate study commission (commission) and provides that only eight affirmative votes are required for the commission to take final action.

B. SMALL ESTATES. Senate Bill 67 increases the value of estates that may be distributed by a small estate affidavit from $50,000 to $100,000 for decedents dying after June 30. 2022. It increases the threshold for summary procedure for unsupervised estates from $50,000 to $100,000. (The introduced version of this bill was prepared by the Probate Code Study Commission and is supported by the Section.)

C. SOLVENT SUPERVISED ESTATE. Senate Bill 66 sets forth procedures for the distribution of assets in a solvent supervised estate after a final distribution order has been entered in certain circumstances. It allows a distributee to distribute assets describe in the decree of final distribution by filing an affidavit with the court. It also provides that undistributed real property may be distributed after the estate is closed by recording certain information with the county recorder of the county in which the real property is situated. It allows a personal representative to complete distribution and delivery of all undistributed estate assets to continue for a period of 90 days after a court enters an order of discharge under certain circumstances.

D. VARIOUS PROBATE AND TRUST MATTERS. House Bill 1208, on health care advance directives, changes the word "testator" to "declarant". It amends several provisions relating to the filing of notices to make those provisions consistent with TR 86 and 87 concerning electronic filing. It resolves inconsistencies in two sections of the chapter on dispensing with administration so that those sections authorize a fiduciary to distribute and disburse the estate assets before filing a closing statement. It authorizes the appointment of a special administrator under certain circumstances and establishes a procedure for the appointment of a special administrator for the purpose of pursuing a claim for a decedent's wrongful death. In a section concerning the filing of an electronic will, it replaces an incorrect reference with a reference to the Rule on Access to Court Records. It provides that a video or audio recording of a principal who executes a power of attorney may be admissible as evidence of matters relevant to the validity or enforceability of the power of attorney. It provides that any objection to a final account and petition for distribution of a decedent's estate must be filed at least 14 days before the hearing date. It eliminates references to a trustee "docketing" a trust and identifies permissible methods for the filing of a copy of a trust instrument with a court. It amends two definitions of "electronic power of attorney" to provide that an electronic power of attorney may be signed in the presence of witnesses instead of being notarized. It provides that a person who has been found guilty, or guilty but mentally ill, on a charge of causing an unlawful death of a decedent is a constructive trustee of certain property acquired or entitled to be received by a culpable person. It includes a married individual who does not have any dependents and whose death was caused by a spouse within the definition of "adult person" for the purpose of a wrongful

death action. It makes conforming changes. It makes technical corrections. (The introduced version of this bill was prepared by the Probate Code Study Commission and is a Section Bill.)

E. DEAD MAN'S STATUE – LLC OWNERSHIP – SUMMARY JUDGMENT. Arnett v. Estate of Beavins, 184 N.E.3d 679 (Ind. App. 2022). Joel Beavins filed articles of organization for Stewart Properties in 2001. His wife, Jill, owned 10%. In 2012 Joel and Arnett, old high school friends, began conducting business together. Arnett was responsible for managing four of the properties that were owned by Stewart Properties, including three rental properties. The fourth property, Arnett resided in and used for his Auto-Annex business. Arnett collected rents, executed leases with tenants, made capital improvements, preformed maintenance and paid utility bills. In 2019, Joel and Arnett sought a commercial loan which would allow Arnett to purchase the rental properties. In 2019, Joel and Arnett allegedly executed an Operating Agreement where Arnett would own 82% of Stewart Properties and Joel would own the remaining 18%. However, the Operating Agreement for Stewart Properties said that no one could become a member without the unanimous consent and Joel's wife, Jill, did not consent. Later in 2019, Joel and Arnett executed a $280,000.00 note whereby Stewart Properties would transfer the properties to Arnett. The first payment was to be made November 1, but Joel died in a plane crash on October 5 before any payments were made. Joel's estate filed a Complaint requesting possession of the residence and the other rental properties and amounts of rent collected by Arnett. The estate filed a Motion for Summary Judgment. The first issue was whether Arnett was a member of Stewart Properties. Arnett filed opposing affidavits which the estate moved to strike under the Dead Man's Statute and for authentication. The trial court granted

in part, the Motions to Strike and gave the estate partial summary judgment on the membership issue.

The Court of Appeals affirmed. Most of the affidavits filed by Arnett were properly stricken under the Dead Man's Statute. Arnett attempted to avoid the Dead Man's Statute by arguing the affidavits covered issues which could not be disputed by the decedent. The Court of Appeals did not accept this way around the Dead Man's Statute. The remaining evidence in opposition to the Motion for Summary Judgment was stricken for lack of authentication. This included the email and attached Operating Agreement that would have given Arnett 82% of Stewart § Properties. Finally, the Court of Appeals agreed with the trial court and the estate that the Operating Agreement for Stewart Properties clearly required Jill's consent before Arnett could become a member. It was clear that Jill never gave that consent and Arnett was never a member of Stewart Properties.

F. WRONGFUL DEATH – DEATH OF DEFENDANT – DISMISSAL – SUBSTITUTION. *Estate of Bichler v. Bichler*, 183 N.E.3d 316 (Ind. App. 2022). Jeffrey Bichler died November 17, 2017. His two children opened an estate for Jeffrey Bichler and sued their stepmother, Wanda Bichler, alleging she shot and killed their father. A life insurance company paid $300,000.00 into the court on a policy where the stepmother, Wanda, was the sole beneficiary. Wanda denied killing Jeffrey and filed a counterclaim for defamation. About a month after filing the counterclaim, Wanda died. Her two children were appointed personal representatives of her estate and moved to intervene in the cause of action filed on behalf of Jeffrey's estate and the interpleader of the life insurance proceeds. Wanda's estate then filed a Motion to Dismiss under TR 12(b)(2), (6) and (7) based on the Plaintiff's failure to name the personal representative of Wanda's estate as defendants. The

trial court granted the Motion to Dismiss without specifying under what part of the TR 12 the case was dismissed.

The Court of Appeals reversed and remanded. It noted that when a party such as Wanda dies, evaluation needs to be done under TR 25 which deals with substitution of parties. While the Federal Rule has a time limit to substitute parties, Indiana's rule does not. The case was remanded for the trial court to apply the appropriate trial rule and allow substitution**.**

G. ADMINISTRATION EXPENSES – ADVERSE PARTY FEES. *Hollrah v. Barker*, 2022 Ind. App. LEXIS 175 (Ind. App. May 31, 2022). Laura Barker and Dewey Barker were husband and wife. They had three children, Dewey R. Barker, Elizabeth Hollrah and James Barker. James predeceased Laura and Dewey, leaving three children, Connie, Lisa and Victoria. Dewey died in 2002. Among the gift was the residue to a bank hold in trust for Laura's benefit. Upon termination of the trust, the balance was to be divided among Dewey R., Connie, Lisa and Victoria. In 2019, Laura died. Her last will gave dishes to Lisa and a vase to Connie but everything else was one share each to her two surviving children and one share to the children of the predeceased James, which would include Connie and Lisa. A complicated series of complaints and claims were filed which can be basically summarized as the beneficiaries of Dewey's estate claiming that Laura had taken items from Dewey's estate that she should not have and that they should be returned. Among the actions was a petition to remove the personal representatives of Laura's estate which the trial court had granted.

In a memorandum decision, the Court of Appeals had remanded that decision for a hearing. The trial court issued and order finding that Laura breached her fiduciary duties and required Laura's estate to reimburse Dewey's estate for $23,000.00. The trial court also found that the execution of a deed in her individual capacity for property owned by Dewey's estate and the receipt of $33,700.00 must be refunded. Lisa and Connie sought attorney's fees from Laura's estate of $50,159.54. The trial court awarded the attorney's fees.

The Court of Appeals reversed and remanded. It discussed IC 29-1-10-14 as well as the definition of expenses of administration which were to be paid by Laura's estate. It concluded that the actions by Connie and Lisa were for the benefit of Dewey's estate and not Laura's estate and that there could not be an award of attorney's fees.

H. WRONGFUL DEATH – GRANDSON – PERSONAL REPRESENTATIVE OF FATHER – RIGHT TO PURSUE. ***Johnson v. Harris*****, 176 N.E.3d 252 (Ind. App. 2021).** In 2013, the two-year-old son of Bobby Nicley (Father) and Michelle Nicley (Mother), drowned in the backyard swimming pool of the Harris' (Maternal Grandparents). Mother soon filed for divorce from Father. Father retained a lawyer to discuss a possible wrongful death lawsuit against Maternal Grandparents. A dissolution decree was entered ending Mother and Father's marriage. Father died four days later. Paternal Grandmother, as PR of Father's (her son's) estate, brought a wrongful death action for the death of her grandson under the Child Wrongful Death Statute (CWDS) contained in IC 34-23-2-1. The trial court granted Maternal Grandparent's motion for summary judgment and Paternal Grandmother appealed.

The Court of Appeals affirmed. Maternal Grandparents and Mother alleged that the CWDS does not authorize the Paternal Grandmother to file a wrongful death action and that the mother was entitled to parental immunity. The Court of Appeals noted that wrongful death actions are purely statutory and must be strictly construed. The CWDS provides in relevant part under IC 34-23-2-1:

> (c) An action may be maintained under this section against the person whose wrongful act or omission caused the injury or death of a child. The action may be maintained by:
> (1) the father and mother jointly, or either of them by naming the other parent as a codefendant to answer as to his or her interest;
> (2) in case of divorce or dissolution of marriage, the person to whom custody of the child was awarded; and
> (3) a guardian, for the injury or death of a protected person.
> (d) In case of death of the person to whom custody of a child was awarded, a personal representative shall be appointed to maintain the action for the injury or death of the child.
> (e) In an action brought by a guardian for an injury to a protected person, the damages inure to the benefit of the protected person.

Paternal Grandmother claims her authority to sue under the CWDS arose under subsection (d) of IC 34-23-2-1, in conjunction with IC 29-1-13-3. IC 29-1-13-3 provides that a personal representative has power to maintain any suit, in his name as such personal representative, for any demand of whatever nature due the decedent or his estate.... Maternal Grandparents argued that Father was never granted custody so subsection (d) could not apply, and that subsection (d) would only allow a PR to continue an action already filed. The Court of Appeals, in affirming the decision of the trial court, reasoned that "strictly construed, the plain language of the CWDS authorizes three categories of people to "maintain" a child wrongful death lawsuit: 1) parents; 2) the child's guardian; and 3) the personal representative of the estate of a person who had been awarded custody of the

child. IC 34-23-2-1(c), (d). To avoid any violation of a non-custodial parent's right to equal protection under the Fourteenth Amendment, we have interpreted the CWDS "to permit non-custodial parents [as well as custodial parents] standing to bring an action for the wrongful death of a child," despite contrary language in the CWDS. Chamness v. Carter, 575 N.E.2d 317, 319-21 (Ind. App. 1991) (interpreting an earlier version of the child wrongful death statute, then codified as IC 34-1-1-8)." "Father had a right under the CWDS to file a wrongful death lawsuit during his lifetime. IC 34-23-2-1(c). However, Father's right to file the lawsuit for the wrongful death of his child expired at Father's death under the CWDS. IC 34-23-2-1(c). As neither Father nor Mother ever filed a wrongful death lawsuit against Maternal Grandparents, Maternal Grandparents owed nothing to either Father or his estate as a result of son's death. Therefore, Paternal Grandmother, as personal representative of Father's estate, had nothing to collect from Maternal Grandparents under IC 29-1-13-3."

I. INTESTATE – HEIR – PROOF. ***Davis-Roper v. Estate of Glenward August Schroeder,*** **179 N.E.3d 984 (Ind. App. 2021)**. Glenward August Schroeder died intestate April 2020. Initially, the Petition for Appointment of the Personal Representative listed Davis-Roper as an heir to the estate because her father (Schroeder) predeceased her grandfather. Subsequently, the personal representative filed a Petition to Determine whether Davis-Roper was an heir claiming that the Petition was inaccurate. The evidence showed that Davis-Roper was born in Perry County, Indiana and that Schroeder was not identified on the birth certificate. However, the family lived together with grandfather until 1983 when Davis-Roper was three years old. At that time, mom moved to Alabama. However, Davis-Roper visited Schroeder every summer and during holidays and maintained regular communications with Schroeder's extended family. In 1996, mother filed in an Alabama Court, a reciprocal child support action,

which was supported by mother's notarized affidavit. The affidavit identified Schroeder as Davis-Roper's father, acknowledged having sexual intercourse with Schroeder during the period of conception and denied having sexual intercourse with any other men during that period of time. The Alabama Court issued the reciprocal support order determining that Schroeder owed Davis-Roper duty of support and referred the matter to be enforced in Indiana where Schroeder lived. Schroeder passed away without a will in July 2017. Davis-Roper, who now once again lived in Perry County, handled Schroeder's estate as the personal representative and sole heir. At the hearing on the Petition to Determine Heirship, Davis-Roper asked the trial court to admit an exhibit which was a certified copy of the Alabama reciprocal child support order determining Schroeder owed Davis-Roper a duty of support. The trial court initially admitted the exhibit but then later excluded it because paternity had not been established pursuant to the Indiana statute. The trial court then ordered that Davis-Roper was not an heir.

The Court of Appeals reversed and remanded with instructions to the trial court to find that Davis-Roper was an heir. It found that the exhibit of the Alabama order had been incorrectly excluded because under the United States Constitution, each state must give each other state's proceedings full faith and credit. As a result, the order of the Alabama court under IC 29-1-2-7 established the heirship of Davis-Roper.

II. TRUST PLANNING AND ADMINISTRATION

A. UNIFORM TRUST DECANTING ACT – TRUSTEE DUTIES. House Bill 1205 allows a trustee of an irrevocable trust to appoint a successor trustee or multiple trustees. It provides that a trustee's power to appoint a successor trustee includes the power to allocate trustee powers to one or more trustees. It also enacts the uniform trust decanting

act. It creates a definition of the decanting power to include a power by a trustee to make limited modifications to an irrevocable trust, including an asset transfer to a new trust. It requires that a modification be consistent with a settlor's or charitable organization's intent. It permits the trustee of an existing trust to make modifications to or distributions from an existing trust for the benefit of a disabled beneficiary. It prohibits a trustee from being required to decant. It requires advanced notice to all qualified beneficiaries. It provides that the decanting power of an authorized fiduciary is not precluded by certain terms. (The introduced version of this bill was prepared by the Probate Code Commission and is a Section bill.)

B. GIFT OR LOAN – STATUTE OF FRAUDS – PART PERFORMANCE – UNJUST ENRICHMENT – CONSTRUCTIVE TRUST. *Akin v. Simons,* 180 N.E.3d 366 (Ind. App. 2021). Akin and Simons were married and then divorced. Akin and Simons became co-guardians of their granddaughter. In 2012, Akin and Simons got back together but their romantic relationship didn't last. They filed separate custody and visitation action for their granddaughter. While the couple was back together, Akin transferred $229,227.05 to Simons to purchase a home where Simons could live with their granddaughter. Simons used the money to buy a home which she titled in her name alone. Akin alleged that they agreed that within thirty days of closing, Simons would repay Akin $130,000 of the money he provided by obtaining a mortgage on the home; and that the remainder of the interest in the home would be held in trust for their granddaughter. Akin filed an action against for breach of contract against his ex-wife and for the imposition of a constructive trust claiming he loaned the money to Simons. Akin also filed a Notice of Lis Pendens on the property. Simons claimed the funds were a gift. Simons filed a motion for partial summary judgment,

arguing that the "alleged" agreement was unenforceable under the Statute of Frauds because there is no evidence of any writing signed to support such a claim. The trial court granted the motion. Akin appealed.

The Court of Appeals affirmed. Even though the parties differed as to whether the money was intended to be a loan or a gift, the Court of Appeals noted it was undisputed that the money was provided to Simons to purchase a home and their agreement was not in writing. The Court of Appeals held that the Statute of Frauds applied to the agreement, and the oral agreement cannot be enforced. Further, the Court held there is no requirement that Akin needed to obtain an interest in the land for the Statute of Frauds to apply. "The Statute of Frauds applies to an agreement "involving any contract for the sale of land" – and "any" means any." The Court held that Akin made a gift and not a loan. The Court further noted as a matter of law, by filing the lis pendens notice, Akin was seeking to enforce a interest against the real estate. The Court held that the lis pendens notice established a direct nexus between the action to enforce an alleged oral agreement and "an action involving any contract for the sale of the land," which implicates the Statute of Frauds.

As to the alleged independent oral agreement for the repayment of money, the Court held that the alleged oral contract for the repayment of money was not severable from the alleged oral agreement to take out a mortgage. The alleged promise to pay and the alleged promise to obtain a mortgage were indivisible and constituted a single, unitary transaction subject to the Statute of Frauds. The Court next considered whether the alleged agreement to establish a trust for the granddaughter was enforceable. The Court held that the trust claim failed because there was no written evidence of an agreement to create a trust, and that

pursuant to IC 30-4-2-1 a trust is enforceable only if there is written evidence of the terms of the trust bearing the signature of the settlor, the settlor's agent, or an authorized person on behalf of the settlor. There is no such written agreement.

Akin raised issues as to the exceptions to the Statute of Frauds: Part Performance Unjust Enrichment and Promissory Estoppel. Akin argued only promissory estoppel at the trial court, and the Court of Appeals said he did not adequately plead part performance nor unjust enrichment. A party seeking to preclude application of the Statute of Frauds based on promissory estoppel must establish the following five elements: (1) a promise by the promisor; (2) made with the expectation that the promisee will rely thereon; (3) which induces reasonable reliance by the promisee; (4) of a definite and substantial nature; and (5) injustice can be avoided only by enforcement of the promise. The Court held that Akin did not prove that his reliance on the oral promise to repay him and create a trust for his granddaughter resulted in reliance injuries that are independent from the benefit of the bargain and so substantial as to constitute the "infliction of an unjust and unconscionable injury and loss" that would remove the oral agreement from the operation of the Statute of Frauds. The Court felt the injuries Akin suffered were of the kind of adverse consequences which normally result from providing money without written documentation that the money provided is a loan and not a gift.

C. BENEFICIARY – IDENTIFICATION – REASONABLE CERTAINTY – "OTHERS". ***Estate of Wilson v. Wilson*****, 181 N.E.3d 417 (Ind. App. 2021).** Personal representative of testator's estate filed petition to probate testator's will. Testator's son filed petition to require representative to produce trust documents identified in Decedent's

residuary clause of his Will. The Decedent's attorney had not prepared a separate trust as he intended to create a testamentary trust. The residuary provision of testator's will provide for the residue of testator's estate to be given to the personal representative, in trust, to be distributed "to my family and others," The trial court concluded that the Trust failed to identify the trust beneficiaries with reasonable certainty and concluded that because no trust can exist, the disposition of the residuary of the Estate was ineffective. The trial court determined the estate would pass pursuant to intestate succession. New counsel entered an appearance for the PR and attempted to enforce the decedent's intent, in spite of the language in the will. The PR filed a motion to correct errors, which was denied. PR appealed. PR argued that the trial court erred when it denied his motion to correct error because the language in the Will created a valid trust under Indiana law as the beneficiaries had been sufficiently identified from the language to my family and others as per my instructions to him and PR was never given an opportunity to testify as to the directions given to him by Decedent. Further, PR argued that IC 30-4-2-1 provides that a power of a trustee to select a beneficiary from an indefinite class is valid.

The Court of Appeals affirmed. The Court reasoned that although the settlor need not identify a beneficiary with exact precision, the settlor must give the trustee the ability to determine an intended beneficiary. The Court noted that IC 30-4-2-1(c) directs the settlor to identify a beneficiary with "reasonable certainty" and IC 30-4-2-1(f) states that a beneficiary must be capable of being "ascertained," The Court interpreted IC 30-4-2-1(g) to provide that a trustee can select a beneficiary "from an indefinite class," but that requires the settlor first limit the trustee's discretion by identifying an indefinite class. The Court found that nothing

close to such an identification existed in the document. While the Probate Code includes a definition for "family" neither the Trust Code nor the Probate Code defines "others."

D. RESTRAINT ON MARRIAGE – NOT APPLICABLE TO TRUSTS. *Roger D. Rotert v. Connie S. Stiles*, 174 N.E.3d 1067 (Ind. 2021). Borcherding executed a revocable living trust that divided her property between her son, Rotert; her daughter, Stiles; and her four stepchildren. The trust created a separate trust for Rotert's share and appointed Stiles as trustee. The trust contained the following provision:

> "In the event that (Rotert's) is unmarried at the time of my death, I give, devise and bequeath his share of my estate to him outright and the provisions of this trust shall have no effect. However, in the event that he is married at the time of my death, this trust shall become effective, as set out below."

Rotert was married to his third wife when Borcherding executed the trust. But before the trust's execution, Rotert's wife filed for divorce. The couple later reconciled and were married when Borcherding died. After Borcherding's death, Stiles, as trustee, distributed the cash in Rotert's trust to him but agreed that his real property would stay in his trust. Rotert filed suit, alleging the provision in the trust was a void restraint against marriage. After a hearing, the trial court found that the trust's terms were not void for public policy; and denied Rotert's motion for summary judgment and granted Stiles' motion. Rotert appealed and argued, that the trial court violated his due-process rights by not permitting him to respond to Stiles cross-motion for summary judgment (a procedural issue not addressed in this summary); and second, that the challenged trust provision is void as a restraint against marriage. The Court of Appeals reversed holding that the challenged provision is an impermissible restraint against marriage and found in Rotert's favor, Rotert v. Stiles, 159 N.E.3d 46, 53 (Ind. App. 2020). Stiles sought transfer, which was granted.

The Indiana Supreme Court held that the statutory prohibition of restraints against marriage applies only to dispositions to a spouse by will and not to dispositions by trust and affirmed the trial court. The Court referenced the Indiana Probate Code which says: "[a] devise to a spouse with a condition in restraint of marriage shall stand, but the condition shall be void." IC 29-1-6-3. Further, the Court noted that IC 29-1-1-3(a) sets out the definitions that apply throughout the probate code. When used as a noun in the probate code, "devise" means "a testamentary disposition of either real or personal property or both." IC 29-1-1-3(a)(6). And a "testamentary disposition", though not defined by IC 29-1-1-3(a), is something our Court has long considered the distinguishing feature of a will. The Court held that this matter involved neither a testamentary devise nor a devise to a spouse, but a disposition by a revocable trust to a child and therefore the statutory prohibition under Indiana's probate code did not apply. The Court examined Indiana's Trust Code and noted that it does not prohibit conditions in restraint of marriage at all. According to the statute: "The rules of law contained in this article"— referring to the trust code "shall be interpreted and applied to the terms of the trust so as to implement the intent of the settlor and the purposes of the trust." IC 30-4-1-3. As a result, the section continues, "[i]f the rules of law and the terms of the trust conflict, the terms of the trust shall control unless the rules of law clearly prohibit or restrict the article which the terms of the trust purport to authorize." Because the probate code's bar against restraints on marriage does not apply to trusts or gifts to children, Borcherding's disposition by a revocable trust to her son is valid.

E. TRUSTEE – BREACH – DAMAGES – FEES. Zartman v. Zartman, 168 N.E.3d 770 (Ind. App. 2021). William Zartman Jr. ("William Jr.") and Marilyn Zartman

were married and had three children: William III, Brenda, and Paul. William Jr. and Marilyn owned a 303-acre farm in Miami County and Fulton County. In 1980, William Jr. and Marilyn established the William Zartman Jr. Revocable Trust ("William Jr.'s Trust") and the Marilyn Zartman Revocable Trust ("Marilyn's Trust"). In 1993, William Jr. and Marilyn executed First Amendments to both trusts. This appeal concerns only Marilyn's Trust. This is the second appeal in this matter. The parties only have the first and last pages of Marilyn's Trust and were unable to locate a copy of the First Amendment to her Trust. William Jr. and Marilyn showed the First Amendment of their respective trusts to Paul shortly after the documents were signed. Paul read the documents, which were identical except for the names of the trusts, signatures, and the pronouns used in the documents. Paul saw the documents again in 2009. In a deposition, William III testified that the First Amendment of William Jr.'s Trust and the First Amendment of Marilyn's Trust were identical except for the names. By 2003, each trust owned a one-quarter interest in the farm, and William III and his wife, Kim, owned a one-half interest in the farm.

Marilyn died in August 2004, and William Jr. died in February 2010. In March 2011, William III, as trustee of Marilyn's Trust, conveyed Marilyn's Trust's one-quarter interest in the farm to himself and his wife, Kim, as tenants in common. In the trustee's deeds, William III warranted that he was appointed the successor trustee under the trust and that, under the trust agreements, he had the "full power to execute" the trustee's deeds. William III and Kim immediately transferred the one-quarter interest in the farm to Zartman Farms, of which William III and Kim are member managers. William III and Kim warranted as Grantors in the deeds that they were lawfully seized of said land in fee simple; and that they had good right and lawful authority to sell and convey said land. The other family members filed a

motion for summary judgment and argued, in part, that the March 2011 deeds conveying Marilyn's Trust's one-quarter interest in the farm to William III and Kim were void. In February 2018, the trial court denied the motion for summary judgment. The trial court determined that the content of Marilyn's Trust had to be resolved by a jury. The jury returned a verdict for William III and the siblings filed the first appeal.

On remand after the first appeal, it was determined that upon Marilyn's death, William Jr. and William III became co-trustees of Marilyn's Trust. Upon the death of William Jr., William III and Brenda became the co-trustees of Marilyn's Trust. Therefore, William III's transfer of Marilyn's Trust's interest in the farm to himself and his wife violated IC 30-4-3-4 because the power to transfer property was required to be exercised by the co-trustees jointly. The Trustee's Deeds dated March 14, 2011, were therefore null and void. On remand the trial court: (1) determined the content of Marilyn's Trust; (2) determined that William III committed breach of trust by transferring the property to himself; (3) voided the transfer of property; (4) ordered William III to pay for lost income to the trust; and (5) ordered William III to pay Appellees' attorney's fees. The trial court ordered the payment of $134,799.98 in lost income for 2011 to 2019. The trial court then ordered William III to pay reasonable attorney fees in the amount of $110,000.00 as a result of his breach of trust as authorized by IC 30-4-3-22(e), William III appealed that decision.

The Court of Appeals affirmed. The opinion contains a review of Indiana law on breach of trust and remedies for breach of trust. The Court reasoned that given the extraordinarily lengthy litigation, which involved complex issues, two summary judgment proceedings, a jury trial, and two appeals, it could not say that the trial court abused its discretion when it awarded Appellees $110,000.00 in attorney's fees. Further, the trial court

properly granted summary judgment to Appellees, voided the deeds at issue here, ordered Appellants to pay lost profits, and ordered William III to pay Appellees' attorney's fees.

III. GUARDIANSHIPS

A. GUARDIANSHIP – VENUE – SUFFICIENCY OF EVIDENCE – APPELLATE FEES. *Wright v. Ruiz,* 184 N.E.3d 629 (Ind. App. 2022).

In 2006, Shawna Wright gave birth to a child whose father was Omar Ruiz. Since the child was 5 years old, the mother and child lived in Lake County, across the alley from the residence where the child's father lived with grandparents. The child attended Whiting schools her entire life. The father passed away July 22, 2020. Subsequent to his death, disputes arose between the father's grandparents and the mother over the care of the child. Mother was charged with disorderly conduct which was pending based on mother's successful completion of a Diversion Program. Mother had drug problems and was diagnosed with a Bipolar episode. The mother sent the child to stay with her adult half-brother in Porter County. The grandparents filed a guardianship proceeding in Lake County. The half-brother filed similar actions in Porter County. Porter County dismissed its actions without prejudice, sending everything to Lake County. The probate court entered extensive findings. Among those findings was that the mother appeared to remain off of drugs for a period of time which the court commended. However, the mother's psychological problems continued and were of a serious nature. As a result, the probate court granted the grandparents guardianship.

The Court of Appeals affirmed. The first issue was venue. The Court of Appeals found that the two weeks in Porter County was not enough to give it venue and that venue

was proper in Lake County. The next issue was the sufficiency of the evidence regarding the appointment of the grandparents as guardians. The Court of Appeals agreed with the trial court that the mother's psychological condition did merit the appointment of guardians. The grandparents also asked for appellate attorney fees which was denied.

B. GUARDIANSHIP – CAPACITY – ATTORNEY FEES. ***Lydia A. Duncan and Donald E. Fredrick v. John J. Yocum, Jr.,*** **179 N.E.3d 988 (Ind. App. 2021)**. John J. Yocum, Jr., (John) at the time of litigation, was a 95-year-old man who lived alone in a single family residence in Vincennes, Indiana. John had no known relatives and he lived in the same home for almost 90 years. Subsequent to litigation, John died. At the time of the litigation, Lydia Duncan, a friend of John's, agreed to live with and care for him. John drafted a new will with charitable gifts and power of attorney appointing Lydia his attorney-in-fact. John and Lydia had an argument which led to John pushing Lydia to the floor. John revoked Lydia's power of attorney and named David Lancaster, his neighbor, as his new power of attorney. He also executed a new will which was pretty much in accordance with his old will. Lydia and Don filed a Petition for a guardian for John in the Knox Circuit Court. The trial court ordered John to be evaluated by Dr. Tracy Gunter. Dr. Gunter concluded the John was incapacitated and did not have the contractual ability to revoke the power of attorney. The trial court found that John had capacity, not only to avoid a guardianship but to revoke the power of attorney and make a new will. The trial court also found that Lydia and Don had no standing to pursue the guardianship and awarded attorney fees to John.

The Court of Appeals affirmed, in part, and reversed, in part. Generally, the Court of Appeals agreed with the trial court's decision that John had capacity both to revoke his power of attorney and make a new will and to avoid a guardianship. However, two of the three Court of Appeal Judges found that the award of attorney fees was not appropriate due mainly to the fact that many of the issues were not raised during the trial and that under the guardianship code, any person had standing to pursue guardianship. Justice Tavitas dissented as to the reversal on the fees.

C. GUARDIAN –DEFACTO CUSTODIANS. *Geels v. Morrow*, 188 N.E.3d 46 (Ind. App. 2022) (opinion corrected on rehearing). Scott Geels and Erica Leitch (collectively, "Scott and Erica") appealed the trial court's denial of their petition for custody of A.R. ("Child"). Child was born on September 9, 2016, to Desiree Morrow ("Mother") and Sean Riley ("Father"). Erica provided daycare to Child from November 2017 to January 2018. In January 2018, Mother asked Scott and Erica to care for Child on a full-time basis after she lost heat in her apartment. In October 2018, Mother asked Scott and Erica to return Child to Mother's care. They refused and Mother called police. § Police contacted the Department of Child Services ("DCS"), which investigated. DCS found Mother's residence appropriate and released Child into Mother's care. Child lived with Mother for ten days until Mother returned Child to Scott and Erica where she stayed from late November 2018 until March 2019. On March 5, 2019, Mother retrieved Child from Scott and Erica's care. On April 9, 2019, Mother allowed Scott and Erica to see Child, for the last time. On June 7, 2019, Scott and Erica filed a petition to establish guardianship of Child. From approximately June 2019 until May 2020, Child resided with Father and his girlfriend. On May 16, 2020,

Mother retrieved Child from Father's care and Child has remained with Mother since. On April 29, 2021, the trial court issued its order denying Scott and Erica's petition for guardianship of Child. Scott and Erica appealed.

The Court of Appeals affirmed. It stated, "(w)hen we examine child custody decisions involving third parties, it is well-established that there is a presumption that fit parents act in the best interests of their children.... [S]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children. 182 N.E.3d at 241 (citing Troxel v. Granville, 530 U.S. 57, 68, 120 S. Ct. 2054, 147 L.Ed.2d 49 (2000)). The Court went on to say, "[b]efore placing a child in the custody of a person other than the natural parent, a trial court must be satisfied by clear and convincing evidence that the best interests of the child require such a placement. The presumption in favor of the natural parent will not be overcome merely because a third party could provide better things for the child..." 182 N.E.3d at 24, 242 (citing to Truelove v. Truelove, 855 N.E.2d 311, 314 (Ind. App.2006)). The trial court determined Scott and Erica were de facto custodians of Child pursuant to IC 31-9-2-35.5. The Court outlined numerous factors to be considered in the determination of the best interest of the child. In affirming the denial of guardianship, they court noted that Mother had provided an appropriate home for Child and the circumstances in her life had improved. While Scott and Erica may have the financial means to give Child a "better" life by some standards, that does not overshadow Mother's natural and constitutional right to raise Child.

Scott and Erica requested a rehearing because the Court of Appeal mischaracterized their action as a guardianship proceeding instead of a Petition to Establish De Facto Custodian Status and for Physical and Legal Custody of Minor Child. The court acknowledged that separate sections of the Indiana Code address guardianships and legal custody by a de facto custodian. IC 29-3-5-3 indicates findings that must be made to appoint a guardian and IC 31-17-2-8.5 defines how a de facto custodian can have legal custody of the child. The Court noted that both types of proceedings, when commenced with regards to a minor, requires inquiry into the existence of de facto custodians, which are defined in IC 31-9-2-35.5. In addition, both types of proceedings require determination of what is in the best interests of the minor. Because the Court felt any erroneous reference in their ruling to a guardianship proceeding did not warrant a reexamination of the merits of the appeal. The Court noted that its decision was based on affirmation of the trial court's determination that Child's best interests were served by remaining in the custody of her mother. That determination prohibited a ruling in Appellants' favor regardless of whether the proceeding was for guardianship or custody as de facto custodians and the Court declined Appellants' request to modify their prior decision.

D. GUARDIANSHIP –SPOUSE – COMPETENCY TO MARRY. *Estate of Michael David Estridge v. Taylor*, 187 N.E.3d 275 (Ind. App. 2022). Estridge and Taylor, were firefighters and EMT/ paramedics. They met in 2011 while employed at the same fire station. Estridge was diagnosed with cancer in 2015. In the fall of 2016, Estridge and Taylor started dating and near the end of that year, Estridge broached the subject of marriage. In 2017 the relationship became intimate and at the end of 2017, Estridge proposed to Taylor

but she was hesitant to commit. After another marriage proposal in early 2018, Taylor agreed and accepted Estridge's ring. No wedding date was set as Estridge had upcoming cancer surgery. The couple's friends and co-workers were informed of the marriage plans, but Estridge and Taylor did not to tell their family because they were concerned about the big age difference between them. Taylor assisted Estridge with his medical care and appointments, and following his 2018 surgery, she assumed further caregiver duties. Estridge was informed palliative care physician noted that Estridge was able to make complicated decisions, was alert neurologically, and was sitting up in bed awake and alert, though he quickly fell asleep. Taylor asked Estridge if he still wanted to get married. Estridge replied yes and so Taylor and the others began calling people to assemble at the City-County building in Indianapolis where the wedding would take place. Back in Indianapolis, they stopped at the Firefighters Credit Union, where a notary witnessed Estridge sign the application for a marriage license. Estridge wanted Taylor to have his firefighter's pension, because, if he died unmarried, the benefit would disappear. Estridge signed a pension beneficiary designation, listing Taylor as his spousal beneficiary. At the wedding, a number of firefighter friends were present, and the ceremony was presided over by the firefighter Chief Estridge Taylor, and the presiding officer signed the marriage license. Following the ceremony, Estridge was driven home, where he signed the Medicaid hospice election form. Estridge passed away four days later.

His Estate filed a petition to annul the marriage, alleging fraud and Estridge's mental incapacity. During a two-day bench trial, both parties presented expert testimony. The Estate's expert, Dr. McCoy, when questioned as to Estridge's mental competency at the time

of the marriage ceremony, testified that there's insufficient information for him to even attempt to do so, and that he believed others on Estridge's treatment team would have better opportunity to assess his competency. Taylor presented Dr. George Rodgers, PhD. In preparing his assessment of Estridge's competency, Dr. Rogers reviewed Estridge's medical records, deposition testimony of Taylor and others who observed and interacted with Estridge prior to and during the wedding ceremony, and the videorecording of the wedding ceremony. Focusing on the medical records, Dr. Rodgers opined that there was no indication other people were making medical decisions for Estridge. He noted the palliative care physician's observation that Estridge was alert and able to make complicated decisions, and the hospice admission record after the wedding noted that Estridge was alert and signed the hospice consent form himself. The trial court denied the Estate's petition to annul the marriage.

The trial court also denied Taylor's request for attorney's fees. The Estate appealed and Taylor cross-appealed. The Court of Appeals affirmed. It noted that marriage is a civil contract the validity of which may be challenged in court. IC 31-11-8-4 provides: "A marriage is void if either party to the marriage was mentally incompetent when the marriage was solemnized." If a party is of unsound mind when the ceremony is performed, the marriage can be declared void, but the burden rests upon the challenger to prove that a party was incapable of understanding the nature of the marriage contract. The presumption in favor of the validity of a marriage consummated according to the forms of law is one of the strongest known. The Court of Appeals felt the trial court was presented with ample evidence and expert testimony from which it could reasonably infer that Estridge could

understand the nature of the marriage contract he entered into and therefore was mentally competent at the time the marriage was solemnized. Taylor's cross-appeal contended that the trial court abused its discretion when it denied her an award of attorney's fees based on the parties' economic circumstances pursuant to IC 31-11-10-4 and 31-15-10-1. The Estate initially petitioned for annulment of the marriage based on IC 31-11-10-1, but it abandoned that claim before trial and pursued its claim instead pursuant to IC 31-11-8-4, which allows a marriage to be declared void due to mental incompetency. There is no statutory provision that allows a party to request reasonable attorney's fees when bringing a claim under IC 31-11-84. Accordingly, as no statutory provision allows Taylor to request attorney's fees, the Court affirmed the trial court's denial of Taylor's petition for attorney's fee.

IV. ADVANCE DIRECTIVES AND NON-PROBATE PLANNING

A. TRANSFER ON DEATH CONVEYANCES -- INSURABLE INTERESTS OF BENEFICIARIES.

Proposed new legislation codifying the insurability of interests of transfer on death grantees is a new section as follows:

> **IC 27-1-13-18 Insurable interests of beneficiaries of transfer on death transfers.**
> (a) This section applies to insurance policies included in Class II and Class III of IC 27-1-5-1:
>
> (1) for losses or damages incurred after July 1, 2024, concerning policies other than policies included in Class II (j) of IC 27-1-5-1; and
>
> (2) retroactively concerning policies included in Class II (j) of IC 27-1-5-1.
>
> (b) The rules of law contained in this section shall apply to all policies described in subsection (a) created before, including, and after July 1, 2024, unless to do so would:
>
> (1) give a right to a beneficiary that the beneficiary was not reasonably intended to have under a policy issued before July 1, 2024, other than the beneficiary's right to insurance coverage until the time limitation stated in subsection (e); or

(2) relieve a beneficiary from any duty or liability imposed on the insured by the terms of the policy.

(c) The following definitions apply to insurance policies described in this section:

(1) "Beneficiary" includes the meaning set forth in IC 32-17-14-3(1);

(2) "Casualty insurance" and "liability insurance" mean insurance included in Class II and Class III of IC 27-1-5-1;

(3) "Insurable interest" means an insured's interest in real or personal property, concerning which the insured is entitled to the benefits of insurance coverage under a policy of casualty insurance or liability insurance;

(4) "Insured" means a person who is entitled to the benefits of insurance coverage under a policy of casualty insurance or liability insurance;

(5) "Named insured" means a person identified by name as an insured under a policy of casualty insurance or liability insurance;

(6) "Transferee" means a person who has acquired or received a named insured's insurable interest in real or personal property through a transfer;

(7) "Transfer" means an ownership change in a named insured's insurable interest in real or personal property to a beneficiary of a transfer on death transfer that occurred as a consequence of the named insured's death; and

(8) "Transfer on death transfer" has the meaning set forth in IC 32-17-14-3(17).

(d) Subject to subsection (e), each transferee of a named insured's insurable interest in real or personal property is also an insured to the extent of the named insured's insurable interest in real or personal property that the transferee has acquired or received through a transfer.

(e) Except as provided in IC 32-38-3, for a period of one hundred twenty (120) calendar days immediately following the death of the insured, each transferee is an insured under any casualty insurance policy and liability insurance policy insuring the property the transferee acquired or received through a transfer. At the time of the insured's death, the transferee succeeds to all rights and obligations of the insured under the casualty insurance policy and liability insurance policy for the one hundred twenty (120) day period.

B. POWER OF ATTORNEY – ACCOUNTING – BURDEN OF PROOF.

***DeHart v. DeHart*, 181 N.E.3d 989 (Ind. App. 2021).** DeHart had two children, Jeff and Christine. DeHart and Christine signed an Indiana Durable Power of Attorney naming Christine as Darlene's attorney-in-fact. Darlene moved in with Christine. Son filed verified

petition for accounting under power of attorney, alleging that his sister had signed the document naming herself as their mother's attorney-in-fact, that he had not seen document, and that he believed sister was misappropriating mother's funds. Mother moved to intervene and objected to petition. The court, granted mother's objection, concluding that it was not in Darlene's best interest to require an accounting in the absence of incapacity, undue influence, abuse, or misappropriation. Son appealed.

The Court of Appeals affirmed. Prior to 2019, IC 30-5-6-4 provided in relevant part: "attorney in fact shall render a written accounting if an accounting is ordered by a court ... [or] requested by ... a child of the principal." In 2019, the statute was amended to state that the attorney in fact shall provide a written accounting to a child of the principal "unless a court finds that such a rendering is not in the best interests of the principal." DeHart provided the court with a letter from a nurse practitioner who examined her for over an hour less than a month before the evidentiary hearing stating she was of clear mind. DeHart told the trial court she approved of Christine's efforts as her agent; her daughter discussed her bills with her; she believed Jeff was only interested in her money, and she opposed his request for an accounting because she felt her finances were none of his business. In affirming the lower court's decision, the Court noted there was ample evidence to support the decision that an accounting was not in DeHart's best interest because she was competent to appoint and maintain Christine as her agent and she was entitled to privacy in the management of her finances.

Estates, Trusts, Guardianships, Advance Directives

2022 INDIANA LAW UPDATE

Todd I. Glass

FINE & HATFIELD

Legislative Updates - Estates

1. Small Estates $100,000
2. Summary Distributions $100,000
3. Distribution of assets
4. Miscellaneous changes (H.B. 1208)

DEAD MAN'S STATUTE – LLC OWNERSHIP – SUMMARY JUDGMENT.
Arnett v. Estate of Beavins

- Affidavits were filed opposing Summary Judgment detailing the Agreements Arnett had with Joel
- Affidavits stricken under Dead Man's Statute
- Lack of authentication
- No validated evidence could be introduced

WRONGFUL DEATH – DEATH OF DEFENDANT – DISMISSAL – SUBSTITUTION. *Estate of Bichler v. Bichler*

- Motion to dismiss TR 12(b)(2), (6), (7) filed by Wanda's Estate for failure to name Personal Representative as defendant
- TR 25 substitution
- Indiana's rule has no time limit for substitution of parties

ADMINISTRATION EXPENSES – ADVERSE PARTY FEES. *Hollrah v. Barker*

- Breach of Mom's Fiduciary duty in Dad's Estate, conversion of property from Dad's Estate, removal of Mom as Personal Representative
- Mom ordered to repay Dad's Estate $23,000
- Mom ordered to return real estate to Dad's Estate
- Daughter's Attorney fee award reversed
- IC 29-1-10-14 discussion, and Mom's Estate was not liable for fees that benefitted Dad's Estate only

WRONGFUL DEATH – GRANDSON – PERSONAL REPRESENTATIVE OF FATHER *Johnson v. Harris*

- Wrongful death action under IC 34-23-2-1 Child Wrongful Death Statute
- Who can bring an action?
- Father could be non-custodial parent
- Father's right to file died with him
- Personal Rep could not file after death

INTESTATE – HEIR – PROOF. *Davis-Roper v. Estate of Glenward Schroeder*

- Alabama reciprocal support order to Schroeder and referred to Indiana for enforcement.
- Trial Court refused to introduce Alabama order because paternity had not been proven under Indiana law
- COA reversed, cited constitutionality of excluding Alabama's court order under full faith and credit.
- Alabama order established heirship

GIFT OR LOAN –PART PERFORMANCE – UNJUST ENRICHMENT – CONSTR TRUST. *Akin v. Simons*

- Grandparents in and out of divorce, guardians over granddaughter
- Loan vs. gift, and constructive trust
- Statute of Frauds – any contract for sale of land
- No written evidence of a trust, signed by grantor. IC 30-4-2-1

BENEFICIARY – IDENTIFICATION – REASONABLE CERTAINTY – "OTHERS". *Estate of Wilson v. Wilson*

- Residuary clause in testator's will provided personal representative hold the residue in trust "to my family and others"
- Trial court found the trust clause insufficient and the residue would pass to intestate heirs
- Personal Representative claimed IC 30-4-2-1 gives trustees power to select beneficiaries from an indefinite class
- Trust Code requires "reasonable certainty" and heirs must be capable of being "ascertained"
- "others" not defined in the Probate Code

TRUST -- SUMMARY JUDGMENT REVERSAL -- RESTRAINT ON MARRIAGE. *Rotert v. Stiles*

- If son is unmarried at my death, his share outright. If married, his share remains in trust
- Rotert appealed and COA agreed it was a restraint of marriage and remanded to the trial court
- Indiana Supreme Court: restraints of marriage were prohibited in wills *but not in trusts*
- IC 29-1-6-3
- A disposition in a revocable trust shall be interpreted to implement the intent of the settlor IC 30-4-1-3
- The condition in mother's trust was valid

TRUSTEE – BREACH – DAMAGES – FEES. *Zartman v. Zartman*

- Mother and Father had RLT. Only first and last pages of Mother's Trust could be found. Her First Amendment to Trust could not be found.
- Based upon Father's RLT, and testimony that both Trusts were identical, Court found sufficient evidence to know what was in the entire Trust
- Son #1 was Co-Trustee with Father. Son #1 Trustee's Deed was void for not having signatures of both Co-Trustees (IC 30-4-3-4)
- Son #1 ordered to repay to Trust lost profits from the farmland, and to pay $110,000 in attorney fees to his siblings

GUARDIANSHIP – VENUE – SUFFICIENCY OF EVIDENCE – APPELLATE FEES
Wright v. Ruiz

- Grandparents appointed guardians over minor granddaughter, with a Mother that had drug addictions and bipolar disorder
- Child's two week stay with half-brother did not establish venue in his County vs. the County the child had lived in for 5 years
- The mother's addiction and illness justified the appointment of guardians
- Grandparents' appellate attorney fee petition was denied

GUARDIANSHIP – CAPACITY – ATTORNEY FEES. Duncan and Fredrick v. Yocum

- Yocum 95 year old man, friend Lydia caregiver was AIF
- Yocum them revoked POA and named his neighbor as his new AIF
- Lydia filed for guardianship, trial court found Yocum had capacity and Lydia had no standing to pursue guardianship over Yocum
- COA agreed Yocum had capacity, but Guardianship Code provides any person has standing to pursue appointment as guardian

GUARDIAN –DEFACTO CUSTODIANS
Geels v. Morrow

- Guardianship (IC 29-3-1) vs. de facto custodians (IC 31-9-2-35.5)
- Parent's natural and Constitutional rights as parent
- Presumption a parent acts in the best interests of their child
- Only clear and convincing evidence overrides the presumption
- Custodians may be able to provide better things for a child vs. child's best interests

GUARDIANSHIP –SPOUSE – COMPETENCY TO MARRY
Estate of Michael David Estridge v. Taylor

- Estridge married Taylor 4 days before his death, and wanted her to have his Firefighter's pension and other assets
- Estridge capacity to enter into marriage? Estate's petition to annul marriage denied
- IC 31-11-8-4 marriage is void if either party mentally incompetent
- Review of evidence = reasonable inference Estridge was competent
- IC 31-11-8-4 does not allow attorney fees, so Taylor's request for Estate to pay her attorney fees denied

POWER OF ATTORNEY – ACCOUNTING – BURDEN OF PROOF. *DeHart v. DeHart*

- Son sought accounting from Daughter who was Mom's AIF
- Discusses amendment in 2019 to IC 29-5-6-4, which added that an AIF must provide an accounting to a child of the principal "unless…not in the best interests of the principal"
- Medical evidence Mom was of clear mind
- Court found accounting not in Mom's best interests (her testimony, wishes, her right to privacy in managing her own affairs)

Section Three

Elder Law

by Robert W. Fechtman

Indiana Law Update
September 13 and 14, 2022

Section Three

Elder Law……...Robert W. Fechtman

ROBERT W. FECHTMAN, JD, CELA

Robert Fechtman is a life-long resident of Indiana. He graduated from Northwestern University with a degree in music and a major in economics, and he received his JD from Rutgers School of Law. He also attended the University of San Diego's Institute on International and Comparative Law at Magdalen College, Oxford University. In 6th and 7th grade, Mr. Fechtman went away to school to sing with the American Boychoir in Princeton, New Jersey.

Mr. Fechtman focuses his practice on the problems of older and disabled persons, particularly special needs trusts, estate planning and trusts, health law, Medicaid planning, guardianships and decedents' estates. He is a frequent writer and speaker on a variety of estate planning, disability and elder law topics. He has been certified as an elder law attorney by the National Elder Law Foundation.

Mr. Fechtman is a member of the National Academy of Elder Law Attorneys, and he is a two-time Past President of the Indiana Chapter of the National Academy of Elder Law Attorneys. He is a member and a Past President of the Special Needs Alliance, which is a national, non-profit, invitation-only network of lawyers dedicated to disability and public benefits law. He is also a member of the Elder Law Section and the Probate, Real Property and Trusts Section of the Indiana State Bar Association, and a member of the Indianapolis Bar Association. Mr. Fechtman is a sustaining member of the Indiana Trial Lawyers Association. He is currently serving on the Board of Directors of the National Elder Law Foundation, which is the accrediting organization for elder law attorneys, and he is the current President of the Board of The Indianapolis Children's Choir.

DISCLAIMER

Although every effort has been made to obtain the best information available for presentation herein, the reader must recognize that many of the issues in this area, particularly as they relate to public benefits, are part of a rapidly changing body of law and administrative interpretation.

The author makes no warranties about the legal conclusions stated herein and this is not intended as legal advice to any individual. Application of the principals discussed in this paper to specific cases should only be taken upon the advice of knowledgeable counsel.

Elder Law

by Robert W. Fechtman

I. Indiana's New Advance Directive for Health Care

Senate Enrolled Act 204 (P.L. 50-2021) became effective on July 1, 2021. It created a new single type of health care advance directive that could be signed and used anytime on or after July 1, 2021, to appoint one or more health care representatives and/or state specific instructions, wishes, and/or treatment preferences. This is codified under I.C. § 16-36-7.

We are nearing the end of a one-and-a-half-year transition period that will end on December 31, 2022. At that point, the new-style health care advance directive will replace the durable power of attorney for health care under I.C. § 30-5-5-16, the appointment of health care representative under I.C. § 16-36-1-7, and the living will declaration under I.C. § 16-36-4-10. The most notable feature of this "replacement" aspect of the new statute is that health care powers included in general powers of attorney signed after December 31, 2022, will be void.

Indiana's advance directive statutes were in great need of this update, due to conflicts between the statutes, outdated language, and unclear decision standards for legal representatives. Moreover, the old statutes required forms to be signed "in the physical presence" of the declarant, which posed technology and transportation barriers.

The basic elements of the new Indiana advance directive are that:

1. There is no official or mandatory form for the advance directive;
2. The declarant my name one or more health care representatives;

3. The declarant may state specific health care decisions and/or treatment preferences, including preferences for life-prolonging procedures or palliative care; and,
4. The declarant may disqualify named individuals from serving as health care representative or receiving delegated authority from a health care representative.

The new advance directive has new and more flexible signing requirements:

1. The declarant may sign on paper or electronically, OR may direct someone else to sign the declarant's name in the declarant's physical presence;
2. The declarant may sign in the "presence" of two adult witnesses, OR in the "presence" of a notary public; and,
3. The two witnesses or the notary public may also sign the advance directive on paper OR electronically.

There are three options for signing the new advance directive remotely:

1. The declarant and the two witnesses OR the declarant and the notary public sign identical counterparts on paper and interact using two-way audiovisual technology, in which case the signed counterparts must be assembled within ten business days;
2. The declarant and the two witnesses OR the declarant and the notary public sign electronically using two-way audiovisual technology; or,
3. The declarant and two witnesses sign with audio-only interaction by telephone during signing.

There will be a set of basic presumptions and rules if the advance directive does not explicitly state otherwise:

1. The advance directive is effective upon signing and remains in effect until or unless the advance directive is revoked in writing;

2. A later-signed advance directive supersedes and revokes an earlier-signed advance directive;
3. Unless the health care representatives are listed in priority order, two or more health care representatives named in the same advance directive have concurrent, equal, and independently exercisable authority and are not required to act jointly;
4. If the declarant still has capacity to consent to health care, orders and instructions by the declarant will control over any decisions by a health care representative;
5. Any health care representative can delegate authority under the advance directive in writing to any competent adult or adults;
6. The health care representative has authority to complete anatomical gifts, to authorize an autopsy, and to arrange for burial or cremation of the declarant's remains after the declarant's death;
7. The health care representative can access the declarant's medical records and health information without a specific HIPAA release;
8. The health care representative has authority to consent to mental health treatment for the declarant;
9. Each health care representative has authority to sign a POST form or an out-of-hospital Do Not Resuscitate (DNR) declaration for the declarant;
10. The health care representative has authority to apply for public benefits (including Medicaid) for the declarant and to access the declarant's financial records for that purpose; and,
11. Each health care representative is entitled to reasonable compensation and expense reimbursement for services performed and payments made for or on behalf of the declarant.

Optional provisions that may be added to the advance directive include:

1. The advance directive may prohibit or restrict the delegation of authority by the health care representative to other specific persons;
2. The advance directive may require another person to witness or approve a revocation of or amendment to the advance directive;
3. The advance directive may name two or more health care representatives in a stated order of priority;
4. The advance directive may require multiple health care representatives to act jointly or on a majority-vote basis to exercise some or all health care powers;
5. The advance directive may prohibit a health care representative from being compensated, or may state an hourly rate or other standard for determining reasonable compensation; and,
6. The advance directive may designate some person other than the health care representative to serve as an advocate or monitor.

II. Indiana Medicaid's Response to COVID-19

Numerous temporary changes were made to all state Medicaid programs under the Families First Coronavirus Response Act (FFCRA), Pub. L. No. 116-127 (2020). Over the time since that law was passed, the Centers for Medicare and Medicaid Services (CMS) has provided additional guidance, and Indiana Medicaid (the Indiana Family and Social Services Administration – FSSA) has adjusted its interpretation of the law.

A. Increase in Federal Medical Assistance Percentage (FMAP)

Medicaid is a program that is run jointly by the federal government and the individual states. Federal law provides a formula based on each state's per capita income to establish the

share of the Medicaid costs that is borne by the federal government. The federal share of these costs is known as the Federal Medical Assistance Percentage (FMAP). For October 1, 2020, through September 30, 2021, the FMAP for Indiana was set at 65.83%. 84 Fed. Reg. 66204, 66205 (Dec. 3, 2019). According to § 6008 of the Families First Coronavirus Response Act (FFCRA), Pub. L. No. 116-127 (2020), all states, including Indiana, are receiving a temporary increase in the FMAP of 6.2%. This increase will continue until the end of the calendar quarter in which the public health emergency ends, as determined by the Secretary of the Department of Health and Human Services (HHS). With the 6.2% increase, Indiana's current FMAP is 72.03%, which is a significant increase given the large cost of the state Medicaid program.

B. Medicaid Benefits May Not Be Terminated or Decreased

In exchange for the increased FMAP as described above, under § 6008(b)(3) of the Families First Coronavirus Response Act (FFCRA), Pub. L. No. 116-127 (2020), state Medicaid programs are forbidden to terminate or reduce a recipient's Medicaid benefits until the end of the month when the Secretary of HHS has determined that the public health emergency has ended. At first, Indiana Medicaid interpreted this to mean that they could only terminate a recipient's Medicaid benefits if they died, voluntarily withdrew from the program, or moved to another state, and that they could not increase nursing home and waiver liability payments (think of this like a monthly health insurance deductible), even if the recipient's monthly income increased. Then, on November 6, 2020, CMS published an interim final rule with comments at 85 Red. Reg. 71142 adopting 42 CFR 433.400. Finally, Indiana Medicaid resumed its standard rules for calculating nursing home and waiver liability payments on March 1, 2021.

With the resumption of the standard rules, when a nursing home resident or a waiver recipient receives their January cost of living (COLA) income increase, or if their income

increases for any other reason, the Division of Family Resources (DFR) will increase their liability payment according. Also, if a waiver recipient who had a $0.00 liability due to the much larger Personal Needs Allowance (PNA) available to waiver recipients now enters a nursing home, the DFR will begin assessing a monthly liability payment. Finally, when a nursing home resident or a waiver recipient has been under a transfer of assets penalty and that penalty comes to an end, the DFR will begin assessing a monthly liability payment.

Even with the resumption of the standard rules as described above, there is still an outlier, which is that the DFR will not assess a transfer penalty when a transfer is made by a Medicaid recipient after Medicaid eligibility is established.

C. Case Processing During and After the Public Health Emergency

There is an annual redetermination process with Indiana Medicaid where recipients must verify compliance with Medicaid eligibility rules such as reporting increases in income, balances of financial accounts, etc. Last year, the Indiana FSSA decided to auto-renew all of these redeterminations for 12 months. Meanwhile, CMS established a six-month time frame for states to complete pending verifications, redeterminations based on changes in circumstances, and renewals for Medicaid after the public health emergency ends. Now, according to a CMS transmittal issued on August 13, 2021, this time frame is extended to 12 months after the public health emergency ends. This expanded time frame will relieve the immense administrative burden on states trying to catch up after the pandemic amid record enrollment in Medicaid during the crisis.

D. States May Not Adopt More Restrictive Rules During the Pandemic

According to According to § 6008(b)(1) of the Families First Coronavirus Response Act (FFCRA), Pub. L. No. 116-127 (2020), eligibility rules and procedures may not be more restrictive than they were on January 1, 2020.

III. Other Changes to the Indiana Medicaid Rules

Some of these other changes to the Indiana Medicaid Rules, or the FSSA's interpretation of existing federal Medicaid laws, are at least peripherally related to the current public health emergency.

A. A Miller Trust May Be Used By Individuals With Monthly Income Lower Than the Special Income Level

A Miller Trust (or Qualified Income Trust) is necessary for nursing home and waiver Medicaid recipients with gross monthly income over the Special Income Level (SIL) of three times the maximum monthly Supplemental Security Income (SSI) payment amount. Since SSI pays a maximum of $841.00 per month in 2022, this means that Medicaid recipients with gross monthly income above $2,382.00 (3 X $841.00 = $2,523.00) must have a Miller Trust and fund it each month with at least as much as the gross monthly income that exceeds the $2,523.00. The Miller Trust, which is defined in 42 U.S.C. § 1396p(d)(4)(B), may only hold income, and therefore it may not be used to shelter resources that exceed the usual Medicaid resource limits.

During the current public health emergency, when the FSSA was not implementing liability payments or increasing liability payments for nursing home and waiver Medicaid recipients, some practitioners wondered whether Medicaid recipients with gross monthly income less than the SIL could place excess income in a Miller Trust in order to avoid future resource eligibility problems when the public health emergency is over. The FSSA has confirmed that its

interpretation of the federal Medicaid law is that such a strategy is permissible, although the FSSA concurrently emphasized that one is not allowed to deposit resources into the Miller Trust.

B. Medicare Cost Sharing Benefits Not Subject to Medicaid Estate Recovery

It has been the FSSA's policy for quite some time that the state's payment for Medicare Part B premiums is not recoverable through Medicaid Estate Recovery. Additionally, Section 4705.00.00 of the Indiana Health Coverage Program Policy Manual (IHCPPM) was amended August 1, 2022, to provide that "Medicare cost sharing benefits paid for any member are not recoverable." The full new paragraph says:

"The claim provision is applicable to all categories of MA, except for Medicare cost sharing benefits which includes the Medicaid categories of QMB (MA L), SLMB (MA J) and QI (MA I). Medicare premiums and Medicare cost sharing benefits paid for any member are not recoverable."

"Medicare cost sharing" refers to the Medicare copays and deductibles that Medicaid pays under the Qualified Medicare Beneficiary (QMB) category of Medicaid. A person can be on both Medicaid for the Aged, Blind, and Disabled and QMB. Here is an example. The QMB income limit for a single person is $1,699.00 per month. Suppose a single individual, who is a Medicare recipient, has gross income of $1,600.00 per month, is in a nursing home, and has been awarded Medicaid for the Aged. That person should also be on QMB. Any copays and deductibles that Medicaid pays for Medicare covered expenses, such as hospital stays, doctor visits, medical tests, Skilled Nursing Facility (SNF) copays, etc. should not part of the state's Medicaid Estate Recovery claim.

Indiana Law Update 2022: Elder Law

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Indiana's New Advance Directive for Health Care: I.C. 16-36-7

This is a new single type of health care advance directive that will replace the old durable power of attorney for health care (I.C. 30-5-5-16), the old appointment of health care representative (I.C. 16-36-1-7, and the old living will declaration (I.C. 16-36-4-10) effective January 1, 2023.

After December 31, 2022, health care powers included in a general power of attorney will be void!

Reasons for the New Advance Directive for Health Care

Conflicts between the three statutes.

Outdated language in the old statutes.

Unclear decision standards for legal representatives.

The old statutes required forms to be signed “in the physical presence” of the declarant, which posed technology and transportation barriers.

Basic Elements of the New Indiana Advance Directive

There is no official or mandatory form.

The declarant may name one or more health care representatives (HCRs).

The declarant may state specific health care decisions and/or treatment preferences, including preferences for life-prolonging procedures or palliative care.

The declarant may disqualify named individuals form serving as HCR or receiving delegated authority from an HCR.

New and More Flexible Signing Requirements

The declarant may sign on paper or electronically, OR may direct someone else to sign the declarant's name in the declarant's physical presence.

The declarant may sign in the "presence" of two adult witnesses, OR in the "presence" of a notary public.

The two witnesses or the notary public may also sign the advance directive on paper OR electronically.

Options for signing remotely

The declarant and the two witnesses OR the declarant and the notary sign identical counterparts on paper and interact using two-way audiovisual technology – signed counterparts must be assembled within ten business days.

The declarant and the two witnesses OR the declarant and the notary sign electronically using two-way audiovisual technology.

The declarant and two witnesses sign with audio-only interaction by telephone during signing.

Basic Presumptions if Advance Directive Does Not Say Otherwise

The advance directive (AD) is effective upon signing and remains in effect until or unless revoked in writing.

A later-signed AD supersedes and revokes an earlier-signed AD.

Unless HCRs are listed in priority order, two or more HCRs have concurrent, equal, and independently exercisable authority and are not required to act jointly.

If the declarant still has capacity, then orders and instructions by the declarant will control over decisions by an HCR.

Basic Presumptions if Advance Directive Does Not Say Otherwise

Any HCR can delegate authority under the AD in writing to any competent adult or adults.

The HCR has authority regarding anatomical gifts, autopsies, and burial or cremation.

The HCR does not need a HIPAA release.

The HCR has authority to consent to mental health treatment.

Basic Presumptions if Advance Directive Does Not Say Otherwise

Each HCR has authority to sign a POST form or out-of-hospital DNR.

The HCR has authority to apply for public benefits (including Medicaid) and to access the financial records for that purpose.

Each HCR is entitled to reasonable compensation and reimbursement.

Optional Provisions that May Be Added to the Advance Directive

The AD may restrict the delegation authority of the HCR.

The AD may name two or more HCRs in a stated order of priority.

The AD may require multiple HCRs to act jointly or on a majority-vote basis.

The AD may prohibit an HCR from being compensated, or may state an hourly rate, etc.

This is not an exhaustive list.

Section Four

Indiana Law Update 2022: Business, Contracts, and Banking

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Taft Stettinius & Hollister LLP
Indianapolis, Indiana

Section Four

Indiana Law Update 2022:
Business, Contracts, and Banking……. Kiamesha-Sylvia G. Colom

PowerPoint Presentation

Indiana Law Update 2022:
Business, Contracts, and Banking

September 13, 2022

Presented By:

Kiamesha-Sylvia G. Colom
kcolom@taftlaw.com

Taft/

Steak N Shake Operations, Inc. v. National Waste Associates LLC, 177 N.E.3d 816 (Ind. Ct. App. 2021)

Facts: Steak 'n Shake entered into a contract with Contractor A for waste removal. Contractor A entered subcontract with Subcontractor to perform work under the contract. Subcontract provided for automatic renewal after 3 years. Steak 'n Shake terminated contract with Contractor A and reminded Contractor A to terminate subcontract with Subcontractor. Contractor A failed to terminate subcontract. Steak 'n Shake entered new contract with Contractor B for the same services. Contractor B engaged Subcontractor to perform same work Subcontractor was providing under their contract with Contractor A. Dispute arose between Subcontractor and Contractor B. Subcontractor sued Contractor A, Contractor B, and Steak n Shake for breach of contract.

Issue: Could Steak 'n Shake be held liable to Subcontractor under agency theory for failure of Contractor A to terminate contract with Subcontractor?

Holding: No. Contract between Steak 'n Shake did not establish an agency relationship because Steak 'n Shake did not exercise control over Contractor A. Steak 'n Shake's reminder to Contractor A to terminate its subcontract was not evidence of "control" to establish agency relationship.

Taft/

Kuebler v. Vectren Corp., 13 F.4th 631 (7th Cir. 2021)

Facts: Vectren and CenterPoint merged and Vectren filed its preliminary proxy statement. Shareholders sued Vectren and its board alleging that the preliminary proxy statement was misleading because it omitted (i) business segment projections and (ii) unlevered cash flow projections.

Issue: Whether omission of business segment projections and omission of unlevered cash flow projection when filing a proxy statement with the Securities and Exchanges Commission (SEC) was materially false or misleading in violation of securities law?

Holding: **:** No. Courts must assess the value of the omitted information in light of the information made available and must strike a balance between "not enough" information and an "avalanche" of information. Plaintiffs were unable to identify circumstances that would show omitted information would plausibly have affected their votes.

Taft/

Seafarers Pension Plan on behalf of Boeing Co. v. Bradway, 23 F.4th 714 (7th Cir. 2022)

Facts: In 2018, a Boeing 737 MAX airliner crashed near Indonesia. A few months later, a second 737 MAX crashed in Ethiopia. A shareholder of the Boeing Company filed a derivative suit in Federal Court on behalf of Boeing alleging that Boeing officers and board members made materially false and misleading public statements about the development and operation of the 737 MAX in Boeing's 2017, 2018, and 2019 proxy materials. Boeing moved to dismiss the case, arguing that Boeing's bylaws provide that all derivative actions must take place in Delaware state court. District court granted motion dismissing the case in favor of Boeing.

Issue: Did the district court err when it dismissed the suit without addressing the merits, applying a Boeing bylaw that gives the company the right to insist that any derivative actions be filed in the Delaware state courts?

Holding: Yes. The Federal Exchange Act gives federal courts **exclusive** jurisdiction over actions derivative suits under federal securities law. Applying the bylaw to this case would mean that plaintiff's action could neither be heard in federal court or Delaware state court. It was not the intent of the Delaware legislature to allow Delaware corporations to opt out of securities laws with forum selection clauses.

Taft/

Reid Hosp. & Health Care Servs., Inc. v. Conifer Revenue Cycle Sols., LLC, 8 F.4th 642 (7th Cir. 2021)

Facts: Hospital hired vendor to handle billing codes, billing, processing paperwork and collecting payments. Vendor trimmed staff, mismanaged revenue cycle and failed to meet contractual obligations. Hospital sued for breach of contract. Vendor moved for summary judgement arguing that even if it breached the contract, the hospital cannot recover lost-revenue damages because the contract does not allow for consequential damages and Vendor's actions did not amount to "willful misconduct".

Issue: (1) Whether lost revenues for breach of contract were unrecoverable consequential damages and (2) whether trimming staff constituted "willfull misconduct" by Vendor.

Holding: (1) Lost revenues were recoverable direct damages in light of the nature of the contract (billing and collections). (2) Court could not say that business decision to trim staff to cut expenses definitively did not amount to "willful misconduct" under contract..

Taft/

N.H. Ins. Co. v. Ind. Auto. Ins. Plan, 176 N.E.3d 514 (Ind. Ct. App. 2021)

Facts: Indiana Automobile Insurance Plan ("Plan") is an association of licensed auto insurance companies in Indiana. The Plan and New Hampshire Insurance Company ("NHIC") executed a Servicing Carrier Agreement ("SCA"). Under the SCA, NHIC issued insurance policies and administered claims services to insureds in Indiana. The SCA provided that NHIC would submit any claims in excess of $10,000 to the Plan and the Plan would not unreasonably withhold approval of payment. In turn, the Plan was obligated to indemnify NHIC for losses sustained as a servicing carrier as set forth in the SCA.

Danny Watkins ("Watkins") was involved in a trucking accident which caused bodily injury to another motorist, Rabin Stovall, Jr. ("Stovall"). Stovall sued Watkins and obtained a verdict of $11 million against Watkins. NHIC mediated with Stovall and agreed to settle for $7.5 million. NHIC settled without the Plan's knowledge or approval. The Plan determined NHIC was not entitled to indemnification arguing that NHIC's failure to obtain the Plan's approval before settling barred indemnity.

N.H. Ins. Co. v. Ind. Auto. Ins. Plan, 176 N.E.3d 514 (Ind. Ct. App. 2021) cont'd.

Issue: Was approval of the payment of the claim by the Plan a condition precedent, even though the Plan was not to unreasonably withhold approval of the payment of the claim? And if so, did the failure to satisfy the condition precedent preclude NHIC from recovery from the Plan on its indemnification claim?

Holding: Yes. Even though the Plan was not to unreasonably withhold approval, the plain language of the contract provided that the Plan's approval was a condition precedent to the indemnification claim. The failure to obtain the approval of the Plan precluded NHIC's recovery on its indemnification claim.

Taft/

Paradigm Care & Enrichment Ctr., LLC v. West Bend Mut. Ins. Co., 529 F.Supp.3d 927 (7th Cir. 2021)

Facts: Childcare centers in Illinois and Michigan sued their insurer after it denied claims related to business disruption caused by the COVID-19 pandemic. Due to the pandemic and public orders, the childcare centers operated at reduced capacities resulting in substantial income loss and additional expenses. The centers filed claims under their all-risk commercial property insurance policy. Insurer denied the claims alleging that the losses were not a "Covered Cause of Loss".

Issue: Whether loss of business due to COVID-19 falls within the scope of (1) Business Income & Extra Expense, (2) Civil Authority, or (3) Communicable Disease coverages.

Holding: No, business disruption caused by the COVID-19 pandemic does not fall within the scope of the coverage because (1) there was no physical loss or damage to the insured's property, (2) the government did not shut down the centers due to a dangerous condition near the premises, and (3) the government did not shut down the centers due to an identifiable COVID outbreak at the centers.

Taft/

Pierre v. Midland Credit Management, Inc., 29 F.4th 934 (7th Cir. 2022)

Facts: Lender sent Plaintiff a letter offering to resolve a long-unpaid debt at a discount. The statute of limitations on the debt had run. The letter advised Plaintiff that because of the age of the debt, Lender would neither sue her for it nor report it to a credit agency. Plaintiff sued Lender alleging that it violated the Fair Debt Collection Practices Act. Plaintiff contended that the collection letter was a deceptive, unfair, and unconscionable method of debt collection, in violation of the FDCPA.

Issue: Whether consumer experienced a concrete injury to confer standing when a debt collection company offered to resolve the stale debt at a discount.

Holding: No, although the letter may have created a risk that consumer would suffer a harm, such as paying a stale debt, consumer did not actually experience a concrete injury giving her standing to pursue claims for money damages. Risk of future harm conferred standing for injunctive, but not monetary, relief.

Taft/

PNC Bank, Nat'l Ass'n v. Page, 186 N.E.3d 633 (Ind. Ct. App. 2022)

Facts: PNC Bank filed a complaint against borrower to foreclose on a promissory note and mortgage during COVID pandemic. The trial court issued a judgment in favor of PNC with the exception that the trial court excluded pre-judgment interest accruing from 3/16/20 to 8/14/20. This exclusion of interest was based on a series of Ind. Administrative Rule 17 Emergency Orders that the Indiana Supreme Court issued in 2020 during the outbreak of the COVID-19 pandemic, stating that "no interest shall be due or charged during this tolled period."

Issue: Did the Indiana Supreme Court have the authority to toll pre-judgment interest that is created by contract under private loan instrument and by statute?

Holding: No. Supreme Court cannot, by rule, change terms of statute that provides for non-discretionary pre-judgment interest, noting that "each branch of our government [must act] within their constitutionally prescribed boundaries."

Taft/

***R.L. Rynard Dev., Corp. v. Martinsville Real Prop. LLC*, 179 N.E.3d 520 (Ind. Ct. App. 2021)**

Facts: Contractor entered agreement to construct a nursing home, assisted living facility, and several duplex apartments. Contract required periodic progress payments. Contractor forged signatures of subcontractors on lien waivers when submitting applications for payment. Subcontractor filed notice of lien and third-party complaint asserting that it had not been fully compensated for its work. Contractor invoked 5th Amendment right not to self-incriminate during deposition.

Issue: Whether court could draw negative inference from Contractor's invocation of 5th Amendment rights.

Holding: Contractor is free to exercise 5th Amendment rights during deposition, but Court can draw negative inference against Contractor in the civil suit.

Taft/

Duncan v. Barton's Discounts, LLC, 178 N.E.3d 810 (Ind. Ct. App. 2021)

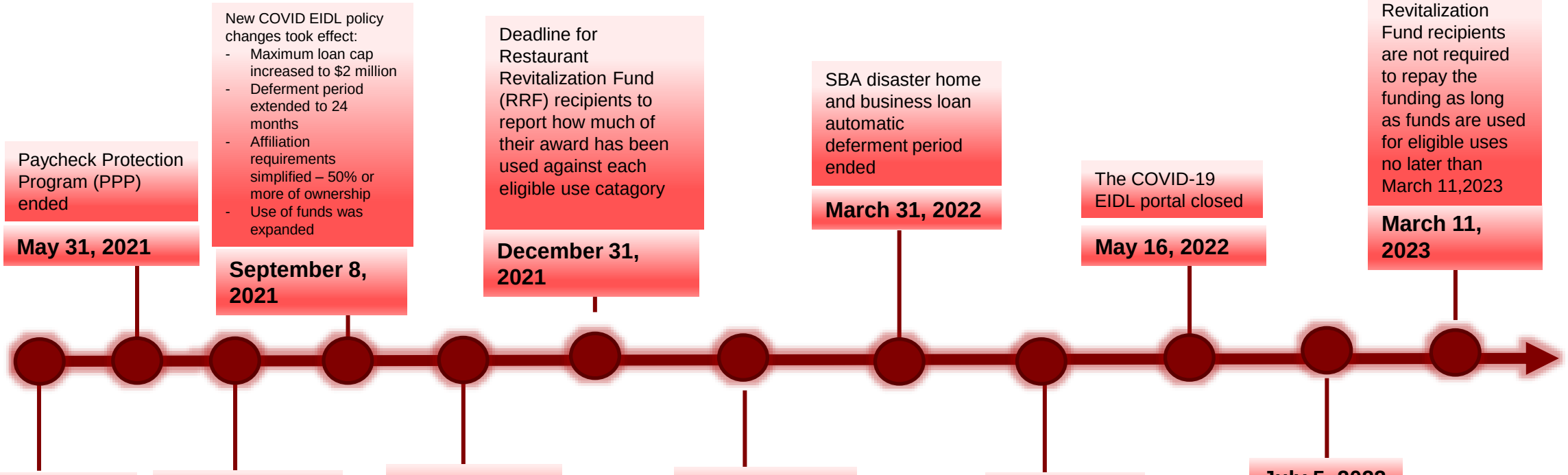
Facts: Company filed claims against former employee and his new employer, asserting claims for conversion, unjust enrichment, and tortious interference with contract where they had stolen inventory from Company and delivered it to new employer. Company requested that text message conversations between employee and new employer be produced during discovery. Text messages were sent from personal devices, but from numbers listed on the companies' respective websites. Employee and new employer objected to production of text message conversations asserting 5th Amendment Privileges.

Issue: Are text messages between employee and new employer protected from discovery under the 5th Amendment?

Holding: No. Text messages between defendants were non-testimonial in nature because they were voluntarily created **prior** to the issuance of the discovery requests, and therefore were not protected by the Fifth Amendment. Also, text messages between defendants were sent on behalf of corporate entities, and corporate entities do not have 5th Amendment rights.

Taft/

SBA COVID-19 Relief Timeline



February 2021

SBA Debt Relief was extended for certain businesses

May 31, 2021

Paycheck Protection Program (PPP) ended

August 20, 2021

The Shuttered Venue Operators Grant (SVOG) stopped accepting new applications

September 8, 2021

New COVID EIDL policy changes took effect:

- Maximum loan cap increased to $2 million
- Deferment period extended to 24 months
- Affiliation requirements simplified – 50% or more of ownership
- Use of funds was expanded

October 1, 2021

SBA announced that for any 7(a) loan that was approved on or before September 30, 2021, SBA will not approve any request for an increase to the 7(a) loan on or after October 1, 2021

December 31, 2021

Deadline for Restaurant Revitalization Fund (RRF) recipients to report how much of their award has been used against each eligible use catagory

January 1, 2022

SBA stopped accepting applications for new EIDL loans or advances

March 31, 2022

SBA disaster home and business loan automatic deferment period ended

May 6, 2022

SBA is no longer processing COVID-19 EIDL loan increase requests or requests for reconsideration of previously declined loan applications due to a lack of available funding

May 16, 2022

The COVID-19 EIDL portal closed

July 5, 2022

The SBA completed its final stages of grant processing for the SVOG program

March 11, 2023

Restaurant Revitalization Fund recipients are not required to repay the funding as long as funds are used for eligible uses no later than March 11,2023

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Economic Injury Disaster Loan (EIDL)

- **Use of Proceeds**
  - Working capital to make regular payments for operating expenses, including payroll, rent/mortgage, utilities, and other ordinary business expenses, and to pay business debt incurred at any time (past, present, or future)
- **Maximum Loan Amount**
  - $2 Million
- **Loan Term**
  - 30 years
- **Payment Deferment**
  - Payments are deferred for the first 2 years (during which interest will accrue), and payments of principal and interest are made over the remaining loan term. No penalty for prepayment.
- **Interest Rate**
  - Businesses: 3.75% fixed
  - Private nonprofit organizations: 2.75% fixed
- **Collateral Requirements**
  - Required for loans over $25,000
- **Forgivable**
  - No
- **Additional EIDL loans**
  - EIDL Advance; Targeted EIDL Advance; Supplemental EIDL Advance

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Paycheck Protection Program (PPP)

- **Purpose**
  - Designed to provide a direct incentive for small businesses to keep their workers on payroll
- **Loan Amount**
  - For loans approved starting week of April 6, 2021: 24-months of economic injury with a maximum loan amount of $500,000
- **Terms**
  - 1% interest rate
  - Loans issued prior to June 5, 2020 – 2 year maturity
  - Loans issued after June 5, 2020 – 5 year maturity
- **Use of Proceeds**
  - Can be used to help fund payroll costs, pay mortgage, rent, utilities, worker protection costs related to COVID-19, uninsured property damage costs caused by looting or vandalism during 2020, and certain supplier costs and expenses for operations
- **Collateral Requirements**
  - None
- **Forgivable**
  - Yes

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Restaurant Revitalization Fund (RRF)

- **Purpose**
  - To provide funding to help restaurants and other eligible businesses keep their doors open
- **Grant Amount**
  - $10 million per business; no more than $5 million per physical location
- **Repayment**
  - Funds need not be repaid if used for eligible uses no later than March 11, 2023
- **Eligibility**
  - Restaurants
  - Food stands, food trucks, food carts
  - Caterers
  - Bars, saloons, lounges, taverns
  - Snack and nonalcoholic beverage bars
  - Bakeries (onsite sales to the public comprise at least 33% of gross receipts)
  - Brewpubs, tasting rooms, taprooms (onsite sales to the public comprise at least 33% of gross receipts)
  - Breweries and/or microbreweries (onsite sales to the public comprise at least 33% of gross receipts)
  - Wineries and distilleries (onsite sales to the public comprise at least 33% of gross receipts)
  - Inns (onsite sales to the public comprise at least 33% of gross receipts)
  - Licensed facilities or premises of a beverage alcohol producer where the public may taste, sample, or purchase products

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Shuttered Venue Operators Grant (SVOG)

- **Purpose**
  - To provide funding to help restaurants and other eligible businesses keep their doors open
- **Grant Amounts**
  - Entity in operation on January 1, 2019: 45% of their gross earned revenue OR $10 million, whichever is less
  - Entity that began operation after January 1, 2019: average monthly gross earned revenue for each full month in operation during 2019 multiplied by six OR $10 million, whichever is less
  - $2 billion reserved for eligible applicants with up to 50 full-time employees
- **Repayment**
  - None
- **Eligibility**
  - Live venue operators or promoters
  - Theatrical producers
  - Live performing arts organization operators
  - Museum operators
  - Motion picture theatre operators (including owners)
  - Talent representatives

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Impact of SBA Relief Programs

- **Economic Injury Disaster Loan (EIDL)**
  - As of May 24, 2021:
    - 3.78 million loans approved
    - $205 billion in approved loans
- **Paycheck Protection Program (PPP)**
  - As of June 1, 2021:
    - PPP provided over 8.5 million small businesses and nonprofits loans
    - 96% of PPP loans went to small businesses with fewer than 20 employees
    - 32% of loans went to Low-and-Moderate Income Communities
- **Restaurant Revitalization Fund (RRF)**
  - As of May 18, 2021, SBA received applications from:
    - More than 122,000 women business owners
    - More than 14,000 veteran business owners
    - More than 71,000 economically and socially disadvantaged individuals
- **Shuttered Venue Operators Grant (SVOG)**
  - As of June 1, 2021:
    - 13,619 Applications submitted
    - 31 grants awarded
    - $34.2 million in total grants awarded

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SBA COVID Related Program Audits

- PPP: On January 27, 2022, SBA issued Procedural Notice 5000-827666, SBA Loan Reviews of Paycheck Protection Program Lender Partial Approval Forgiveness Decisions (Reconsideration Process). It is a new process allowing borrowers who have received partial forgiveness but not had the benefit of a manual review by SBA, to ask SBA to conduct such a review.
- Updates to the Forgiveness Platform were made to accept Reconsideration requests.
- SBA committed to conducting manual reviews of all $0.00 forgiveness decisions (Lender Full Denials), previously approved by SBA without a manual review. SBA will proactively load these reviews into the portal and will notify Lenders.

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SBA COVID Related Program Audits

- PPP:
- SVOG: On July 14, 2022, the SBA conducted a webinar, *Audit Requirements for For-Profit Entities*
  - provided guidance to for-profit entities that received funding under the Shuttered Venue Operators Grant (SVOG) program. The SBA announced a nine-month audit submission extension. The extension specifically states for-profit recipients will be allowed to submit their audit at the later of either of the following:
    - Nine months from the date the SBA's for-profit SVOG guidance is released
    - Nine months after the end of the for-profit's fiscal year

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SBA COVID Related Program Audits

- Extension is only applicable to for-profit entities; nonfederal entities are excluded.
- Not-for-profit entities receiving SVOG funding still have the normal reporting requirements under Uniform Guidance.
- Upcoming audit requirements include:
  - calling out the thresholds for audit requirements to be triggered, along with options for for-profit entities to meet the SVOG audit requirements. Traditionally, a threshold of $750,000 of federal expenditures is used to determine the need for all for-profit audit options. However, SVOG allows pre-award costs to be charged to the program; therefor, audits are now required at $750,000 or more of SVOG revenue is recognized during the entity's fiscal year.

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SBA COVID Related Program Audits

- For-profit entities meeting requirements for an audit, may choose from the following options:
  1. A single audit conducted in accordance with Uniform Guidance requirements
  2. A program-specific audit conducted in accordance with Uniform Guidance requirements
  3. An audit of the entity's financial statements
  4. A compliance examination attestation engagement
- If an entity already had an audit of its financial statements done during the fiscal year it received $750,000+ of SVOG revenue, those audited statements should be submitted to the SBA.

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SBA COVID Related Program Audits

- For those entities that did not already have a financial statement audit conducted, the fourth option above will be the most cost-effective and efficient option for compliance with the SBA requirements.
- EIDL: If a EIDL loan is audited, expect the audit to focus on:
  - The company's eligibility for the loan at the time it was applied for; and
  - Whether the loan amount was used for allowed purposes under the rules.

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QUESTIONS?

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Section Five

Juvenile Law Update 2022

Hon. Vicki L. Carmichael
Clark Circuit Court #4
Jeffersonville, Indiana

Section Five

Juvenile Law Update 2022……... Hon. Vicki L. Carmichael

PowerPoint Presentation

Juvenile Law Update
2022

Judge Vicki L. Carmichael
Clark Circuit Court No. 4

Recent Legislation

- Electronic monitoring
- Crime delinquent
- Automatic expungement
- Juvenile boot camps
- Juvenile Justice Oversight Committee
- Juvenile Competency

Electronic Monitoring

- I.C. 31-37-2-8 (eff. 7/1/22)
- A child commits a delinquent act (Escape) if the child:
  - Intentionally flees from lawful detention;
  - Knowingly or intentionally violates a home detention order;
  - Intentionally removes, disables, or interferes with the operation of an electronic monitoring device; or
  - Knowingly or intentionally fails to return to lawful detention

Crime Delinquent

- IC 5-14-3-4 amended to provide information contained in a daily log of a law enforcement agency about a crime delinquent who is less than 18 years of age may not be disclosed by a public agency, except to DCS, unless permitted under state or federal law or under discovery rules

Automatic Expungement

- IC 35-38-9-1 amended to require a court to automatically expunge a juvenile delinquency allegation even if it resulted in an adjudication for an infraction

More on Expungement

- IC 35-38-9-1 also amended to require a court to automatically enter an expungement order if a court dismisses all juvenile delinquency allegations filed against a person; one year has passed since allegations were filed and there is no disposition; or the court finds the allegations not true

Juvenile Boot Camps

- IC 11-14-3-1 concerning the use of boot camps for juveniles by the Department of Correction REPEALED

Juvenile Justice Oversight

- IC 2-5-36-9 amended to require the Commission on Improving the Status of Children in Indiana to create a statewide juvenile justice oversight body

Youth Justice Oversight Committee

- Justice Steve David, Chair (17 Members)
- YJOC charged with:
  - Developing a plan to collect and report statewide juvenile justice data
  - Establish procedures and policies related to the use of screening tools and assessments
  - Develop a statewide plan to address the provision of behavioral health services to children
  - Develop a plan for the provision of transitional services for children leaving DOC
  - Develop a plan for juvenile diversion and community alternatives grant programs

Juvenile Competency

- IC 31-37-26 (eff 12/31/2022) added new procedures for determining competency of juveniles
- Provides DCS will prepare and implement competency attainment services for juveniles
- Requires the court, if reasonable grounds to believe child is not competent, to order a competency evaluation

Requirements

- The disinterested person appointed by the court may be a psychiatrist or a psychologist who has expertise in determining competency of juveniles
- No later than 7 days after appointment, the probation department shall provide all relevant files to the doctor

Additional Requirements

- No later than 14 days after completion of the evaluation, the doc shall provide a written report to the court and attorneys
- The court shall determine whether the child is competent (hearing can be requested)

Competency Attainment

- If the court finds the child is not competent, the court shall determine if the child may attain competency w/in 180 days (if charged with a felony) or 90 days (if not a felony)
- If the court determines the child will not attain competency, the court shall dismiss the allegations w/o prejudice and refer the matter to DCS

Competency Attainment

- If the court determines the child is likely to attain competency, the court may refer the child to competency attainment services in the least restrictive setting to be paid for by DCS
- The provider shall submit a competency plan

Competency Attainment

- Progress report every 30 days
- Once provider determines the child is competent, shall issue a report w/in 3 days
- If provider determines child will not attain competency, shall issue that report w/in 3 days

More on Competency

- No later than 15 days after receiving a report, the court may hold a hearing to determine if a new order should issue
- The court may order a new competency evaluation
- If the court determines the child will not attain competency, the court shall dismiss the allegations w/ prejudice

And, more…

- If the court determines competency services are not in child's best interest, court may refer the matter for civil commitment proceedings
- If the court determines the child is competent, the court shall proceed with the delinquency proceedings

Timelines

- IC 31-37-11-11 added to provide if a child is found to be competent after a competency hearing is ordered, the fact finding must be commenced within 20 days if child is detained or 60 days if not detained

Jurisdiction

- State v. Neukam, 189 N.E.3d 152 (Ind. June 23, 2022)
- Some background - in 2017:
  - Defendant is 20 years old
  - Charged in adult court
  - 9 sex offenses against same victim

Neukam cont’d

- In 2019
  - Defendant is now 22 years old
  - Delinquency petition filed in juvenile court
    - Alleges 8 sex offenses when defendant was between 14-17 years of age
    - Same victim as in adult case
  - Juvenile court dismisses pursuant to DP case

Neukam cont’d

- State tries to amend delinquency allegations into existing adult case
- Trial court denies amendment
- State appeals

Neukam cont’d

- Court of Appeals decision:
  - Adult court does not have subject matter jurisdiction over the juvenile charges when brought after age of 21
- Supreme Court took transfer

Supreme Court Decision

- Juvenile courts lose jurisdiction once an alleged delinquent child reaches 21 years of age
- A child's delinquent act does not ripen into a crime when the child ages out of the juvenile system

Neukam cont’d

- Neither the juvenile court nor the circuit court has jurisdiction over Neukam
- There is a jurisdictional gap only the legislature can close
- Trial court’s judgment for Neukam and against the State is affirmed

What is the fix?

- HB 1198 introduced in 2021 (died in conference committee), but provided:
  - A charge for child molesting shall be filed in adult criminal court if the accused person: (1) was at least 14 but less than 18 at the time of the offense; and (2) is at least 21 at the time of filing the charge
  - Under certain circumstances an adult criminal prosecution for child molesting must be commenced not later than one year after information is discovered if: (1) the accused person was less than 18 years of age at the time of the offense; and (2) the evidence was discovered before the accused person becomes 21 years of age

Thank you!

Section Five

CROSS | GLAZIER | REED | BURROUGHS, PC.

Indiana Family Law Update

September 13, 2022

By:
James A. Reed
Cross Glazier Reed & Burroughs

With Written Materials By:
Michael R. Kohlhaas
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Anyone interested in subscribing to the free, E-mail based Indiana Family Law Case Update that provides the enclosed case law digests in real time can subscribe by sending an email to familylawcases@cgrblaw.com *with "subscribe" in the subject line. Thank you!*

Section Five

RECENT FAMILY LAW CASES:

A. Child Support

***Walters v. Walters*, 186 N.E.3d 1186 (Ind. Ct. App. 2022)**

HELD: Trial court acted within its discretion when it found Husband to be voluntarily underemployed for child support purposes, but the amount of income to which Husband was imputed was remanded for a hearing on how much Husband could reasonably expect to earn in the community in which he lived.

FACTS AND PROCEDURAL HISTORY:

Husband and Wife have three children together. Wife filed a petition for dissolution of marriage in 2019. Husband had approximately 20 years of work experience in the pipeline industry as a boom operator and supervisor. Husband earned approximately $200,000 per year from 2016 to 2018, though this required Husband to live and work in West Virginia, apart from Wife and the children for months at a time.

At the final hearing, Wife testified that Husband frequently threatened to become a "deadbeat" and not pay child support in the event of a divorce. After Wife filed, Husband did not return to the pipeline industry, and instead began working as a car salesman making $2,500 per month.

The trial court found Wife's testimony that Husband would deliberately become a deadbeat to be credible and found that Husband was voluntarily underemployed. Further, the trial court imputed to Husband a level of income that was consistent with what Husband earned in 2016-2018. Husband appealed.

On the issue of whether Husband was voluntarily underemployed, the Court of Appeals viewed Husband's appeal as an invitation to reweigh the evidence presented to the trial court, which it declined to do. However, as to the amount of income imputed to Husband, the Court of Appeals was concerned that no evidence was presented that Husband could continue to earn an income locally similar to what he earned in 2016-2018 working in West Virginia. The trial court had specifically entered a finding that it was not requiring Husband to return to work in West Virginia.

Thus, the finding that Husband was voluntarily underemployed was affirmed, but the income imputation determination was remanded "for a hearing on Husband's prevailing job opportunities and earnings levels in the community."

B. Property Division

Rotert v. Stiles, 174 N.E.3d 1067 (Ind. 2021)

HELD: Vacating the Court of Appeals' contrary determination last year, the Indiana Supreme Court held that a trust's distribution provision, which hinged on whether the beneficiary was married, was not an unlawful restraint against marriage.

FACTS AND PROCEDURAL HISTORY:

Rotert was one of two adult children of Marcille, who passed away in 2016. Prior to Marcille's death, she executed a revocable trust. Operative to Rotert's share of the trust property was this:

> In the event that [Rotert] is unmarried at the time of my death, I give, devise, and bequeath his share of my estate to him outright and the provisions of this trust shall have no effect. However, in the event that he is married at the time of my death, this trust shall become effective, as set out below. . . .

At the time of Marcille's death, Rotert was, in fact, married. Rotert later petitioned to docket the trust and requested summary judgment that the above provision was void as a restraint on marriage and against public policy. That summary judgment motion was denied, from which Rotert appealed.

In 2020, the Indiana Court of Appeals reviewed an extended history of Indiana case law expressing skepticism towards restraints on marriage. Applying that history to *Rotert*, the Court concluded that "the marriage provision simply cannot be interpreted as anything other than an encouragement for Rotert to divorce his wife of almost twenty years upon the opening of the estate . . ." Thus, the Court concluded, the provision was void as a restraint on marriage and against public policy.

The Indiana Supreme Court granted transfer, thus vacating the Court of Appeals' decision. The Indiana Supreme Court held that the statutory prohibition of restraints against marriage applies only to dispositions to a spouse by will, and not to dispositions made by trust.

The Indiana Probate Code provides that "[a] devise to a spouse with a condition in restraint of marriage shall stand, but the condition shall be void." Ind. Code § 29-1-6-3. Concluding that the word "devise" applies to wills, but not to trusts, the code section does not apply to dispositions made by trust. Further, the Indiana Trust Code does not include a similar provision that proscribes conditions in restraint of marriage. The trial court's summary judgment against Rotert was affirmed.

Justice Goff wrote a lengthy concurrence in result to opine that he would conclude that the prohibition against restraints on marriage apply to testamentary trusts as well as wills. However, he nevertheless concurred in the result of the case, reasoning that the terms of the trust in question amount to a permissible condition of acquisition, rather than an impermissible condition of retention (as opposed to, for example, a trust term that granted a beneficiary an interest in property that would be subject to divesting in the event the unmarried beneficiary later married.)

***Kearney v. Claywell*, 181 N.E.3d (Ind. Ct. App. 2021)**

HELD: Trial court's division of marital estate 60/40%, in favor of Husband, was affirmed, rejecting Husband's argument that the division should have matched the parties' respective 68/32% contribution of premarital assets to their short, 30-month marriage.

FACTS AND PROCEDURAL HISTORY:

Husband and Wife married in 2016. Both had been married previously, and each party brought substantial assets to the marriage. Husband brought approximately $841,000 to the marriage, and Wife brought approximately $394,000 to the marriage. Importantly, in order to marry Husband, Wife uprooted her life and nursing career in Tennessee to move to Indiana.

During the marriage, the parties' respective assets were not commingled and the overall marital estate changed very little. Wife filed her petition for dissolution in 2019.

Following a final hearing, the trial court divided the parties' marital estate 60/40% in favor of Husband. The trial court acknowledged the personal and professional costs incurred by Wife in moving from Tennessee to Indiana.

After finding that Husband had contributed 68% to the marital estate and Wife 32%, the trial court nevertheless divided the marital estate 60/40% in Husband's favor. Husband appealed.

Husband argued essentially that the division of the marital estate should have matched the parties' respective 68/32% premarital contributions. The Court of Appeals rejected this argument, noting that Husband had successfully argued for a deviation from 50/50 in his favor, but once doing so, the only obligation of the trial court is to be "just and reasonable" in its deviation. Further, the trial court's consideration of the parties' economic circumstances made its division not an abuse of discretion.

The trial court's property division was affirmed.

***Johnson v. Johnson*, 181 N.E.3d 364 (Ind. Ct. App. 2021)**

HELD: Trial court erred when it treated Husband's accumulated sick days as a marital asset, subject to valuation and award in the parties' property division.

HELD: Trial court's unequal division of marital estate, in Wife's favor, was properly supported by a finding that, during the marriage, Husband moved from the marital residence and failed to provide financial support to the parties' minor child for four years before the divorce was filed.

FACTS AND PROCEDURAL HISTORY:

Husband and Wife married in 1990 and had two children together. Husband worked for the United States Postal Service; Wife resigned from the USPS to become a fulltime homemaker.

In 2013, Husband moved out of the marital residence. He stopped contributing his salary to the joint marital pot and did not contribute financially for the care of the parties' remaining child at

home, who continued to live with Wife. A petition for dissolution of marriage was not filed until 2017, four years after Husband moved out.

At the time of filing, Husband had accumulated leave of 3,369 hours at the USPS.

After a final hearing, and as part of its broader Decree, the trial court determined that Husband's accumulated leave was a marital asset worth $142,912, valued by multiplying the hours of accumulated paid leave by Husband's pay rate, and awarded this as an asset to Husband.

The Decree also deviated from an equal division by awarding Wife 58% of the marital estate, based in part upon Husband's failure to provide financial support for the parties' minor child for the four years Husband lived away from the marital residence prior to filing.

Husband appealed.

The Court of Appeals agreed with Husband that the trial court erred in its inclusion of Husband's paid leave as a marital asset. "Husband had no present right to convert his unused sick days to cash; indeed, Husband had no right to convert any unused sick days to cash even upon retirement. Husband's sick leave provided income protection in the event of a short-term illness, and he was entitled to use his sick days only for limited purposes." Thus, the trial court erred in by finding this was a marital asset subject to property division.

However, the Court of Appeals affirmed the trial court's unequal division of the marital estate based upon Husband's failure to provide financially for the parties' child during their extended estrangement. Husband characterized this as an impermissible retroactive award of child support. The Court of Appeals disagreed with Husband, concluding that Husband's actions hurt Wife's economic circumstances, thereby supporting an unequal division of the marital estate in Wife's favor.

The trial court's decree was affirmed in part, reversed in part, and remanded for further proceedings.

***Tyagi v. Tyagi*, 142 N.E.3d 960 (Ind. Ct. App. 2022)**

HELD: Trial court did not err when it: (1) found a note payable to Husband to be a marital asset; (2) determined $5,000/wk was Husband's income for child support purposes; and (3) adopted a Dollar-to-Rupee conversion rate introduced into evidence by Wife.

HELD: Interestingly, the Court of Appeals appears to hold that a party who requested a deviation from an equal division of the marital from the trial court is precluded from arguing on appeal that an unequal division in favor of the other party was error because there was no basis for deviating from an equal division.

FACTS AND PROCEDURAL HISTORY:

Husband and Wife married in 2007, and Wife filed to dissolve the marriage in late 2016. Substantial litigation followed.

As part of its final orders, the trial court found that a business owned by Husband's parents owed an outstanding debt to Husband in the amount of approximately $183,000, which was a marital asset to Husband.

The trial court also used $5,000/wk as Husband's income for child support purposes, based in part upon a verification of that amount that Husband provided to the trial court in 2018.

The parties agreed that, prior to filing, Wife had made numerous financial transfers of marital assets to her brother in India; the parties disagreed as to the conversion rate of Dollars-to-Rupees that should be used to value the transfers, with the trial court eventually adopting the conversion rate urged by Wife.

Finally, Husband argued to the trial court for a deviation from an equal division of the marital estate to 58/42% in Husband's favor; Wife argued for a 55/45% division in her favor. The trial court would later divide the marital estate 55/45% in Wife's favor.

Husband appealed.

Husband argued on appeal that there was no evidence to support a finding that Husband had ever loaned $183,000 to his parents' business. However, Wife had put into evidence balance sheets for the parents' business which listed the payable to Husband, as well as deposition testimony by Husband in other litigation in which Husband admitted the existence of the note. Based upon this evidence, the trial court did not err in finding the existence of the note.

On Husband's income level at $5,000/wk for child support purposes, Husband had stipulated to that amount at a hearing in 2018. While Husband introduced at the final hearing more recent tax returns that indicated Husband's income had declined, Wife introduced evidence that Husband's lifestyle had not materially changed and that, as CEO of his company, Husband had the ability to manipulate the presentation of his income. Thus, the trial court did not err when it used $5,000 per week as Husband's income for child support purposes.

Wife introduced evidence to support the Dollar-to-Rupee conversion rate that existed on the date of separation. While Husband argued a different rate should be used, Husband submitted no evidence to support his preferred rate. The trial court did not err when it adopted the conversion rate urged by Wife.

At the trial court, Husband had argued that an equal division of the marital estate was not appropriate when he requested a 58/42% division in his favor. That request precluded Husband from arguing, on appeal, that the trial court erred when it deviated from an equal division (in Wife's favor.)

The trial court's Decree was affirmed in all respects.

***Roetter v. Roetter*, 182 N.E.3d (Ind. 2022)**

HELD: Indiana Supreme Court clarifies that a trial court, when implementing the two-step process of dividing the marital estate—first identifying the property to be included, and then determining whether to deviate from a presumed equal division—the trial court need not follow a rigid, technical approach, provided the trial court considers all marital property and offers sufficient justification in support of any deviation from the presumed equal division.

[Previously in this case, the Indiana Court of Appeals ruled that the trial court erred in its approach when it "set off" certain property to each party before making its division of the remaining marital estate.]

FACTS AND PROCEDURAL HISTORY:

Husband and Wife married in 2014, at which time Husband had considerably more assets than Wife. There were two children born of the marriage. Wife became a full-time mother and homemaker, while Husband earned over $100,000/yr at his job.

Wife filed for dissolution in late 2019. The parties resolved custody, parenting time, and child support by agreement. Property division remained contested. At the final hearing, Wife requested 55% of the marital estate; Husband asked that he be credited for his IRA and 401(k) balances as they existed on the date of marriage, but that appreciation thereafter and all other property be divided 50/50.

The trial court's subsequent Decree awarded Husband the values of his IRA, 401(k), and two life insurance policies at their date of marriage values. The Decree also assigned Wife the student loan debt she brought into the marriage. The trial court then calculated the value of all other assets of the marriage and divided them 55/45% in favor of Wife.

On transfer, the Indiana Supreme Court recited the two-step process for dividing marital property: account for all property of the marriage, and then determine whether a deviation from the presumed 50/50 division is warranted. The Court concluded that the trial court considered all assets of the marriage, then set aside certain premarital assets and liabilities to specific parties, and then divided the "remaining divisible marital estate."

The Court noted that a better approach would have been to include all assets and liabilities in the divisible marital pot and proceed with a division from there, rather than engaging in set-offs. However, "[s]o long as it expressly considers all assets and liabilities, and so long as it offers sufficient findings to rebut the presumptive equal division, a trial court need not follow a rigid, technical formula in dividing the marital estate . . . That's precisely what happened here."

The trial court's order was affirmed.

***Alifimoff v. Stuart*, 2022 WL 3008929 (July 29, 2022)**

HELD: The parties' suspended passive activity losses were too speculative and remote to be included in the marital estate.

FACTS AND PROCEDURAL HISTORY:

Husband and Wife, both physicians, married in 1991. During the marriage, they acquired various real estate investments, including a house in St. Croix that the parties purchased in 2006. Rental income on the St. Croix house typically covered its upkeep, but not its mortgage and insurance.

Over the years, the St. Croix house and other real estate holdings generated substantial suspended passive activity losses. At the final hearing, Husband called a CPA witness who testified that the potential value to the parties in claiming these in the future was $295,903 to Wife and $21,349 to Husband. He also testified that a party's ability to claim such losses in the future was uncertain, and depended upon various unknowable factors, such as whether the subject property would generate income (against which such losses could be claimed), whether party might die before the losses could be claimed, and whether the property would ever be sold. "[I]n future years, one may never . . . meet the requirements to be able to date the deductions" for the suspended passive activity losses.

In its Decree, the trial court concluded that "[t]hese suspended passive activity losses are too remote and speculative to be considered part of the parties' marital estate and placed on their marital balance sheet." Following an unsuccessful motion to correct errors, Husband appealed.

The Court of Appeals, applying relevant statute and case law, concluded that "there are simply no inherent, necessarily incurred tax consequences resulting from the trial court's property distribution order, and no taxable event has occurred as a direct result of the court-ordered disposition of the marital estate. . . . the trial court did not abuse its discretion when it determined that suspended passive activity losses generated from the parties' passive real estate holdings were too speculative and remote to be included in the marital pot."

The trial court's decree was affirmed.

***Smith v. Smith* (August 9, 2022)**

HELD: Trial court acted within its discretion when it divided Husband's INPRS pension by requiring Husband to pay Wife, upon receipt, one-half of the after-tax value of each pension payment Husband received.

HELD: Trial court acted within its discretion when it valued Husband's pension based upon a presumed retirement age of 62, even though the present value of Husband's pension could have been larger if Husband were to retire at 55.

HELD: The trial court erred by failing to award Wife either survivor's pension benefits or other protection for Wife's interest in Husband's pension, such as life insurance.

FACTS AND PROCEDURAL HISTORY:

Husband and Wife married in 1992, shortly after Husband began work as a teacher. Husband eventually became a superintendent. Husband filed a petition for dissolution of marriage in 2020. Husband's Indiana Public Retirement System ("INPRS") pension was the dominant asset of the parties' marital estate.

Importantly, INPRS pensions are not subject to division, such as pursuant to a Domestic Relations Order or similar. At the final hearing, various valuations of Husband's pension were presented, including depending upon Husband's assumed retirement date. Each valuation was over a million dollars. Husband also presented testimony by a CPA who estimated that Husband's effective tax rate at age 62 would be 22%.

Husband's proposal to the trial court was that, upon Husband's retirement, Husband would pay to Wife $2,602 per month. This was calculated as one-half of the value of Husband's expected monthly benefit if he retired at age 62, after deducting 22% from each payment for taxes. Wife's proposal to the trial court was that Husband be awarded all of his INPRS pension at its highest value (which presumed retirement at age 55), resulting in a very large property settlement payment due from Husband to Wife.

The trial court essentially adopted Husband's proposal on the pension, from which Wife appealed.

The Court of Appeals deferred to the pension valuation approach used by the trial court, which assumed Husband's retirement at age 62, even though the pension would have a higher present value if Husband retired at age 55. "Our Supreme Court has noted that a dissolution court cannot compel an 'involuntary retirement.' . . . . The trial court was presented with three options to value Husband's INPRS pension and chose the option that most closely represented the evidence presented regarding Husband's actual retirement plans."

Wife also took issue with the trial court's means of distributing Husband's pension. The Court of Appeals acknowledged that the trial court had several options for implementing that distribution, but the option of requiring Husband to make monthly payments in an amount equal to one-half of the after-tax monthly pension payment that Husband expected to receive was not an abuse of discretion; Wife was simply inviting the Court of Appeals to reweigh evidence or substitute its opinion for the trial court's.

The Court also specifically endorsed the trial court's tax-affecting of Husband's pension payments. To do otherwise, such as to make Husband responsible for all of the taxes on his pension payments, would make the intended 50/50 division of each payment illusory.

The Court of Appeals was receptive to Wife's argument on the survivor's benefit. Under the Decree, Husband's payment of $2,602 per month to Wife upon his retirement would terminate upon either Husband's death or Wife's death. "We conclude that the trial court erred by failing to award either survivor's benefits or protection of Wife's portion of the Pension benefits through another means, such as life insurance."

The last issue was remanded for the hearing of further evidence and consideration, but the remainder of the Decree was affirmed.

C. Preliminary Order

***Rambo v. Rambo*, 187 N.E.3d 301 (Ind. Ct. App. 2022)**

HELD: Absent the agreement of both parties, a trial court's preliminary order in a marriage dissolution action cannot order the sale of property.

FACTS AND PROCEDURAL HISTORY:

In 2021, Husband filed a petition for dissolution of marriage. As part of the preliminary proceedings, Wife asked for an order that the marital residence be sold. Husband instead requested that he be given temporary, exclusive possession of the marital residence. Following the provisional hearing, the trial court ordered that the marital residence be sold. Husband filed an interlocutory appeal.

The Court of Appeals noted that provisional orders are governed by Ind. Code § 31-15-4 which, in turn, specifies the type of a relief that can be granted. While "possession of property" is among them, sale of property is not. Concluding that, if the legislature had intended orders for the sale of property to be an option for preliminary relief, it would have articulated that authority, which it did not.

Also, the Court of Appeals included a footnote that "[o]ur holding is limited to situations in which one or both of the parties to a dissolution action object to the sale of property. Parties are free to enter an agreed provisional order for the sale of property."

The trial court's provisional order that the marital residence be sold was reversed.

D. Adoption

***D.G. v. D.H*, 182 N.E.3d 247 (Ind. Ct. App. 2022)**

HELD: Affirmed trial court's determination that Father's consent to adoption was required, even though it was uncontroverted that Father went a period of 13 months without paying any child support.

FACTS AND PROCEDURAL HISTORY:

Child was born in 2009, and Father's paternity was established shortly thereafter. Father and Mother shared joint legal custody, with Father having IPTG parenting time and ordered to pay $55/wk in child support to Mother. Thereafter, the parties had relatively modest disputes about parenting time and small child support arrearages.

However, in 2018 and 2019, Father began to experience severe personal problems that resulted in the loss of his employment and increasing financial reliance on his family members. Father stopped paying his Court ordered child support in November 2018.

Just over a year later, Stepfather filed a petition to adopt Child. The petition asserted that Father's consent to the adoption was not required because Father had failed to pay child support for the 13 months prior. Within a few days, Father paid $2,000 towards his arrearage, which funds Father received from family.

Indiana Code § 31-19-9-8 provides that a parent's consent to an adoption is not required "if for a period of at least one (1) year the parent . . . knowingly fails to provide for the case and support of the child when able to do so as required by law or judicial decree." (Emphasis supplied.) The trial court found that Father's testimony concerning his struggles with mental health and his finances were credible, and that Stepfather had not met his burden of proving by clear and convincing evidence that Father had the ability to pay child support but failed without justifiable cause to do so for a period of at least a year. Stepfather appealed.

In reviewing the matter, the Court of Appeals construed Stepfather's appeal as essentially an invitation for it to reweigh the evidence that the trial court was presented. Reviewing the record in a light most favorable to the trial court's decision, there was evidence in the record to support a conclusion that Father's period of non-payment of support was neither willful nor without justification.

The trial court's order that Father's consent was required for Stepfather's adoption of Child to proceed was affirmed.

***In re: the Matter of the Adoption of I.B.*, 185 N.E.3d 428 (Ind. Ct. App. 2022)**

HELD: Trial court's order granting Stepfather's adoption of Child without Father's consent—based upon Father's failure to communicate with Child for a period of a year—was error where the lack of communication was due in part to Mother's efforts to thwart such communication.

FACTS AND PROCEDURAL HISTORY:

Child was born in 2009 to Mother and Father. Paternity was established, and Mother was awarded primary custody subject to Father's parenting time. Father was ordered to pay child support.

In 2017, Mother married Stepfather. In 2018, the trial court suspended Father's parenting time based upon Father's pending criminal charges and Father's noncompliance with prior orders for anger management counseling and drug testing.

In 2019, Stepfather petitioned to adopt Child. Father filed a motion contesting the adoption. The need for Father's consent to the adoption was set for hearing. Father testified that from July 2018 through June 2019, Father sent Mother multiple text messages asking to speak with Child, and that Father's attempts to call to speak with Child would consistently go directly to Mother's voicemail.

The trial court later issued an order that Father's consent to the adoption was not required based upon Father not communicating significantly with Child during the year leading up to Stepfather filing his petition to adopt. Later, the trial court granted the adoption. Father appealed.

The Court of Appeals noted that Indiana Code § 31-19-9-1 includes an exception for parental consent to an adoption where "for a period of at least one (1) year the parent . . . fails without justifiable cause to communicate significantly with the child when able to do so." On appeal, Father argued that he attempted to communicate with Child, but Mother thwarted his efforts to do so.

The Court of Appeals detailed the evidence in the record of Father's attempts to communicate and interact with Child that were thwarted by Mother. "It was Mother's responsibility as Child's custodial parent to take reasonable steps to encourage communication between Child and Father, regardless of her feelings about Father . . . ."
The trial court's conclusion that Father's consent to the adoption was not required was erroneous because of Mother's efforts to thwart Father's communication with Child. By extension, the trial court's order granting Stepfather's petition to adopt, without Father's consent, was reversed.

***B.A. v. D.D. and C.D.*, 189 N.E.3d 611 (Ind. Ct. App. 2022)**

HELD: In an adoption, the consent of a Father who executed a paternity affidavit for the Child is required, even if DNA testing later establishes that Father is not the biological father of Child.

HELD: The granting of summary judgment in favor of Adoptive Parents that Father's consent to the adoption was not required, in the absence of designated evidence that excluded Father as the *legal father* of Child, not just that excluded Father as the *biological father* of Child, was error.

FACTS AND PROCEDURAL HISTORY:

Mother gave birth to Child in 2018. Father stated that, within two weeks of Child's birth, he executed a paternity affidavit identifying himself as Child's father. Sometime thereafter, a CHINS proceeding resulted in Child being placed with Adoptive Parents in 2019, where Child has remained since.

Adoptive Parents filed a petition to adopt child. They acknowledged that Father was the "legal father" of Child but alleged that Father's consent to the adoption was not required because he is not the biological father of Child. Indeed, subsequent DNA testing requested by Adoptive Parents excluded Father from being Child's biological father.

Adoptive Parents then moved for summary judgment on the issue that Father's consent was not required to the adoption since he was not the biological father. The trial court granted summary judgment on the issue, from which Father appealed.

The Court of Appeals focused on the fact that, at the time the trial court ruled on the summary judgment, the trial court did not have any evidence before it that Father had executed a paternity affidavit; Father raised that fact only in his response to the Adoptive Parents' motion for

summary judgment, but Father's response was ultimately struck as being filed untimely and thus not part of the record.

The Court of Appeals concluded that, for purposes of summary judgment, it was not enough for Adoptive Parents to designate evidence that Father was excluded as Child's biological father; instead, they were required to designate evidence that Father had never established his paternity of Child by any of the means available, including by executing a paternity affidavit. Since the Adoptive Parents did not do so, the granting of summary judgment on the issue was inappropriate.

The Court also rejected Adoptive Parents' argument that the need for Father's consent to the adoption was dispensed with upon establishing that Father was not the biological father of Child. "[W]hether or not Father is Child's biological father does not, in itself, determine whether Father's consent is required." In other words, an adoption requires the consent of a parent who is not the biological father of a child, yet who has established paternity, such as by executing a paternity affidavit.

The trial court's granting of summary judgment in favor of Adoptive Parents, that Father's consent to the adoption was not required, was reversed and remanded for further proceedings.

E. Custody

***Ellenburg v. Kropp*, 175 N.E.3d 1208 (Ind. Ct. App. 2021)**

HELD: Trial court acted within its discretion when it modified custody to sole legal and primary physical custody to Father following Mother's alcohol-related criminal incidents.

FACTS AND PROCEDURAL HISTORY:

Mother and Father shared joint legal custody of their two children, ages 14 and 11, with Mother providing the primary residence for the children, subject to Father's "IPTG+" parenting time schedule. In 2020, Mother was involved in separate alcohol-related criminal incidents (public intoxication and DUI), following which Father filed a petition for modification of custody, parenting time, and child support. Father alleged Mother's alcohol issues to be a substantial change in circumstances.

Following a hearing, the trial court granted sole legal custody and primary physical custody of the children to Father. Mother appealed.

The Court of Appeals was unpersuaded by Mother's primary argument, which was that her legal problems did not constitute a substantial change because none of them directly affected the children. Mother did not contest any of the trial court's findings, which summarized Mother's alcohol-related legal problems, but also that made findings as to Mother's cohabitation with a repeat criminal offender, and Father's comparatively stable home life with his current wife.

The Court also rejected Mother's argument that the somewhat vague request in Father's original petition to modify—asking that the trial court "make a modification of current custody"—was

insufficient to place the issue of legal custody, as opposed to physical custody, before the trial court.

The trial court's order was affirmed.

In Re the Matter of: Paternity of W.M.T., 180 N.E.3d 290 (Ind. Ct. App. 2021)

HELD: The trial court did not err when it awarded custody of Child to a third party, Paternal Grandmother, instead of to Mother.

FACTS AND PROCEDURAL HISTORY:

Mother gave birth to Child in 2008. Mother and Father were never married. As a result of a paternity matter initiated by Father, Father received primary physical custody of Child, subject to Mother's parenting time. As a practical matter, Child was thereafter raised by Father's mother ("Paternal Grandmother").

Father died in 2019. After Father's death, litigation ensued between Mother and Paternal Grandmother concerning the custody of Child. At the conclusion of which, the trial court awarded sole legal and primary physical custody of Child to Paternal Grandmother, subject to Mother's parenting time per the Indiana Parenting Time Guidelines. Mother appealed.

The Court of Appeals noted that when a party other than the child's natural parent seeks custody, "a trial court must be satisfied by clear and convincing evidence that the best interests of the child require such a placement" (citing *In re: Guardianship of B.H.*). Further, the burden of proof always rests with the third party.

The trial court's order made detailed findings about the various factors set forth in Ind. Code 31-14-13-2 regarding the best interest of a child in a custody determination, including that Child had well-established roots living with Paternal Grandmother, Child's expressed desire to remain living with Paternal Grandmother, concerns about Mother's mental health, and Mother's admission to previously striking her child. Based upon this analysis, the trial court concluded that Paternal Grandmother had demonstrated, by clear and convincing evidence, that it was in Child's best interests to be in her custody. The Court of Appeals rejected Mother's argument that the trial court had evaluated its decision using a lower burden of proof than required by Indiana law in third party custody cases.

The trial court's order modifying custody of Child in favor of Paternal Grandmother was affirmed.

G.S., Jr. v. H.L., 181 N.E.3d 1040 (Ind. Ct. App. 2022)

HELD: Trial court did not abuse its discretion when it awarded custody of Child to Stepfather, over the objection of Father.

FACTS AND PROCEDURAL HISTORY:

Mother and Stepfather were married and had one child together, D.L. After their divorce, Mother and Father had Child together. Mother and Father's relationship ended, and Father's interactions with Child thereafter were limited.

Stepfather came to know Child during the parenting time exchanges for D.L. During Stepfather's parenting time periods, Stepfather began taking not only taking D.L, but Child, as well. Mother and Stepfather later reconciled and, for a time, Mother, Father, D.L., and Child all lived together as a family unit. When Mother later moved out, Child and D.L. remained with Stepfather.

DCS become involved with the family based upon drug allegations concerning Mother. As a result of subsequent proceedings, the trial court awarded legal and primary physical custody of Child to Stepfather, with Mother's support of that arrangement. Mother and Father were each awarded substantial parenting time and ordered to pay child support. Father appealed.

Under Indiana law, an award of custody to a third party, over the natural parent, may be made only when the trial court is satisfied by "clear and convincing evidence that the best interests of the child require such a placement." The Court of Appeals concluded that Stepfather's long history of providing stability for Child, and Father's relative acquiescence, supported the trial court's decision.

Father also argued on appeal that the trial court failed to engage in "best interests" analysis. The Court noted that the required best interests analysis does not require the trial court to engage in a point-by-point analysis of every factor listed in Ind. Code § 31-14-13-2. And, here, the trial court developed an adequately detailed and specific analysis of many of the factors listed therein.

The trial court did not abuse its discretion in awarding custody of Child to Stepfather, and the trial court's order was affirmed.

***McClendon v. Triplett*, 184 N.E.3d 1202 (Ind. Ct. App. 2022)**

HELD: The trial court's modification of custody from Mother to Father was affirmed.

FACTS AND PROCEDURAL HISTORY:

KT was born to Mother in 2005. Mother and Father had a child together, DT, in 2013 and they married that same year. Father subsequently adopted KT.

Mother and Father divorced in 2016. The parties shared legal custody of DT and KT, as well as equal parenting time. Nevertheless, Mother began a series of frequent residential relocations in South Carolina and North Carolina following the divorce. Father remained in Indiana, still exercising substantial parenting time because the children were homeschooled. In 2020, after approximately 6 moves, Mother ended up remarried and living with a new husband in North Carolina.

In late 2020, Father filed a petition to modify, seeking custody of both minor children. At Father's request, a GAL was appointed. Two days before the hearing, the GAL, on its own

initiative and under no Court order to do, submitted a report indicating that KT wished to live with Father, that DT wished to live with Mother, but ultimately recommending that Father have primary physical custody of both children, subject to Mother having "distance as a factor" parenting time.

Mother moved to continue the hearing based upon the late arrival of the GAL report; the trial court denied the continuance based upon the school year fast approaching and that Mother was not prejudiced by the timing of the GAL report.

At the hearing, Mother called 16-year-old KT as a witness. At the outset, KT stated that she preferred to testify without Mother and Father present, to which Mother objected. Overruling Mother's objection, the trial court permitted KT to be questioned and cross-examined by counsel without the parties present.

Following the hearing, the trial court granted Father's requested modification of custody based upon multiple substantial changes of circumstances. Father was awarded sole legal and primary physical custody of the children, subject to Mother having "distance as a factor" parenting time. Mother appealed.

On the issue of Mother's denied continuance, Mother relied heavily on Indiana Code § 31-17-2-12, which generally requires custody evaluations to be provided to the parties at least 10 days prior to a hearing. However, the Court of Appeals concluded that this statute did not apply here because the trial court never ordered the GAL to prepare a report; it was prepared and submitted at the GAL's initiative. Further, the Court of Appeals concluded that the late-arriving GAL report caused Mother no demonstrable prejudice, with Mother failing to cite any allegations in the report that Mother might have been able to refute with more time.

Mother also argued that her exclusion from the courtroom during KT's testimony violated Mother's due process rights. The Court of Appeals noted the statute that permits a trial court to permit in-camera witness testimony in custody cases. The Court of Appeals likened what occurred here to permissible in-camera testimony but with Mother having the added benefit of her counsel able to participate. Mother's due process was not violated, and the trial court did not abuse its discretion.

On the core issue of the medication of custody, the Court of Appeals found that the trial court's findings were supported evidence, and its conclusions supported by findings. Mother's appeal was an invitation to reweigh evidence, which the Court declined.

The trial court's order modifying custody was affirmed.

***Sanford v. Wilburn*, 185 N.E.3d 451 (Ind. Ct. App. 2022)**

HELD: Trial court erred when it modified custody to Mother only a short time after a previous judge, sitting in the same matter, modified custody to Father, and the subsequent modification back to Mother did not articulate a substantial change in the best interest factors since the previous modification.

FACTS AND PROCEDURAL HISTORY:

Child was born to Mother and Father in 2007. Mother and Father's marriage was dissolved in 2011, pursuant to which the parties shared joint legal custody, with Mother having primary physical custody.

In 2020, Father successfully petitioned to modify primary physical custody of Child to him. The trial court granted Father's petition based upon numerous articulated findings, including that Child was struggling in school, in part because Mother did not take Child to school; Mother changed Child's school without telling Father; Mother withheld parenting time from Father; and, that Father would provide a more stable environment.

Weeks later, Mother filed a motion for change of judge, followed by a petition to modify custody back to Mother. Several months later, the new judge heard the case, and granted Mother's requested change of primary physical custody back to Mother. The basis of the change back was essentially that Child was not happy and the transition to living primarily with Father was not going well. Father appealed.

The Court of Appeals noted the deference it affords to a trial court, especially in custody determinations. However, "we must reverse the trial court's most recent modification order because there is no evidence that there was a substantial change in circumstances justifying a change of custody." The Court of Appeals continued: "A parent cannot undo a custody modification order by waiting a few weeks and filing a new modification in front of a new judge. There must be substantially changed circumstances related to the statutory consideration for child custody when compared to those reflected in the previous modification order, and the second judge's findings here do not support such a conclusion."

The trial court's order modifying primary physical custody back to Mother was reversed.

***Hahn-Weisz v. Johnson*, 189 N.E.3d 1136 (Ind. Ct. App. 2022)**

HELD: The trial court erred when it granted Father custody of Child, when Child had been living with Grandmother for years. Grandmother had established by clear and convincing evidence that it was in Child's best interest to remain in her custody, overcoming the strong presumption in favor of a natural parent.

FACTS AND PROCEDURAL HISTORY:

Child was born to Father and Mother, who were married, in 2012. When the parties separated in 2015, Child stayed in Father's care. The following year, Child reported being molested in Father's home by her two half-brothers.

Child then began living with Grandmother. During Father and Mother's subsequent dissolution proceedings, Grandmother intervened. In 2020, as part of those proceedings, the parties agreed that Grandmother would have sole legal and physical custody of Child.

In 2021, Father filed a petition to modify custody. At a hearing, the trial court received testimony from Father and Grandmother. Later, the trial court issued an order that would transition custody to Father, with Mother having parenting time opportunities and Grandmother given visitation of one weekend per month. The trial court's order appeared to focus on the strong presumption in favor of natural parents, and that the brothers who had sexually abused Child previously no longer resided at Father's residence. Grandmother appealed.

The Court of Appeals reviewed the legal standards for placing custody of a child with a third party over a natural parent. Here, the trial court's order did not undertake a "best interests" analysis. Rather than remanding the matter, the Court of Appeals undertook its own analysis and concluded that Grandmother met her burden by presenting clear and convincing evidence that modification of custody to Father was not in Child's best interests.

The trial court's order was reversed.

***Hurst v. Smith et al.*, 2022 WL 3008608 (July 29, 2022)**

HELD: Trial court did not abuse its discretion in awarding custody of Child to Maternal Grandparents; however, it did abuse its discretion in awarding Father less than the Indiana Parenting Time Guidelines without accompanying findings and also when it issued a child support order without testimony or evidence regarding the parties' incomes.

FACTS AND PROCEDURAL HISTORY:

Child was born to Mother and Father, out of wedlock, in 2015. Father signed a paternity affidavit. From the outset, Maternal Grandparents played a significant role in Child's life, initially providing childcare while Mother and Father worked. But that arrangement for Maternal Grandparents evolved more into primary parenting due to Mother's drug use. From 2018 forward, Child made her primary residence with Maternal Grandparents. The involvement of Mother and Father in Child's life was limited.

Eventually, litigation resulted as Maternal Grandparents first sought a guardianship over Child and, later, a paternity action was initiated by Father, in which Maternal Grandparents intervened and requested custody of Child. Maternal Grandparents alleged that Child had lived with them for four years, that Father's involvement in Child's life was only sporadic, and that Father provided no financial support for Child.

Following a hearing, the trial court awarded custody of Child to Maternal Grandparents. It also ordered parenting time for Father on a schedule that was less than the IPTG schedule. Finally, the trial court ordered Father to pay child support of $141 per week to Maternal Grandparents. Father appealed.

On the custody determination, the Court of Appeals noted the presumption that exists in favor of a natural parent, which must be overcome by clear and convincing evidence. Then, if that presumption is overcome by the third party, the trial court engages in a best interests analysis. Here, the totality of the evidence supported the trial court's award of custody to Maternal Grandparents, including Father's long-time acquiescence to Child living with Maternal

Grandparents, Father playing very little role in Child's life for an extended period, and Father providing no financial support.

As to Father's parenting time, the trial court awarded Father a schedule what, while not vastly less than the IPTG schedule, was less. The Indiana Code and the Indiana Parenting Time Guidelines together provide that the IPTG serves as a minimum schedule, below which cannot be awarded in the absence of findings in support thereof. Since no findings accompanied the trial court's parenting time order, the matter was remanded for the trial court either to award Father parenting time consistent with the IPTG, or to enter findings in support of its downward deviation.

The trial court's child support calculation of $141 per week was apparently based upon evidence that Maternal Grandparents pay $110 per week for Child's pre-school tuition, and $31 per week for Child's health insurance. However, in Indiana, child support is based upon application of the Indiana Child Support Guidelines and its income shares model. The trial court received no testimony about any party's gross income, and no child support worksheets were submitted. Thus, the calculation was remanded for a calculation of child support pursuant to the Guidelines and the use of a child support worksheet.

F. Procedural Cases

***Bixler v. Delano*, 185 N.E.3d 875 (Ind. Ct. App. 2022)**

HELD: Trial court erred when, in Father's absence and without notice to him of the proceedings, it modified custody and parenting time in favor of Mother.

FACTS AND PROCEDURAL HISTORY:

In July 2021, Mother, acting *pro se*, filed a letter with the trial court that the trial court construed as a request to modify custody, parenting time, and child support. The trial court set the matter for hearing.

At the hearing, Mother appeared, still *pro se*, and Father did not appear. Attempts to serve Father with the applicable documents had been returned as undeliverable. Nevertheless, the trial court held the hearing, after which the trial court awarded Mother legal and physical custody of Child and ordered Father to pay child support of $46 per week.

Days later, counsel for Father filed an appearance and a motion for relief from judgment. At a subsequent hearing on Father's motion for relief from judgment, Father testified that he was living at a new address after an eviction and that he never received copies of Mother's modification documents. Following the hearing, the trial court denied Father's motion for relief from judgment, from which Father appealed.

The Court of Appeals discussed the unique aspects of child custody proceedings and the related substantial due process considerations. Importantly, there had been evidence presented that Mother had some idea of possible locations where Father could be living, but no efforts were made to pursue those in serving notice to Father.

The trial court's denial of Father's motion for relief from judgment was reversed and remanded, with instructions for the trial court to hold an evidentiary hearing on Mother's original request to modify custody, parenting time, and child support.

***Cruz v. Cruz*, 186 N.E.3d 152 (Ind. Ct. App. 2022)**

HELD: A petition for annulment is a distinct cause of action from a petition for dissolution. Therefore, if a petition for annulment is filed after a petition for dissolution, the annulment petition must be served upon the Respondent by summons as provided in Trial Rules 4 and 5. Because that did not occur here, the trial court's granting of the annulment was reversed.

FACTS AND PROCEDURAL HISTORY:

Husband and Wife married in 2005 and separated in 2018. Husband did not see or speak to Wife again before she filed a petition for dissolution in April 2019. Wife served the petition by publication, asserting that Husband was living in an unknown location in Guadalajara, Mexico.

Several months later, Wife received information that Husband's previous marriage had not been dissolved at the time of the parties' marriage. In the dissolution action, Wife filed a petition for annulment. The annulment petition was not served upon Husband as a new cause of action.

At a subsequent hearing at which Husband did not appear, Wife presented untranslated documents from Mexico, purporting to show that Husband's prior divorce had not been granted at the time of the marriage. Presumably based upon this, the trial court granted Wife's request for an annulment.

Nine months later, Husband filed a Trial Rule 60(B)(6) motion to set aside the annulment, reciting that he had never been served. Husband objected to the annulment out of fear that the allegations of fraud therein could jeopardize his immigration status. After a hearing, the trial court agreed with Wife that Wife's annulment petition was merely an amendment to her dissolution petition, and thus new service was not required. Husband appealed.

The Court of Appeals outlined that an annulment proceeding and a dissolution proceeding are two distinct causes of action. Therefore, proper Trial Rule 4 service on Husband was required for the annulment petition. "We conclude that the trial court never obtained personal jurisdiction over Husband as to the annulment petition because he was not served with it as required by Indiana Trial Rules 4 and 5. Given this lack of jurisdiction, the trial erred in entering a decree of annulment."

The trial court's decree of annulment was reversed, and the matter remanded for further proceedings. In *dicta*, the Court suggested that, given the facts alleged by Wife, Wife should have sought a declaratory action that the marriage was void due to bigamy instead of seeking an annulment.

***In re: Paternity of A.M.*, 189 N.E.3d 619 (Ind. Ct. App. 2022)**

HELD: A divided panel ruled that the trial court did not abuse its discretion when it denied Mother's motion for a continuance of a hearing on Mother's relocation, and Father's related petition to modify custody, where the trial court thereafter modified custody of Child in favor of Father.

FACTS AND PROCEDURAL HISTORY:

Mother gave birth to Child in 2012. Mother and Father executed a paternity affidavit. Neither party thereafter sought any formal orders for parenting time or child support. Instead, the parties arranged an informal parenting time schedule.

In early 2021, Mother informed Father that she intended to relocate to Dallas with her new husband ("Stepfather"). In response, Father filed a petition to establish paternity, parenting time, and child support. Father's petition expressed considerable concerns about past instances of alleged domestic violence involving Stepfather.

Mother's counsel withdrew from the case in the days before a final hearing. There was dispute over when Mother received notice from her counsel of the withdrawal. Mother's request for a continuance to acquire new counsel was denied, the hearing took place with Mother appearing pro se, after which the trial court granted primary physical custody of Child to Father, awarded Mother IPTG parenting time, and ordered Mother to pay child support to Father. Mother appealed.

A majority of the Court of Appeals panel affirmed the trial court's denial of Mother's request for a continuance, relying on the venerable rule that a trial court has broad discretion to grant or deny a continuance.

Judge Brown dissented, noting the unique Constitutional facets that are implicated by parenting and custody determinations, that the continuance was denied at a critical time in the case (Mother had just lost her counsel), and a delay would not have substantially prejudiced Father.

G. Grandparent Visitation

***In the Matter of the Adoption of R.D.H. and R.K.H*, 181 N.E.3d 983 (Ind. Ct. App. 2021)**

HELD: Trial court erred when it awarded visitation rights to Maternal Grandmother nearly four years after Stepmother adopted the Children. Indiana law provides that only grandparent visitation rights that are established prior to an adoption will survive the adoption.

FACTS AND PROCEDURAL HISTORY:

Father and Birth Mother were never married. In 2014, Father gained custody of Children as part of a CHINS proceeding arising from Birth Mother's drug problems. Two years later, Father married Adoptive Mother, who promptly filed petitions to adopt the Children.

In 2017, the adoption petitions were granted. Maternal Grandmother participated in the adoption proceedings. Contact between Children and Maternal Grandmother was discussed during those proceedings, but it was never part of the final adoption order, and no one appealed the adoption order.

In early 2020, Maternal Grandmother asked the trial court to assist with establishing contact for her with the Children. In 2021, the trial court ordered monthly visitation between Maternal Grandmother and the Children. The Children were then 8 years old and had not seen Maternal Grandmother for over 6 years. The trial court stayed enforcement of its visitation order pending this appeal by Father and Adoptive Mother.

The Court of Appeals reviewed the various statutory bases for establishing postadoption contact, which differs for birth parents, birth siblings, and grandparents. *See Ind. Code* §§ 31-19-16-1, 31-19-16.5-1, and 31-17-5-1. Critically, Indiana law provides that only grandparent visitation rights that are established prior to an adoption will survive the adoption. Because no grandparent visitation rights were established in this case prior to the adoption decree, it was error for the trial court to issue a visitation order subsequently.

For similar reasons, the Court of Appeals also rejected an argument that a visitation order could have instead been premised on the Children visiting with their birth siblings.

The trial court's postadoption visitation order was reversed.

***Shelton v. Hayes*, 190 N.E.3d 951 (Ind. Ct. App. 2022)**

HELD: Because neither the Grandparent Visitation Act nor the statute authorizing the appointment of a GAL provides for the appointment of a GAL in a grandparent visitation proceeding, a grandparent cannot request, and a trial court cannot appoint, a GAL over the objection of a parent.

HELD: Where a GAL was erroneously appointed, it was appropriate to remand the matter to the trial court to make a grandparent visitation decision, disregarding the GAL's testimony and report.

FACTS AND PROCEDURAL HISTORY:

Mother was married to, and had Child with, Grandfather's son. In 2019, Grandfather's son passed away. Grandfather was very involved with Child, as he and Mother lived at Grandfather's residence. Mother would eventually become involved in a new relationship, and she and Child moved out of Grandfather's residence.

In September 2020, Grandfather filed a petition for joint custody of Child. That resulted in Mother and Grandfather reaching a mediated agreement that provided for Grandfather to have visitation with Child four times per month, one of which would be a full weekend. The trial court accepted the agreement and entered it as an order.

The following year, Grandfather filed a contempt petition, seeking Mother's compliance with the visitation order; in response, Mother filed a petition to modify, alleging that a substantial change in circumstances rendered Grandfather's visitation order no longer in Child's best interests.

Grandfather petitioned for the appointment of a GAL, which was granted over Mother's objection. The GAL ultimately concluded that modifying Grandfather's visitation order was not in Child's best interests, and the GAL subsequently testified as to details underlying that conclusion at the hearing. Following the hearing, the trial court denied Mother's petition to modify the grandparent visitation order, and held Mother in contempt for not complying with it previously. Mother appealed.

Relying on the applicable statutes and prior case law, the Court of Appeals concluded that the trial court erred when it granted Grandfather's GAL petition over Mother's objection. "[T]he law currently provides no authority for grandparents to request visitation evaluations[.]" The Court of Appeals concluded that, because the trial court's order made it clear that it relied upon the GAL considerably, the appropriate remedy was remand, and for the trial court to reweigh its decision in disregard of the GAL report and testimony.

The denial of Mother's petition to modify the grandparent visitation order was reversed and remanded for further proceedings.

H. Family Law Collections

Holland v. Ketcham, 181 N.E.3d 1030 (Ind. Ct. App. 2021)

Pursuant to the parties' 2018 Decree, Wife owed Husband a property settlement payment of $200,000. As the 90-day payment deadline approached, Wife used cash assets awarded to her under the Decree to purchase real estate for $200,000, and took title to the property in joint name with her Boyfriend who did not contribute to the purchase. Wife and Boyfriend later married, and the property was transferred into joint tenancy by the entireties.

Husband apparently only later became aware of these transactions, and then sued Wife and Boyfriend under Indiana's Uniform Fraudulent Transfer Act. The trial court concluded that Husband had no claim against Boyfriend because he was not a debtor to Husband. As to Husband's claim against Wife, the trial court concluded that Husband had failed to meet his burden of establishing an intent to defraud. Husband appealed.

The Court of Appeals reviewed Indiana's adoption of the Uniform Fraudulent Transfer Act and its guidance for making a determination of fraudulent intent. "Considering the force and effect of the factors as a whole, we hold that the evidentiary submissions [to the trial court] demonstrate a pattern of fraudulent intent by [Wife]. We therefore reverse the trial court's judgment . . . ."

As to the trial court's denial of Husband's claim against Boyfriend, that was also reversed. The Court concluded that Husband had established a civil conspiracy between Wife and Boyfriend to commit a fraudulent transfer.

The matter was remanded to the trial court with instructions to issue an immediate injunction to prevent Wife and Boyfriend from transferring the real estate in question while the trial court fashions an appropriate remedy for the fraudulent transfer.

I. Family Law Attorney Disqualification Case

***Duff v. Rockey*, 180 N.E.3d 954 (Ind. Ct. App. 2022)**

HELD: An attorney who is disqualified from participating in one post-decree matter is not necessarily disqualified from participating in a subsequent post-decree matter, if the basis for the original disqualification no longer exists.

FACTS AND PROCEDURAL HISTORY:

Father and Mother divorced in 2010, with five children. Ten years later, Mother filed a contempt against Father on a parenting time issue.

Attorney Duff, who was married to Mother from 2013-2019, entered an appearance on Mother's behalf. Father sought to disqualify Attorney Duff's participation on the basis that he would likely be a necessary witness in the parenting time contempt dispute. The trial court agreed, and disqualified Attorney Duff. The parenting time dispute was subsequently resolved by agreement and without a hearing.

Eight months later, Father filed a petition against Mother seeking the recovery of alleged child support overpayments. Attorney Duff again filed an appearance on behalf of Mother. Father sought Attorney Duff's disqualification on the sole basis that Attorney Duff had been disqualified from the case previously. The trial court agreed with Father, from which Mother and Attorney Duff pursued an interlocutory appeal.

The Court of Appeals focused on the fact that the basis for Attorney Duff's original disqualification was that Duff was a likely witness in the parenting time dispute. There was no assertion by Father that Duff was a likely witness in the child support overpayment matter. Therefore, the basis for disqualifying Attorney Duff no longer existed, and the trial court erred in disqualifying him from the second post-decree matter.

The case was reversed and remanded.

J. Annulment

***Estate of Estridge v. Lana Ann Taylor*, 187 N.E.3d 275 (Ind. Ct. App. 2022)**

HELD: Trial court did not abuse its discretion in denying an Estate's petition to annul a marriage between the Decedent and Wife, concluding that evidence supported the trial court's findings that the Decedent was mentally competent at the time the marriage was solemnized.

FACTS AND PROCEDURAL HISTORY:

Husband and Wife first met working together as firefighters / EMT-paramedics in 2011. Husband was diagnosed with cancer in 2015, which information he shared with Wife. The parties began dating the following year. The parties became engaged in 2018, but no wedding date was set due to Husband's then-upcoming cancer surgery. By 2019, Husband's cancer had become so advanced that he was advised to stop treatment and pursue palliative care.

Husband was discharged wearing a fentanyl patch. He left the hospital with several firefighter friends, including Wife. On the ride home, Husband conversed with others in the vehicle and looked at photographs. At some point during the ride, Wife asked Husband if he still wanted to get married, and he replied affirmatively. The parties stopped at a Firefighters Credit Union, where a notary witnesses Husband's application for a marriage license. Husband also signed a beneficiary designation of his firefighter's pension, listing Wife as his spousal beneficiary.

Late that afternoon, the parties went to the City-County building, where a small ceremony was officiated by the firefighter Chief. Husband died four days later.

Husband's Estate quickly filed a petition to annul the marriage, citing fraud and lack of capacity by Husband. A bench trial followed, at which expert testimony was presented by both parties. Wife's expert testified that, after reviewing medical records, deposition testimony describing the drive home from the hospital, as well as the video recording of the wedding ceremony, that Husband was competent at the time of the ceremony and understood the nature of the marriage contract.

The trial court denied the Estate's petition for annulment, from which the Estate appealed.

The Court of Appeals noted that the burden rests on the challenger to prove that the party was incapable of understanding the marriage contract. "The presumption in favor of the validity of a marriage…is one of the strongest known." Finding that the evidence in the record supported the trial court's decision, the denial of the petition to annul was affirmed.

K. Hague Convention

Cole v. Cole, 187 N.E.3d 957 (Ind. Ct. App. 2022)

HELD: Trial court erred when it found, under the Hague Convention, that the children's "habitual residency" was in Germany, rather than the United States, because the evidence established that the parties and their children had moved from Germany to the United States in a serious way, with an intent to stay in the United States indefinitely and perhaps permanently.

FACTS AND PROCEDURAL HISTORY:

Father is a British citizen. Mother is a United States citizen. They married in 2016 and had two children, who are United States citizens. The family lived together in Germany from 2017 to 2020. At some point, the parties agreed that the family would take an "extended vacation" to the United States to develop a better understanding of the prospect of moving there, initially living with Mother's mother in South Bend beginning in late 2020.

The family's relocation involved terminating their lease in Germany, moving all of their investments to the United States, and moving most or all of their personal property.

In early 2021, the parties began to disagree about whether to return to Germany, with Father wishing to do so, but Mother not. Father did return to Germany alone and, in June 2021, he filed a petition for dissolution of marriage in Germany while Mother filed a petition for dissolution of marriage in Indiana.

Father later filed, in the Indiana court, a petition for the return of the children to Germany pursuant to the Hague Convention. The Indiana trial court subsequently concluded that Germany was the children's place of "habitual residence" under the Hague Convention, and that Mother had wrongfully withheld them. That judgment was stayed as Mother pursued this appeal.

The Court of Appeals' opinion developed a brief summary of the Hague Convention and its operative mechanics. Central thereto is the undefined concept of a child's "habitual residence." After developing that analysis, the Court of Appeals concluded that the children's habitual residence had become South Bend, Indiana. "The Children moved to South Bend in December 2020 by agreement of both Mother and Father. While Mother and Father may have not seen eye-to-eye with respect to the circumstances under which the family might return to Germany, the facts are clear that Mother and Father both saw the family's move to the United States as indefinite and possibly permanent."

Because the children's habitual residence was South Bend, Indiana, and not Germany, the trial court's judgment was reversed.

L. Decree Non-Disparagement Clause

***Israel v. Israel*, 189 N.E.3d 170 (Ind. Ct. App. 2022)**

HELD: A divorce court may not impose upon parents a Non-Disparagement Clause that extends beyond ordering the parents not to disparage each other in front of the parties' children. The provision in this case overstepped that limitation by also proscribing disparagement of each other to "friends, family members, doctors, teachers…." etc.

FACTS AND PROCEDURAL HISTORY:

The parties married in 2012, had one child together, and Wife filed a petition for dissolution in 2019. Following a contested final hearing, the trial court issued orders for custody, parenting time, and property division. The trial court's Decree also included a Non-Disparagement Clause as follows:

> *The parties shall refrain from making disparaging comments about the other in writing or conversation to or in the presence of [Child], friends, family members, doctors, teachers, associated parties, co-workers, employers, the parenting coordinator, media, the press, or anyone. Disparaging remarks include[e], but are not limited to, negative statements, criticisms, critiques, insults[,] or other defamatory comments. The parties shall not say or do anything or allow a third party to say or do anything about the other*

party in [Child's] presence that may estrange [Child] from the other party or impair his regard for the other party. The parties shall not involve [Child] in matters that are adult matters and that solely involve the parents or the other parent.

Father's appeal included a challenge of the Non-Disparagement Clause.

The Court of Appeals noted the First Amendment and prior restraint implications of the Decree's Non-Disparagement Clause. To be constitutionally valid, prior restraints on speech must further a compelling interest. The Court concluded, based upon precedent, that there is a compelling interest in protecting children from being exposed to disparagement between their parents. However, the remaining breadth of this Decree's Non-Disparagement Clause, involving disparagement outside the presence of the child, "is an unconstitutional prior restraint and must be stricken."

The matter was remanded to the trial court to modify the Decree's Non-Disparagement Clause accordingly.

The opinion was silent on whether an order that contained a broad Non-Disparagement Clause that was *agreed to by both parties* could be enforced by the trial court.

M. Change of Gender Marker

***In the Matter of the Change of Gender of O.J.G.S*, 187 N.E.3d 324 (Ind. Ct. App. 2022)**

HELD: In a three-opinion, divided decision, the Court of Appeals holds that Indiana statute does not confer upon Indiana courts the authority to change the gender marker on a birth certificate. The decision leaves the Indiana Court of Appeals internally divided over the resolution of this issue.

FACTS AND PROCEDURAL HISTORY:

Child was born in 2013 and was assigned male at birth, which was reflected on Child's birth certificate. However, as Child grew up, Child began to increasingly identify as female. Child was treated as female at home, and, after the family sought the counsel of a licensed clinical psychologist, the parents began to allow Child to present as female in every aspect of life. While Child's school was generally supportive of Child, the school nevertheless required Child to be listed as male in school records due to the assignment on Child's birth certificate. This prompted Mother, in 2020, to file a petition to change the gender marker on Child's birth certificate.

Mother's petition was summarily denied, the appeal from which was consolidated into the 2021 *Matter of A.B.* case. Therein, a two-judge majority held, as a matter of first impression, that a parent has the authority to petition for a change of gender marker on a child's birth certificate and, further, the standard to be applied to evaluation of the proposed change was best interests of the child. Judge Pyle dissented in that case on the basis that Indiana statute does not confer such an authority upon Indiana trial courts.

On remand, Mother's petition was again denied, this time on the basis that the trial court could not find that the change would be in Child's best interests. Mother again appealed.

On this second appeal, Mother argued that the trial court abused its discretion because the evidence presented overwhelmingly established that Child's best interests would be served by a change of the gender marker. Judge Altice's opinion did not get to an evaluation of Mother's arguments on the merits, instead short-circuiting Mother's appeal by adopting a position similar to Judge Pyle's dissent in *Matter of A.B.*, that the trial court lacked any authority to change birth certificate gender markers, regardless of the evidence presented by Mother. He concluded: "I urge the [Indiana] Supreme Court to speak on this matter, which has divided this court and resulted, unfortunately, in unpredictability for petitioners who earnestly desire a remedy."

Judge Bailey concurred in result but wrote separately. He agreed that Indiana courts lacked the statutory authority to change birth certificate gender markers. However, he wrote separately to articulate his opinion that there should be an equitable path to remedy harm in these circumstances but, lacking a statutory framework to evaluate a child's best interests, an equitable action cannot accomplish the desired objective.

Finally, Judge Mathias, dissenting, wrote that, while a statutory framework for addressing these cases would be ideal, Indiana trial courts nevertheless have a "well-established constitutional and equitable power . . . to remedy a wrong *in the absence of a statutory authority to the contrary*." Further, he wrote that, in the instant case, the trial court's denial of the change of gender marker petition was wholly unsupported by the record and, thus, clearly erroneous. He would have reversed the trial court's order and remanded the case with instructions to grant Mother's petition.

N. Decree Enforcement

Dennis v. Dennis, 189 N.E.3d 1115 (Ind. Ct. App. 2022)

HELD: A trial court has continuing jurisdiction to complete the implementation of the division of property as ordered in the final decree, even where one of the parties has died since the decree was issued.

FACTS AND PROCEDURAL HISTORY:

Husband and Wife divorced in 2007. The Decree incorporated the parties' final settlement agreement. The Decree provided that Wife would pay the sum of approximately $20,000 to Husband and, upon doing so, Husband would quitclaim his interest in the former marital residence to Wife.

The record indicated that Wife completed the payment to Husband by 2010 but, for reasons not revealed, Husband never quitclaimed his interest in the former marital residence to Wife. Husband died in 2021.

In 2022, Wife filed a motion in the divorce court seeking to appoint a Commissioner and/or declare the lien held by Husband to be satisfied and released, all so as to effectuate the re-titling

of the former marital residence into Wife's name alone. The trial court, relying upon the general rule that "a court's authority in a divorce proceeding terminates with the death of one of the parties," denied Wife's motion. Wife appealed.

The Court of Appeals reviewed the general jurisdictional rules that apply in divorce proceedings. Importantly, it also noted the numerous exceptions to those rules. The 2017 *Edwards* case, for example, involved a decree whereby the husband died before his retirement could be transferred to the wife as contemplated by the decree. There, like the instant case, the trial court concluded it lost jurisdiction over the case with the husband's death. On appeal, the Indiana Court of Appeals disagreed, holding that the trial court retained continuing jurisdiction and the "authority to complete the implementation of the division of property as ordered in the final decree."

Relying largely on *Edwards*, the Court of Appeals reversed the trial court's order that it lacked jurisdiction to hear Wife's petition and remanded the matter for further proceedings.

STATUTE AND RULE CHANGES:

On October 5, 2021, the Indiana Supreme Court issued an order amending the Indiana Parenting Time Guidelines. By the terms of the order, the changes became effective on January 1, 2022. The main changes included:

- A child's communication with their parent may not be recorded;
- Discouraging the use of a police station as a place to transfer children;
- A parent may restrict access from a telephone, tablet, or other device used to communicate with the other parent as punishment for a child, but such punishment shall not prevent communications with the other parent;
- A new section on Shared Parenting and the principles of how to put it into practice;
- Parenting time during a public health emergency;
- Changes aimed to reduce the potential for third-party conflict when children are dropped off/picked up between homes;
- Clarification regarding make-up time issues;
- Addition of factors which determine "regular care responsibilities";
- Uniformity of pick-up and drop-off times on holidays and birthdays;
- Transportation to and from extracurricular activities;
- Text messaging as a common type of communication;
- Immunity of parenting coordinators; and
- Removal of the section on parallel parenting

Section Six

Real Estate Law Update

Mary A. Slade
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Endpoint
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Section Six

Real Estate Law Update……...Mary A. Slade

Mary Slade has over 25 years of Indiana real estate transaction and litigation experience. Mary began her career in real estate as an assistant regional counsel for a national title underwriter where she oversaw transaction underwriting, claims, and auditing in six states including Indiana. As regional counsel for another national title underwriter, and as a national underwriter for a title company and a national title insurance carrier, her real estate experience continues from her home base in Indiana with a national presence for simple, complex, and digital transactions. Mary's private practice concentrated on real estate litigation and commercial transactions. Mary graduated from Butler University with a Bachelor of Arts in International Studies and received her Juris Doctorate from Indiana University School of Law – Indianapolis. She has served as the 2018-2022 Chair of the Real Property Committee of the Probate, Trust, & Real Property Section of the Indiana State Bar Association ("PTRP") and previously served as the 2017-2018 PTRP Chair. Her volunteer work includes co-editor of the Indiana Land Title Association's Real Estate Handbook and the PTRP's newsletter. After her in-house counsel work with a national underwriter, she currently serves as the national underwriter and title operations manager for Endpoint covering commercial, multi-site, and residential transactions in Indiana and throughout this great country.

2021-2022 Real Estate Law Update

By

Mary A. Slade

Endpoint[1]

I. Ownership Dispute Cases

***Pulliam v. Peconge (In re Estate of Blair)*, 177 N.E.3d 84 (Ind. Ct. App. 2021)**

The case provides extensive details of Larry's medical concerns, mental condition, and efforts in estate planning by Larry and his family members, including Larry's children, sibling, stepchildren, in-laws, and grandchildren. "Once Larry was discharged from the hospital on August 16, 2019, his granddaughter Samantha became his full-time caretaker." "[O]n August 27, 2019, Samantha, Laura [Larry's daughter], and Connie Ogden, Larry's sister… had Larry sign a purchase agreement in which he agreed to sell his home to Samantha for $0.00." This agreement was signed after failed attempt to modify Larry's 2010 will and to convey his residence by using a power of attorney. On September 5, 2019, Larry executed a quitclaim deed conveying his residence to Samantha and fell into a coma on September 6, 2019. After Larry passed away on September 11, 2019, two of Larry's devisees under Larry's 2010 will petitioned the Allen Superior Court in 2020 to determine whether the quitclaim deed conveyance was invalid and whether the residence should be administered as an estate asset. After concluding that Larry was unduly influenced by his

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granddaughter and Larry did not have the mental capacity to convey his residence, the trial court ordered the residence returned to Larry's estate for disposition.

In her appeal, Samantha alleged that medical records, the deposition of Larry's attorney were inadmissible due to hearsay statements, unfounded expert opinions, and attorney-client privilege. However, the Indiana Court of Appeals found that Samantha's filings with the trial court did not preserve these issues for appellate review. In reviewing Samantha's claims of error with the finding of undue influence and of an abuse of discretion for ordering the residence's transfer, the Indiana Court of Appeals examined the type of undue influence determined by the trial court: Samantha's and Larry's confidential relationship as a matter of law when the dominant party in the relationship is a younger family member. "Undue influence is the exercise of control by one person over another person to destroy that person's free agency and compel the person to do something he or she would have otherwise not done." The Court of Appeals disclosed that Samantha failed to present clear and convincing evidence as to the good faith element for the following elements to rebut undue influence: "1) she acted in good faith; 2) she did not exploit position of trust she had with Larry; and 3) the transaction was fair and equitable" with a zero dollar conveyance for a residence with "a market value of $131,300.00". In affirming the trial court's decision, the Indiana Court of Appeals also related how the trial court reasonably determined Larry's incompetence contributed to the failure to meet the following elements among the many elements of a gift inter vivos: "1) The donor must be competent to contract; and 2) there must be freedom of will.

***Cutter v. Jurus*, 177 N.E.3d 492 (Ind. Ct. App. 2021)**

Mr. and Mrs. Jurus purchased their 10-acre residential property in 2001. They later rented a smaller house on the land to Cutter in 2007. The couple decided to sell the property in 2013 to Bailey with a written agreement providing for installment payments of the $155,000.00 total purchase price: Cutter signed that agreement solely as a witness. The couple and Bailey also contemporaneously signed an addendum to that agreement permitting the couple to live on the land "for their natural lifetime" and to "make all updates, repairs, pay utilities, insurance, taxes [sic] for the Big White House on the property." That addendum also provided for Bailey to "take control of leases on the property." After Mr. Jurus' death in 2014, Ms. Jurus and Bailey executed and recorded a new land contract for sale of the 10 acres to Bailey with Ms. Jurus Cutter having "a life estate in the real estate upon which is erected the main residence, together with ingress and egress." Jurus signed and recorded warranty deed in 2015 to convey the land to Bailey due to the fulfilled land contract but the warranty deed did not disclose a life estate interest in favor of Ms. Jurus. During his submissions to the county board of zoning appeals for a 2016 variance, Bailey described a "life lease" related to the white house where the current resident (Juris) would reside until she moved to Arizona or passed away. Cutter continued to live on the property as Bailey's tenant or guest until Bailey's death in 2018: Cutter as personal representative and beneficiary under Bailey's probated will, conveyed the 10-acre property in 2019 to Cutter without reference to any life estate. After discovering the omitted life estate, Ms. Jurus requested the court to reform the 2015 and 2019 deeds to include her life estate. The trial court awarded Ms. Jurus a life estate interest in and an

access right to the White House. In terms of the equitable doctrine of reformation of contracts, "[e]quity will reform a written contract between the parties whenever, through mutual mistake, or mistake of one of the parties accompanied by the fraud of the other, it does not, as reduced to writing, correctly express the agreement of the parties…[:] reformation is available to remedy only mistakes of fact, not mistakes of law." Cutter alleges that the doctrine of merger and the parole evidence rule prevent the reformation of the 2015 warranty deed. The Indiana Court of Appeals affirmed the trial court's decision referencing that the doctrine of merger is inapplicable to subvert a deed reformation due to a deed drafting mistake that does not disclose the parties' pre-drafting intentions. Cutter's appellate laches claim that Bailey's death should bar equitable reformation was not alleged at the trial level. The agreement, its addendum, the land contract, and Bailey's representations before the county's board of zoning appeal met the following elements of reformation due to mutual mistake for the trial court's ordered deed:

> (1) the true intentions of the parties to an instrument;
> (2) that a mistake was made;
> (3) that the mistake was mutual; [and]
> (4) and that the instrument does not reflect the true intentions of the parties.

***Thalls v. Draving*, 182 N.E.3d 260 (Ind. Ct. App. 2022)**

The Thalls Trustee parcel, and the Conrad parcel are adjacent to Big Chapman Lake and across the street from the Draying Trustee parcel. The Draving trustee's April 22, 2019 lawsuit alleged quiet title, adverse possession and prescriptive easement to a six foot walkway between the Thalls Trustee parcel and the Conrad parcel. After a two-day trial in February 2021, the trial court's 19-page May 18, 2021 judgment disclosed:

1.) the Draving family's use, maintenance and improvement of the walkway to the lake's edge since 1959;
2.) The Dravings' seasonal placement of a pier at the end of the walk in 1968 without objection until the Thalls, as new owners in 2019, objected to the pier;
3.) Fee simple title to the walkway by adverse possession in favor of the Draving Trustee existed from the public road to the shoreline of Big Chapman Lake; and
4.) If a subsequent action eliminated the adverse possession of the walkway, a prescriptive easement over the walkway existed in favor of Draving Trustee.

In its appeal, the Thalls Trustee alleged the walkway was the subject of a common law dedication given the developers intent with the depiction of the walkways on the plat and omission of the walkway as a taxable parcel. Additionally, the Thall Trustee alleged the unreasonableness of any belief as to the payment of taxes by Draving as well as the inability of a non-riparian owner to lawfully place a pier. In affirming the trial court's decision, the Indiana Court of Appeals examined the trial court's findings that the original and three addition plats were not signed or accepted by the county commissioners and only referenced one public use dedication provision: the original plat labeled a "Main Street" with the roadway having a "side of the depiction, provid[ing] '[a] Public Road.'" The title evidence presented to the trial court also disclosed two 1945 deeds where the walkway land was conveyed with other land. The trial court's record disclosed how Draving for approximately 60 years had control, intent, notice and duration for ten years with a reasonable good faith belief of paid taxes. *Fraley v. Minger*, 829 N.E.2d 476, 486 (Ind. 2005); *Morgan v. White*, 56 N.E.3d 109, 115-116 (Ind. Ct. App. 2016*)*; and Ind. Code § 32-21-7-1.

II. Easement Case

***Town of Linden v. Birge,* 187 N.E.3d 918 (Ind. Ct. App. 2022)**

A 124-year-old regulated drain, the James Hose Drain, traverses an area of Montgomery County, Indiana to carry water northerly from the higher elevated areas south of the town of Linden through town and the lower elevation of the Birges' land (including a pre-existing drainage easement on a portion of the Birges' property) to the Stoddard Ditch located north of Birges' land. The town had no storm sewer system. After the agricultural infrastructure of the drain could not handle the area's rainwater after 1927 and 2006 efforts, the county utilized a 2009 grant to retain an engineering company that, ultimately, developed three proposed plans to improve the James Hose Drain. The plan with the least cost and land acquisition needs was approved with its $730,000.00 estimated price tag: the town subsequently obtained a $600,000.00 grant in 2009 for the project. After a September 2011 drainage board hearing, the board ordered the drainage improvements. The Birges did not object at the hearing which also created improvement assessments: the Birges' land was assessed $7,679.23 for improvements without any assessed damages. The town chose a $605,821.00 bid in January 2012 and planned for a new 48-inch diameter drainpipe (as opposed to the board approved plan's 42-inch-wide pipe) south of where the new split of two 32-inch diameter drainpipes (as opposed to the board approved plan's two 30-inch width pipes) and a grated manhole or inlet on the Birges' land. After complaining about the grated manhole during construction, the Birges sent a formal notice in March 2012 disagreeing with the construction project on their property and the grated manhole configuration. As part of the notice, the Birges wanted the manholes removed but also

suggested that any manholes be interred to prevent interference with the farming on the Birges' land. After the March 2012 board concluded on the board's compliance with legal requirements for the project and viewed the Birges' objection as untimely, the drain project was completed at the end of 2012. The farming on the Birges' land was affected by multiple 5-7 days of flooding in low areas. The Birges refused to pay the drainage assessment and filed an action alleging inverse condemnation. In *Birge v. Town of Linden*, 57 N.E.3d 839 (Ind. Ct. App. 2016), the Indiana Court of Appeals determined the town had not substantiated a discretionary-function immunity to the Birges' claims. "On June 22, 2021, the trial court issued a judgment and order finding that the improvements to the Drain had caused repeated flooding on the [Birges' land, and the] benefit to [the Birges'] property was calculated by the Defendants using a "[b]efore" condition that never existed: a functioning 18" drain [condition] through the Town and through Plaintiffs' property." The trial court's interlocutory order described the taking as follows:

> The category of taking that applies to this case is "a permanent physical invasion of . . . property." The design and reconstruction of the James Hose Drain uses Plaintiffs' property as the overflow basin for any heavy rain. This is a "permanent physical invasion" of Plaintiffs' property and therefore a taking.

The Indiana Court of Appeals remanded the case to the trial court to apply a different set of factors to evaluate whether a taking exists from the drain construction for causing intermittent flooding of the Birges' land. The defendants alleged that the drain's impact on the Birges' property was not a compensable taking. Through its extensive evaluation of the following inverse condemnation's factors, the Indiana Court of Appeals decided that the trial court applied an erroneous review of the land's damage to be a "permanent physical invasion" as opposed to frequent periodic flooding:

(1) a taking or damaging;

(2) of private property;
(3) for public use;
(4) without just compensation being paid; and
(5) by a governmental entity that has not instituted formal proceedings.

The taking evaluation should not factor a highest and best use of the land. On remand, the trial court is to consider the standards in the following cases for evaluating whether flooding outside the drainage easement area (including the rights within 75 feet of a regulated drain under Ind. Code § 36-9-27-33) is a taking of a permanent physical invasion ("however minor"), a regulation depriving economic beneficial property use, or a regulatory taking outside the invasion and economic deprivation taking types: *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978) as expanded by *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 34, 133 S. Ct. 511, 184 L. Ed. 2d 417 (2012).

In its analysis of government-induced flooding events for determining a taking, "[t]he Court in *Arkansas Game* also clarified or expanded the list of factors set forth in *Penn Central*. This factor list included:

> (1) the duration of the interference; (2) "the degree to which the invasion is intended or is the foreseeable result of authorized government action," (3) "the character of the land at issue," (4) "the owner's reasonable investment-backed expectations regarding the land's use," and (5) the "[s]everity of the interference . . . "

III. Liens

Serv. Steel Warehouse Co., L.P. v. United States Steel Corp., 182 N.E.3d 840 **(Ind. 2022)**

As part of their construction plans for two facilities, United States Steel Corp. ("USSC") contracted Carbonyx Inc. for the facilities' build and design. Carbonyx contracted with Steven Pounds for the project's steel fabrication. Pounds' company, Troll Supply, did not perform on-site work but the fabricated steel was delivered to the project site. Service Steel Warehouse Co., L.P. ("Service") "sold steel for the project to Troll Supply, and it even

identified the USSC project on its invoices. Service recorded a mechanic's lien notice against USSC's land and subsequently filed a foreclosure: Troll Supply failed to Pay $452,825.03 to Service. USSC asserted Troll Supply as an off-site supplier of the fabricated steel (as opposed to a worker or contractor of on-site work) and Service as a material supplier with no capability to perfect a mechanic's lien. The trial court granted summary judgment in favor of USSC, but the Indiana Court of Appeals reversed that summary judgment decision after concluding that Troll Supply was a subcontractor without a statutory requirement for on-site work "who perform a definite substantial portion of the prime contract." *Serv. Steel Warehouse Co., L.P. v. U.S. Steel Corp.,* 171 N.E.3d 115, 122 (Ind. Ct. App. 2021), *vacated*.

The Indiana Supreme Court analyzed various Indiana mechanic's lien cases from 1871 to 2011 supporting and not supporting the supplier-to-supplier mechanic's lien prohibition. In terms of the "supplier to a supplier has no lien rights" rule, the Indiana Supreme Court "disapprove[d] of that demonstrably erroneous, though longstanding, rule" resulting in reversal of the summary judgment order in favor of USCC and a remand for reevaluation of Service's summary judgment motion.

***Holland v. Ketcham*, 181 N.E.3d 1030 (Ind. Ct. App. 2021)**

After 8 years of marriage, Tammy Ketcham ("Ketcham") filed for divorce. Kelly Holland ("Holland") and Ketcham divorced in January 2018: the decree included an equalization payment in favor of Holland for Ketcham to pay $205,098.75 no later than April 24, 2018 as required by the decree's 90 days payment provision. If Ketcham failed to timely pay, "a judgment shall be entered against all property and assets of [Ketcham] and interest shall

accrue on said judgment at the statutory rate." After Ketcham filed a February 23, 2018 motion to correct error, Ketcham completed two real estate transactions while the motion was pending with the divorce court: 1.Ketcham sold her Owensburg property on April 24, 2018 (net value of $90,000 at time of divorce) with receipt of net proceeds of $101,236.68; and 2. Ketcham and her then boyfriend, Jason, were also conveyed on April 24, 2018 a Bedford, Indiana property (appraised at $256,000.00) as joint tenants. Ketcham contributed all of the $200,000.00 purchase funds accumulated from the net proceeds from the Owensburg sale and from a portion of the life insurance proceeds that the divorce court awarded Ketcham from her deceased brother's life insurance policy. When the 90-day time period expired without the equalization payment, Holland filed a contempt motion. After a motions hearing and a finding of Ketcham in contempt, the court ordered on August 10, 2018 an amended equalization payment amount of $200,478.96 and a judgment against Ketcham for the unpaid equalization. Ketcham and Jason subsequently married and conveyed the Bedford property on November 1, 2018 to themselves as husband and wife. Holland filed his May 2019 complaint alleging that Ketcham and Jason had fraudulently transferred $200,000.00 and "conspired and engaged in actions with an intent to defraud the claim of [Holland] established [which] denied the benefits of the judgment entered in his favor." The special judge entered an order in favor of Ketcham and Jason finding that Holland had not substantiated an intent to defraud during the bench trial.

After examining the Uniform Fraudulent Transfer Act, Ind. Code §§ 32-18-2, the Indiana Court of Appeals remanded the case with instructions that Ketcham's conduct demonstrated "a pattern of fraudulent intent" and Jason's conduct from the record disclosed

his actions in concert with Ketcham for the fraudulent transfer. The appellate court agreed with Holland's allegation that Ketcham bought a residence instead of providing the equalization payment. Ketcham's conversion of the funds to a residence on the last day of the required equalization payment time resulted in Ketcham retaining the benefit of those funds. Ketcham's pro se research and erroneous belief that the homestead residence was shielded from Holland as a creditor revealed Ketcham's interest in hindering the collection of the equalization payment. Besides evaluating eight factors in Holland's favor and six downgraded factors in Ketcham's favor, the appellate court also analyzed Jason's participation in the conveyance where he did not provide a reasonably equivalent value for the purchase with his promise to pay "utilities, taxes, insurance[,] and maintenance." The Indiana Court of Appeals reversed the trial court's judgments in favor of Ketcham and Jason and instructed the trial court to immediately place an injunction to impede the transfer of the Bedford property and to aid the trial court creating a remedy in favor of Holland for his damages consistent with the appellate court's decision.

IV. Recent 2022 Legislation

Public Law 26 (SEA 357) from the 2022 General Session reaffirmed Indiana's 2000 Uniform Electronic Transactions Act's provisions (Ind. Code §§ 26-2-8) in terms of electronic documents for real estate transactions. This new Public Law focused on county auditors or assessors. This Public Law put a new date, "after December 31, 2023", into the mix where certain county officials cannot refuse the following actions because a deed, sales disclosure, or in instrument is an electronic document:

1.) the auditor's endorsement of a deed or instrument of conveyance (Ind. Code §§ 6-1.1-5-4(c); 36-2-9-18(d));

2.) the auditor's or assessor's acceptance of an electronic sales disclosure form (Ind. Code § 6-1.1-5.5-3(b)(4)); and
3.) the auditor's endorsement of an electronic heirship affidavit submitted pursuant to Ind. Code § 29-1-7-23.

Public Law 156 during the 2022 general legislative session added two new chapters as to agricultural land and foreign business entities as defined in Ind. Code §§ 32-22-3 and 4. If these chapters permit the foreign business entity to acquire or transfer Indiana agricultural land after June 30, 2022 for crop farming or timber production, the foreign business entity must submit a report within thirty days of the transaction to the Indiana Secretary of State and the Indiana Attorney General. If the transaction is prohibited under Ind. Code § 32-22-3-4, the Indiana attorney general can enforce a forfeiture action. Ind. Code § 32-22-3-6. The prohibition in relation to Russian Federation business entities is set to expire June 30, 2023. Ind. Code § 32-22-4-2. The prohibition of foreign business entities organized under the laws of another country or its equivalent, as well as agents, trustees, or fiduciaries of a foreign business entity, does not apply to the following circumstances:

(1) Agricultural land that is used for research or experimental purposes, including testing, developing, or producing seeds or plants for sale or resale to farmers as seed stock.
(2) The acquisition by a foreign business entity of agricultural land or an interest in agricultural land that is located within Indiana:
  (A) that is used for crop farming and that is not more than three hundred twenty (320) acres; or
  (B) that is used for timber production and that is not more than ten (10) acres.
(3) As used in this subdivision, "confined feeding operation" has the meaning set forth in IC 13-11-2-40. The acquisition by a foreign business entity of a confined feeding operation or agricultural land on which to construct a confined feeding operation.
(4) Agricultural land used for raising or producing eggs or poultry, including hatcheries and other ancillary activities.
(5) This chapter does not affect the ability of a foreign business entity to hold or acquire by grant, purchase, devise, descent, or otherwise

agricultural land in such acreage as may be necessary to its business operations for purposes other than crop farming or timber production. Ind. Code § 32-22-3-0.5

APPENDIX

Real Estate Law Update
September 13-14, 2022
Mary A. Slade

Indiana

Pulliam v. Peconge (In re Estate of Blair)
177 N.E.3d 84 (Ind. Ct. App. 2021)

2019

- June-August: Hospitalization
- August 16: Caretaker: Samantha
- August 26: Attempts
- August 27: Purchase Agreement
- September 5: Quitclaim Deed
- September 6: Coma
- November 19: Probated Will

Indiana

Cutter v. Jurus

177 N.E.3d 492 (Ind. Ct. App. 2021)

- 2001 Purchase
- 2009 Rental
- 2013: Sale Agreement & Addendum
- 2014: Land Contract
- 2015: Warranty Deed
- 2016: BZA Variance
- 2019: Personal Rep. Deed

Thalls v. Draving

182 N.E.3d 260 (Ind. Ct. App. 2022)

- 1924: Original Plat
- 1959: Purchase
- 1959-2019: Use, Maintenance, Boat
- 2019: Objection
- April 2019: Litigation

Town of Linden v. Birge
187 N.E.3d 918 (Ind. Ct. App. 2022)

- 1898: James Hose Drain
- 1927 and 2006: Drain Projects
- 2009-2012 Plan Logistics
- March 2012: Objection Activity

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Serv. Steel Warehouse Co. L.P. v. United States Steel Corp.
182 N.E.3d 840 (Ind. 2022)

- Property Owner: United States Steel Corp.
- Contract Parties: Carbonyx Inc.
  Steven Pounds
- Fabrication: Troll Supply
- Steel: Service Steel Warehouse Co., L.P.

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Holland v. Ketcham

181 N.E.3d 1030 (Ind. Ct. App. 2021)

- 2015: Dissolution Petition
- 1-24-2018: Divorce Decree
- 2018: Motions
- 4-24-2018: Transactions
- 8-10-2018: Orders
- 11-1-2018: New Deed
- 2019: Litigation

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Indiana

2022 Legislation

- Auditors and Assessors
- Agricultural Land and Foreign Entities

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Section Seven

Judge Robert H. Staton
Indiana Law Update

2022 Insurance Law Update

Anna Mallon
Paganelli Law Group LLC
Indianapolis, Indiana

Section Seven

Judge Robert H. Staton Indiana Law Update
2022 Insurance Law Update..... Anna Mallon

2022 INSURANCE LAW UPDATE

CASE LAW UPDATE

A. HOMEOWNER'S AND CONDOMINIUM POLICIES

1. Appraisal

A sample appraisal provision in a homeowner's policy states:

APPRAISAL

If "**you**" and "**we**" fail to agree on the amount of loss, on the written demand of either, each party will choose a competent, disinterested and impartial appraiser and notify the other of the appraiser's identity within 20 days after the demand is received. The appraisers will select a competent, disinterested and impartial umpire. If the appraisers are unable to agree upon an umpire within 15 days after both appraisers have been identified, "**you**" or "**we**" can ask a judge of a court of record in the state where "**your**" "**residence premises**" is located to select an umpire.

The appraisers will then set the amount of loss. If the appraisers submit a written report of an agreement to "**us**," the amount agreed upon will be the amount of loss. If they cannot agree, they will submit their differences to the umpire. A written award by two will determine the amount of loss.

Each party will pay the appraiser it chooses, and equally bear expenses for the umpire and all other expenses of the appraisal. However, if the written demand for appraisal is made by "**us**," "**we**" will pay for the reasonable cost of "**your**" appraiser and "**your**" share of the cost of the umpire.

"**We**" will not be held to have waived any rights by any act relating to the appraisal.

This is not an agreement to arbitrate. The appraisers and umpire are only authorized to determine actual cash value or the cost to repair or replace damaged property. The appraisers and umpire are not authorized to determine if a loss is covered or excluded under the policy.

Either party can invoke appraisal under the policy. Appraisal is appropriate when there is a dispute about the amount of the loss.

In *Legend's Creek Homeowners Assoc., Inc. v. Travelers Indem. Co. of America*, 33 F.4th 932 (7th Cir. May 10, 2022), Travelers denied a hail and wind claim under a condominium policy issued to Legend's Creek. Legend's Creek filed a lawsuit alleging breach of contract and bad faith. Travelers defended against the allegations, in part, by alleging that Legend's Creek failed to file the lawsuit within the two year suit limit. It was undisputed that the date of loss was May 1, 2016 and the lawsuit was not filed until July 23, 2018, more than two years after the date of loss. After filing suit, Legend's Creek moved to compel Traveler's to submit to appraisal relating to a matching siding issue. The magistrate judge granted the motion to compel appraisal and the appraiser granted an appraisal award for Legend's Creek. However, the District Court granted summary judgment for Traveler's on the breach of contract and bad faith claims and found the appraisal award invalid. Legend's Creek appealed to the Seventh Circuit.

In affirming the decision of the District Court, the Seventh Circuit held that Legend's Creek could have filed a lawsuit regarding the claim within the two year timeframe. 33 F.4th at *935. It did not matter that Traveler's was still handling the claim outside of the two year deadline. *Id.* Legend's Creek argued that Travelers had a duty to notify it of Traveler's intent to enforce the suit limitation provision in the policy and its failure to do so constitutes waiver. The Seventh Circuit rejected this argument and held that "Indiana courts have not required an insurer to notify an insured that it intends to rely on express contractual provisions." *Id*.

The Seventh Circuit affirmed the enforcement of the two-year suit limit and held that the District Court properly disposed of the appraisal award. *Id.* at 936. The Seventh Circuit held:

> The two-year deadline applied not only to contractual claims, but to any "legal action." A motion to compel appraisal falls under this category. It would be nonsensical to conclude that Legend's Creek's lawsuit was barred as untimely under the contract, but not the motions filed within that lawsuit. Accordingly, Legend's Creek had no right under the policy to petition the district court to compel

> Traveler's to submit to the appraisal process outside of the two-year suit limitation, and therefore the so-called award is void.

Id. at 936-937.

B. AUTOMOBILE POLICIES

Indiana has financial responsibility requirements set forth in Ind. Code § 27-7-5-2 et seq. The purpose of the Financial Responsibility Act is to ensure that every insured is entitled to recover uninsured motorist benefits for the damage they would have recovered from the offending motorist if that person would have maintained a policy of liability insurance or maintained adequate liability insurance. Every year, there are cases interpreting underinsured motor vehicle ("UIM") and uninsured motor vehicle ("UM") coverage. This year is no exception.

1. Meaning of "Use" of an Auto

Cases arise wherein the person or persons seeking UM/UIM coverage are not in the car when the accident occurs. In *Auto-Owners Insurance Company v. Shipley*, 179 N.E.3d 513 (Ind. Ct. App. December 2, 2021), the driver of a roadside assistance van sought UIM coverage from his employer's auto insurer for an injury that occurred when the driver was assisting a customer in repairing a flat tire. The Indiana Court of Appeals explained that Shipley has two paths to UIM coverage: (1) if Shipley meets the definition of "insured" which includes anyone occupying a covered auto or (2) if, at the time of the accident, Shipley would have been entitled to liability coverage under the employer's policy. 179 N.E.3d at * 514. The Court of Appeals found that Shipley would have been entitled to liability coverage under his employer's policy, so the Court did not need to assess whether Shipley was "occupying" a covered auto. *Id.*

In finding that Shipley was entitled to UIM coverage because he would be entitled to liability coverage under his employer's policy, the Court relied on the language in the liability coverage related to "ownership, maintenance or use of a covered auto." *Id.* at *514-515. The Court of Appeals acknowledged that the policy does not define "use", but looked to prior decisions on the issue of use of a covered auto. The Court of Appeals found that Auto-Owners would have contemplated that tire technicians would park vehicles on the roadside and exit to do their work. *Id.* The Court of Appeals also noted that Shipley maintained an active relationship with the vehicle while he did his work on the side of the road. *Id.* All of these facts supported that Shipley was using the van at the time of the accident. *Id.* at 516. The Court explained:

> At the time of the accident, Shipley was using his roadside-assistance van as a roadside-assistance van- to accomplish the repair necessary to get the customer back on the road. He parked the van just in front of the customer's car, opened the doors to remove tools, left doors open while he worked, and was about to go back to the van to turn on the air compressor. This constituted that use of an auto as an auto.

Id. The Court of Appeals affirmed the trial court in denying summary judgment for Auto-Owners and found that Shipley was entitled to UIM coverage under his employer's policy. *Id.*

2. Reduction and Offset Provisions For UM/UIM Coverage

The most litigation recently in Indiana has centered around whether the carrier can take a reduction or offset from the UM/UIM benefits for amounts already received by the insured. It is not uncommon for the UM/UIM coverage to contain limiting provisions that state something to the effect of the following:

1. The limit of insurance under this coverage shall be reduced by all sums paid or payable by or for anyone who is legally responsible, including all sums paid under this coverage form's Liability Coverage.
2. No one will be entitled to receive duplicate payments for the same elements of "loss" under this coverage form and any Liability Coverage Form or Medical Payments Coverage endorsement attached to this Coverage Part.

We will not make a duplicate payment under this coverage for any element of "loss" for which payment has been made by or for anyone who is legally responsible. We will not pay for any element of "loss" if a person is entitled to receive payment for the same element of "loss" under any workers' compensation, disability benefits or similar law.

3. No "insured" shall recover duplicate payments for the same elements of "loss" or payments in excess of damages sustained.

This year, the Indiana Court of Appeals decided two cases involving reduction provisions in UM/UIM coverage. In *Erie Insurance Exchange v. Craighead*, 2022 WL 2678572 (Ind. Ct. App. July 12, 2022), the Indiana Court of Appeals held that Erie could not reduce its UIM obligation by the amount of MPC payments previously made. And just one day later, the Indiana Court of Appeals decided *Kearschner v. American Fam. Mut. Ins. Co.*, 2022 WL 2709480 (Ind. Ct. App. July 13, 2022) and held that American Family could not reduce its UIM obligation by amounts the insured received in worker's compensation payments.

In *Craighead*, Craighead was a passenger in a car wherein the driver crashed the driver's car. Craighead had an auto policy with Erie with UM/UIM limits of $100,000.00/per person and MPC limits of $5,000.00. The driver's carrier tendered the liability limits of $50,000.00 and $5,000.00 MPC limits. Erie also paid Craighead its $5,000.00 MPC limits. There was no dispute that the $100,000.00 UIM obligation could be reduced by the $50,000.00 paid by the at fault party's carrier, but the parties were not in agreement as to whether the MPC payments totaling $10,000.00 could also reduce the UIM obligation. The trial court agreed with Craighead that Erie could not rely on the set-off provision in the policy to reduce the UIM obligation by the $10,000.00 in MPC payments. Erie appealed.

In affirming the trial court, the Indiana Court of Appeals examined I.C. § 27-7-5-2(a) which provides, in part, as follows:

> The uninsured and underinsured motorist coverages must be provided by insurers… in limits at least equal to the limits of liability specified in the bodily injury liability provisions of an insured's policy, unless such coverages have been rejected in writing by the insured. However, underinsured motorist coverage must be made available in limits of not less than fifty thousand dollars ($50,000)… Insurers may not sell or provide underinsured motorist coverage in an amount less than fifty thousand dollars ($50,000).

I.C. § 27-7-5-2(a). The Indiana Court of Appeals also examined I.C. § 27-7-5-5(c), which states in part:

> (c) The maximum amount payable for bodily injury under uninsured or underinsured motorist coverage is ….
>
> (1) the difference between:
>
> (A) the amount paid in damages to the insured by or for any person or organization who may be liable for the insured's bodily injury; and
>
> (B) the per person limit of uninsured or underinsured motorist coverage provided in the insured's policy.

I.C. § 27-7-5-5(c).

After examining the policy and the statutes, the Indiana Court of Appeals held that the $50,000.00 amount mentioned in the statute is "simply the minimum UIM coverage that must be offered and nothing more." 2022 WL 2678572 at *4. The Court proceeded to explain its refusal to allow the $10,000.00 MPC reduction as follows:

> Keeping in mind that the goal is to guarantee that insureds are put in the position they would be if the tortfeasor had purchased sufficient liability coverage, allowing coverage over the statutory minimum of $50,000.000 to be offset by non-liability payments would clearly be inconsistent with that goal.

Id. The Indiana Court of Appeals rejected a prior Indiana Supreme Court case of *Justice v. American Family Mut. Ins. Co.,* 4 N.E.3d 1171 (Ind. 2014) to the extent that it allows set-offs against UIM coverage over $50,000.00 for non-liability payments. *Id.* The Court of Appeals also held that the statute requires that a payment must be made "in damages" for it to reduce a UIM

obligation and MPC payments, even if from a party who may be liable, is not an "amount paid in damages." *Id.* at *5. Essentially, in *Craighead,* the Indiana Court of Appeals acknowledged that the language of the policy allows for the set-off of auto medical payments, but maintained that the MPC payments could not be set-off as the provision in the policy violates the statute *Id.* at *5.

In *Kearschner v. American Fam. Mut. Ins. Co.*, 2022 WL 2709480 (Ind. Ct. App. July 13, 2022), the Indiana Court of Appeals again addressed a reduction provision, but this time related to worker's compensation payments. Kearschner was employed by Wal-Mart and while in the scope of employment was involved in an automobile accident. Kearschner was not at fault for this accident. Kearschner had an auto policy with American Family which had UIM limits of $100,000.00/per person. Kearschner received $62,084.52 in worker's compensation benefits and $50,000.00 from the tortfeasor's carrier. The policy contained an explicit provision allowing for the reduction for "a payment made or amount payable because of bodily injury under any worker's compensation or disability benefits law or any similar laws." The policy also had a provision stating that the terms of the policy must conform to statute.

Relying on the *Justice* decision, American Family argued that it had no UIM obligation to Kearschner because the reductions of $62,084.52 and $50,000.00 from the $100,00.00 UIM limit took the amount owed to a negative. The trial court agreed with American Family that it had no UIM obligation and Kearschner appealed.

The Indiana Court of Appeals examined the same statutes cited in *Craighead* and reversed the trial court:

> The workers compensation reduction in the UIM Limit Reduction Provision resulted in a reduction of Kearschner's UIM policy limit to zero and diminished the protection required by the UIM Statute. AFI's policy provision attempting to reduce Kearschner's UIM policy limit to zero based on the payment of any worker's

> compensation benefits provided less coverage than the UIM statute required and is inconsistent with the view that the UIM Statute is a full-recovery, remedial statute.

20222709480 at *8.

3. **Statute of Limitations for UM/UIM Claim**

In *Napier v. American Family Mut. Ins. Co.*, 179 N.E.3d 505 (Ind. Ct. App. November 15, 2021), the Indiana Court of Appeals addressed the statute of limitations for bringing a UM/UIM claim. Napier was involved in a car accident with an uninsured motor vehicle. Four years after the car accident, Napier filed suit against American Family to recover uninsured motorist benefits. The Policy contained a general suit limitation provision that stated in part:

> We may not be sued under the Uninsured Motorist coverage on any claim that is barred by the tort statute of limitations.

American Family argued that the two-year tort statute applied and the trial court agreed. On appeal, Napier argued that the ten-year statute applicable to contract actions should apply. The Court of Appeals affirmed the trial court and upheld the two-year statute of limitations for bringing the UM claim. 179 N.E.3d at *509. The Court of Appeals rejected the argument that limiting suits to two years after the loss is against public policy:

> Indiana Code section 27-7-5-2 requires auto insurance policies to include uninsured motorist coverage. The purpose of the statute is to afford the same protection to a person injured by an uninsured motorist as they would have enjoyed if the offending motorist had themselves carried liability insurance…. Thus, any limiting language in the insurance contract which has the effect of providing less protection than that made obligatory by the above statute would be contrary to public policy, and of no force and effect…Here, the Provision affords Napier the same amount of time to bring an uninsured motorist coverage claim as Napier has to bring a claim against an insured tortfeasor… Therefore, we conclude the limitation is not contrary to public policy.

Id. at *509-510.

C. COMMERCIAL POLICIES

1. Business Interruption Claims from COVID-19

The business closures and restrictions due to COVID-19 triggered claims for business interruption and business loss. This year, the Indiana Court of Appeals issued a decision on the coverage sought for Covid-19 claims.

In *Indiana Repertory Theatre v. The Cincinnati Cas. Ins. Co.*, 180 N.E.3d 403 (Ind. Ct. App. January 4, 2022), *reh'g denied*, the IRT sought a declaration of coverage relating to the losses from the closure of the theatre due to the pandemic. Cincinnati Insurance denied the claim and cited in its denial letter that "the fact of the pandemic, without more, is not direct physical loss or damage to property at the premises" as required for coverage under the commercial policy. The trial court granted summary judgment for Cincinnati Insurance and found no coverage for the business losses. The IRT appealed. The operative issue on appeal was whether the policy language granting coverage for "direct physical loss" or "direct physical damage" to covered property encompassed the IRT's loss of use of its facilities during the pandemic. In affirming the trial court, the Court of Appeals held that the "plain language of the insurance contract does not support coverage for Covid-19 related loss of use." 180 N.E.3d at 405.

IRT argued that the policy language "physical loss or physical damage" is ambiguous. IRT looked to dictionary definitions of "loss" and "damage" and argued that the definitions do not require an observable change in the condition of the property. IRT argued that it was enough to show that it could not physically use the theatre to host live performances—ie that the property was unusable or unsafe even without tangible alteration of the property. However, the Court of Appeals rejected these arguments and held that the IRT's interpretation was inconsistent with the policy as a whole:

> Finally, IRT's interpretation of "physical loss or physical damage" is unreasonable because it parses and dichotomizes the Policy language. IRT's interpretation of the Policy does not take into account the Policy as a whole, as it does not rectify its interpretation of "physical loss or physical damage" with the "period of restoration" provision of the Policy, which outlines the time when coverage begins and ends based on when the covered premises is "repaired, rebuilt or replaced" or the "business is resumed at a new permanent location." Without physical alteration or impact to IRT's premises, there can be no period of restoration, and thus IRT's interpretation of "physical loss or physical damage" does not take into account the language of the Policy as a whole.

Id. at 410. The Court of Appeals held that there was no coverage for IRT because it "did not suffer physical loss or physical damage under the language of the Policy because the premises covered… was not destroyed or altered in a physical way that would require restoration or relocation." *Id.*

Consistently, over the past year, the Seventh Circuit and District Courts in Indiana have found no coverage for the business loss claims under commercial policies. *See Circle Block Partners, LLC v. Fireman's Fund Ins. Co.*, 2022 WL 3401535 (7th Cir. January 17, 2022)(presence of Covid-19 particles on hotel surfaces did not cause physical alteration of property for coverage to exist); *Café Patachou at Clay Terrace v. Citizens Ins. Co. of America,* 2021 WL 6062958 (S.D. Ind. December 22, 2021).

2. Liquor Liability Exclusion

In *Ebert v. Illinois Cas. Co.*, 188 N.E.3d 858 (Ind. June 16, 2022), the Indiana Supreme Court interpreted a liquor liability exclusion in commercial policies and found it unambiguous. This case involved a patron who was served alcohol at Big Daddy's Show Club in Kokomo, Indiana and later drove his vehicle injuring several members of the Ebert family. The Eberts filed suit against Big Daddy's, Little Daddy's, and an off-duty employee of Big Daddy's who told the patron to leave, alleging that Big Daddy's violated Indiana's Dram Shop Act by serving alcohol to the patron when it new (or should have known) of his intoxication. The policies issued to Big

Daddy's contained an exclusion for bodily injury for which an insured may be liable by (1) causing or contributing to a person's intoxication, or (2) furnishing alcoholic beverages to a person under the influence of alcohol. The insurer sought a declaration that it did not owe liability coverage to Big Daddy's and the other defendants. The trial court found no coverage existed under the commercial policy, but found coverage under the liquor liability policy. Both parties appealed and the Indiana Court of Appeals found that the commercial policies provided coverage. Illinois casualty sought transfer which was granted.

In affirming the decision of the trial court, the Indiana Supreme Court found the liquor liability exclusion in the commercial policies unambiguous. 188 N.E.3d at *865. Next, the Indiana Supreme Court found that the unambiguous language of the exclusion applied to exclude coverage for the claims against Big Daddy's that it negligently served alcohol and failed to obtain alternate transportation for the patron. *Id* at 865-866. The Indiana Supreme Court also held that the exclusion applied to exclude coverage for remaining the claims against the defendants. *Id.* at 866. In so holding, the Indiana Supreme Court adopted the efficient and predominate cause analysis set forth by the Indiana Court of Appeals (in other cases) and determined that the efficient and predominant cause of the collision was the patron's drunk driving after he was served alcohol at Big Daddy's. *Id* at 867. Because the commercial policies "excluded coverage for claims of bodily injury after causing or contributing to a person's intoxication or furnishing alcohol to a person under the influence of alcohol, the policy excludes the Eberts' claims from its coverage." *Id.* at 870.

This case also looked at whether the off-duty employee was an insured under the commercial policies and concluded that he was an insured but the liquor liability exclusion also applied to exclude coverage for the claims against him. *Id.* at 869.

3. Personal and Advertising Injury Coverage

Many commercial policies provide coverage for "Personal and Advertising Injury" as defined in the Policy. The definition of "personal and advertising injury" includes "infringing upon another's copyright, trade dress or slogan in your 'advertisement.'"

In *Aluminum Trailer Co. v. Westchester Fire Ins. Co.*, 24 F.4th 1134 (7th Cir. January 31, 2022), the Seventh Circuit interpreted this definition of "personal and advertising injury." Specifically, this case assessed what constitutes infringing upon another's trade dress in your advertisement. In this case, Aluminum Trailer was sued by BizBox for allegedly manufacturing and selling knock-off trailer's using BizBox's design. After Westchester denied coverage to Aluminum Trailer, Aluminum Trailer filed suit against Westchester seeking a declaration that Westchester owed it defense and indemnity for the claims in the underlying lawsuit. The District Court dismissed the declaratory suit filed by Aluminum Trailer and found that no infringement of trade dress in Aluminum Trailer's advertisement was alleged in the underlying lawsuit. Aluminum Trailer appealed to the Seventh Circuit.

In support of coverage, Aluminum Trailer argued that BizBox alleges trade dress infringement and that Aluminum Trailer's logo attached to the knock-off trailer was an "advertisement." In assessing coverage, the Seventh Circuit noted that "advertisement" was defined in the policy as "a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters." 24 F.4th at 1137. The Seventh Circuit explained that BizBox sued Aluminum Trailer for breach of contract and tortious interference with contract, and there was no allegation that Aluminum Trailer infringed on BizBox's trade dress in Aluminum Trailer's advertisement. *Id.* The Seventh Circuit held:

> In sum, BizBox did not bring a claim for infringement of trade dress and did not allege an advertising injury against ATC in the Arizona litigation. Importantly, BizBox alleged no facts that can plausibly be construed to show that it asserted that an advertising injury occurred in that suit. Westchester therefore has no duty to defend or indemnify ATC under the "personal and advertising injury" provision in the Policy.

Id. at 1138.

D. BAD FAITH AND EXTRACONTRACTUAL CLAIMS

The tort of breach of an insurer's duty of good faith and fair dealing was first recognized in Indiana in *Erie Ins. Co. v. Hickman*, 622 N.E.2d 515 (Ind. 1993). Although the *Erie* court did not establish the exact parameters of the duty owed by an insurer to an insured, it did state that the obligation of good faith and fair dealing with respect to the discharge of an insurer's contractual obligation includes the obligation to refrain from: (1) making an unfounded refusal to pay policy proceeds; (2) causing an unfounded delay in making payment; (3) deceiving the insured; and (4) exercising any unfair advantage to pressure an insured into a settlement of the claim. *Erie*, 622 N.E.2d at 519.

Every year there are decisions from Indiana courts on bad faith claims brought by the insured against the insurer. There were several published opinions this year. A good assessment of each of the obligations of good faith and fair dealing set forth above is the case of *Palmer v. Travelers Indemnity Co. of America*, 2021 WL 5564890 (S.D Ind. November 29, 2021). Furthermore, *Erie Insurance Exchange v. Craighead,* discussed in the Auto section above, includes analysis of a bad faith claim where the Indiana Court of Appeals found an issue of fact to defeat summary judgment on the bad faith claim. The insurer is often able to defeat a bad faith claim via summary judgment so this case is instructive on what may cause a fact dispute on bad faith.

2022 Indiana Law Update

Insurance Law Update

Anna Mallon

Paganelli Law Group

Insurance Case Law Update

- Homeowner’s Policies
- Automobile Policies
- Commercial Policies
- Bad Faith/Extra-Contractual


Homeowner’s
Policies

Appraisal:

- *Legend's Creek Homeowners Assoc. Inc. v. Travelers Indem. Co. of America,* 33 F.4th 932 (7th Cir. May 10, 2022).

Background:

- Appraisal to set the amount of loss.
- Often used before suit filed.
- Coverage issues not appropriate.

Facts:

- Hail and wind damage claim to condominiums.
- Travelers denied the claim.
- Legend's Creek filed suit after the two-year time limit.

Facts:

- Legend's Creek moved to compel appraisal. Magistrate granted and appraisal award issued.
- District Court granted summary judgment for Travelers and found appraisal award invalid.
- Appeal by Legend's Creek.

Holding:

- Appraisal award invalid.
- Two-year suit limit barred claims- including appraisal demand.
- Insurer does not have to notify intent to rely on suit limit.

Practice Pointer:

- Suit Limits in policies still valid.
- Appraisal demands subject to the suit limit.
- Good discussion of when suit limit can be waived.

Prediction:

- More cases will be decided involving appraisal.
- Coverage issues mixing in with appraisal.
- Can an insurance company refuse to go forward with appraisal?
- Can an insurance company dictate scope of appraisal?
- Can an insurance company apply coverage after award?

Automobile Policies

Uninsured and Underinsured Motorist Coverage (UM/UIM)

Background:

- Insurer required to offer UM/UIM coverage in auto policy (Ind. Code §27-7-5-2).
- Protect insured from paying for damage caused by uninsured/ underinsured motorist driver.

Meaning of "Use" of An Auto

- *Auto-Owners Ins. Co. v. Shipley*, 179 N.E.3d 513 (Ind. Ct. App. December 2, 2021).

Facts:

- Driver of roadside assistance van sought UIM coverage from employer's carrier.
- Injured while repairing a flat tire for a customer.
- Trial court found UIM coverage for driver.

Holding:

- Driver would be entitled to UIM coverage under employer's policy if that driver would be entitled to liability coverage.
- Liability language- "ownership, maintenance or use of a covered auto"

Holding:

- Driver maintained an “active relationship” with the employer’s vehicle while he did work on the side of the road.
- Facts supported that the driver was using the vehicle.
- Affirmed UIM coverage for driver.

Practice Pointer:

- A person does not always have to be in the vehicle for UM/UIM coverage to apply.
- Similar analysis for what it means to be “occupying” a vehicle.

Reduction/Offset Provisions for UM/UIM Coverage

Whether an insurance company can take a reduction from the UM/UIM limits for amounts already received?

- *Erie Insurance Exchange v. Craighead,* 2022 WL 2678572 (Ind. Ct. App. July 12, 2022).

- *Kearschner v. American Family Mut. Ins. Co.*, 2022 WL 2709480 (Ind. Ct. App. July 13, 2022).

Facts (Craighead):

- Craighead was a passenger in vehicle where owner crashed the vehicle.
- Craighead had a policy with Erie with UM/UIM limits of $100,000 per person and $5,000 medical payments limits.

Facts (Craighead):

- Driver's carrier paid liability limits of $50,000 and $5,000 medpay limits.
- Erie paid its $5,000 medpay limits.
- Craighead received $60,000 total.
- Erie wanted to reduce the $100,000 UIM limit by the $60,000 received.
- Set-off provision in the policy.

Holding (Craighead):

- Erie could reduce the $100,000 UIM limit by the $50,000 liability payment.
- Erie could NOT reduce the $100,000 UIM limit by the $10,000 medpay payments.
- Indiana Court of Appeals acknowledged that the language of the policy may allow for the set-off for med-pay payments, but allowing that set-off violates the UIM statutes.

Facts (Kearschner):

- Kearschner was employed by Walmart and was involved in an accident while working.
- American Family insured Kearschner with UIM limits of $100,000.
- Kearschner received worker's compensation benefits totaling $62,084.52 and $50,000 from the at fault party's carrier.
- Policy allowed for the reduction.

Facts (Kearschner):

- American Family argued that it had no UIM obligation because the set off of $62,084.52 and $50,0000 took the UIM limits to $0.
- Trial court agreed.

Holding:

- Indiana Court of Appeals reversed.
- American Family could not reduce the UIM limit by the worker's compensation benefits paid.

Practice Pointer:

- Many of the reduction and set-off provisions in UM/UIM coverage appear to be contrary to statute.
- Only reduce UIM limits by liability payments.

Prediction:

- The two recent cases on set-offs will change how UM/UIM cases are analyzed.
- Might see additional cases providing more clarity on when and why set-offs can or cannot be taken.

Statute of Limitations for UM/UIM Claim

- *Napier v. American Family Mut. Ins. Co.*, 179 N.E.3d 505 (Ind. Ct. App. November 15, 2021) .

Facts:

- Napier involved in a car accident with an uninsured motorist.
- Four years after the accident, Napier filed suit against American Family to recover UM benefits.
- Trial court dismissed case because it was filed after two year suit-limit.

Holding:

- Indiana Court of Appeals affirmed and applied two-year suit-limit and not ten year statute for contract claims.

Commercial Policies

Business Interruption Claims-COVID-19

Indiana Repertory Theatre v. The Cincinnati Cas. Ins. Co., 180 N.E.3d 403 (Ind. Ct. App. January 4, 2022).

Background:

- Closures and restrictions due to COVID-19 have led to claims for business losses under commercial polices.
- Some policies have virus exclusions, but many do not.

Facts:

- Cincinnati denied claim for business loss due to closure of theatre from pandemic.
- Trial court granted summary judgment for Cincinnati and found no coverage.

Facts:

- Pay for the direct “loss” to Covered Property at the “premises” caused by or resulting from a Covered Cause of Loss.

Facts:

- “Loss” is defined as “accidental physical loss or accidental physical damage.”

Holding:

- Commercial Policy does not cover losses due to COVID-19.
- “Direct physical loss” or “direct physical damage” to covered property does not encompass loss of use of facilities due to virus.

Holding:

- Damage must be physical in nature.
- Covered property must be destroyed or altered in a physical way.
- Loss of use not enough.

Practice Pointer:

- Hard to find coverage for business losses from COVID-19 under Commercial Policies in the absence of virus exclusion.
- Need to show physical alteration of the property.

Liquor Liability Exclusion

- *Ebert v. Illinois Cas. Co.*, 188 N.E.3d 858 (Ind. June 16, 2022).

Background:

- Commercial Policies often have an exclusion for injuries when the insured caused or contributed to the intoxication of another or furnished alcohol to an intoxicated person.

Facts:

- Patron was served alcohol from a bar in Kokomo and later drove vehicle injuring a family.
- Suit was filed against the bar for serving alcohol when the patron was clearly intoxicated.

Facts:

- Trial court found no coverage.
- Court of Appeals found coverage.
- Transfer was granted.

Holding:

- Indiana Supreme Court affirmed the trial court and found no coverage.
- Liquor liability exclusion applied to claims against bar.
- Adopted the “efficient and predominant cause” test.

Practice Pointer:

- Liquor liability exclusion found unambiguous by Indiana Supreme Court.
- Exclusion may bar coverage for claims against more than just the establishment serving the alcohol.

Personal and Advertising Injury

Aluminum Trailer Co. v. Westchester Fire Ins. Co., 24 F.4th 1134 (7th Cir. January 31, 2022).

Background:

- Commercial Policies contain coverage for “personal and advertising injury” which often includes (among other things) infringing upon another’s copyright, trade dress or slogan in your advertisement.

Facts:

- Aluminum Trailer was sued by BizBox for manufacturing and selling knock off trailers using Biz Box's design.
- Aluminum Trailer sought coverage from Westchester- seeking defense and indemnity for the claims against it.
- District Court found no coverage as no trade dress was alleged.

Holding:

- Seventh Circuit affirmed the District Court.
- Focused on the claims alleged in the lawsuit- breach of contract and tortious interference with contract.
- No claim for infringement of trade dress and no advertising injury alleged.
- No coverage under the personal and advertising injury coverage.

Practice Pointer:

- Personal and advertising injury lists the specific claims that fall within coverage. Need those specific claims alleged or facts that could plausibly be construed to form one of the claims listed for coverage to exist.

Bad Faith/Extra-Contractual Claims

Background:

- Duty for Insurer to act in good faith to Insured.

- Duty arises by virtue of contract between Insurer and Insured.

Background:

- High standard to prove bad faith.
- Clear and convincing evidence.
- Summary judgment often granted for insurance company.

- *Palmer v. Travelers Indem. Co. of America,* 2021 WL 5564890 (S.D. Ind. November 29, 2021). Good discussion on the elements of bad faith.
- *Erie Insurance Exchange v. Craighead,* 2022 WL 2678572 (Ind. Ct. App. July 12, 2022). Example of a fact dispute that overcame summary judgment.

Section Eight

ICLEF INDIANA LAW UPDATE – 2022

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Section Eight

ICLEF Indiana Law Update – 2022

Torts.....Sarah Graziano

Jennifer D. Warriner, Ph.D., J.D.

Renner v. Shepard- Bazant, 172 N.E.3d 1208 (Ind. 2021).
Goff, Rush, David, Massa, & Slaughter.

Holdings

(1) The evidence supported the trial court's decision to reduce Renner's damages based on her failure to mitigate her damages after the car accident.
(2) The evidence supported the trial court's determination that Shepard-Bazant was not responsible for all of Renner's claimed damages.
(3) The trial court erroneously failed to apply the eggshell-skull rule when it reduced Renner's award based on two concussions she experienced prior to the car accident.

Facts & Procedural History

Renner experience significant concussions in 2013 and 2014, but she fully recovered from both. In May 2016, Renner was in a car stopped in traffic and was rear-ended by a car driven by Shepard-Bazant. The impact pushed Renner's car into the car in front of her. She felt fine at the scene of the accident, but then she had a headache when she got home. She was diagnosed with a third concussion and instructed to rest. Instead, Renner went to prom, which increased her symptoms, and to an amusement park, where she rode rollercoasters that resulted in memory loss. Renner subsequently experienced two other minor concussions in the summer of 2016 before going to college, where she did not perform well.

Believing her continued symptoms and difficulty with memory (and thus college) were due to the car accident in May, Renner sued Shepard-Bazant for $600,000. Shepard-Bazant asserted Renner should not recover more than $20,000 due to her failure to mitigate and to prove her damages. The trial court entered judgment for Renner for $132,000. Renner filed a motion to correct errors, requesting additional damages, which the trial court denied. The Court of Appeals reversed. The Supreme Court affirmed in part and reversed in part – affirming the trial court's decision to reduce Renner's award based on failure to mitigate and to prove Shepard-Bazant was responsible for all of her claimed damages; but reversing because the trial court failed to apply the eggshell-skull rule.

Blackford v. Welborn Clinic, 172 N.E.3d 1219 (Ind. 2021).

Goff, Rush, David, Massa, & Slaughter

Holdings

(1) The 5-year winding-up period for dissolved business trusts provided in the Indiana Business Trust Act ("IBTA") is a statute of repose, which is not subject to equitable tolling.

(2) Even if equitable tolling were available, Blackford missed the five-year window for bringing her claim for failure to reveal the hepatitis diagnosis, because tolling is different for passive concealment than for active concealment, and the duty to disclose the diagnosis (i.e., end the passive concealment of information) ended when the physician-patient relationship ended upon the dissolution of the business trust.

Facts & Procedural History

In 2003, Clinic tested Blackford for Hepatitis and told Blackford she was negative when, in fact, she was positive. Blackford continued to receive her treatment at the Clinic until 2009, when the Clinic surrendered its authority to conduct business in Indiana pursuant to the IBTA. In 2014, another doctor told Blackford she had hepatitis, so she requested her records from the Clinic and learned she had tested positive in 2003.

Blackford sued the Clinic for malpractice, and the Clinic asserted her claim was barred by the IBTA because she sued more than five years after the Clinic dissolved. Blackford asserted a right to equitable tolling of the limitations period because the Clinic fraudulently concealed her test results. The trial court granted summary judgment for the Clinic. The Court of Appeals reversed. On transfer, the Supreme Court affirmed the grant of summary judgment to the Clinic because Blackford's action was barred.

Spainhower v. Smart & Kessler, LLC, 176 N.E.3d 258 (Ind. Ct. App. 2021), *reh'g denied*, *trans. denied*.
Najam, Pyle, & Tavitas.

Holdings

(1) Spainhower's claim – that she was fraudulently induced to pay $100 to meet with an attorney for an initial consultation when, in fact, the person with whom she met was not an attorney – is a claim for fraud in the inducement, not a claim for legal malpractice; thus, the appropriate statute of limitations for Spainhower's claim is the 6-year limitation period for claims of fraud.

(2) Spainhower's claim of fraud failed because there was no evidence the law firm had actual knowledge that Boehning was not licensed to practice law when it held Boehning out as an attorney and a member of the firm.

Facts & Procedural History

In 2013, Spainhower called Smart & Kessler, a law firm, seeking legal representation. She was told that for $100 she could meet with an attorney, Boehning, for an initial consultation. Spainhower paid the fee and met with Boehning. Spainhower's mother then paid for Spainhower to hire the firm. Boehning billed her for some services, but when her case was not progressing after a year, she fired the firm. Thereafter Spainhower heard "randomly" that Boehning was not licensed to practice law, and she contacted the firm seeking a refund of funds she and her mother had paid. Kessler asked Spainhower to submit her request in writing, which she did via letter. Kessler then informed Spainhower that, to get a refund, she needed to hire a lawyer and execute a release of any claims she may have against the firm. Spainhower filed complaints against the firm with the Disciplinary Commission, which were dismissed.

Spainhower sued the firm in small claims court for $465, which covered the consultation fee, treble damages, and court costs. At trial, she argued the firm fraudulently induced her to pay $100 to meet with an attorney, but then sent a non-attorney to meet with her. The firm argued Spainhower's claim was untimely under the two-year statute of limitations for legal malpractice. The trial court determined her claim was for legal malpractice, and thus untimely, but also that her claim of fraud failed. The COA affirmed the trial court's judgment because no evidence indicated the firm knew Boehning was not licensed during the months when the firm represented to the public that Boehning was an attorney.

Napier v. American Family Mut. Ins. Co., 179 N.E.3d 504 (Ind. Ct. App. 2021).
Robb, Bradford, & Altice.

Holdings

(1) The phrase "tort statute of limitation" unambiguously refers to IC 34-11-2-4(a), which required Napier's claim be brought within two years.
(2) The two-year limitation period provided by the contract does not violate public policy because it allowed Napier the same amount of time she would have had to bring a claim against an insured driver.

Facts & Procedural History

On August 8, 2014, and January 20, 2015, Napier had car accidents with unnamed operators of uninsured vehicles. At the time she had insurance through American and the policy had uninsured motorist coverage. On September 17, 2019, Napier filed a complaint to recover uninsured motorist benefits from American. American moved for summary judgment because Napier's policy contained a provision that prohibited a claim by an insured for uninsured motorist coverage that is "barred by the tort statute of limitations," which American claimed was the two-year limit provided by IC 34-11-2-4(a). Napier argued the statute of limitations is either six years (IC 34-11-2-9) or ten years (IC 34-11-2-11). The trial court granted summary judgment to American. The COA affirmed.

Reece v. Tyson Fresh Meats, 173 N.E.3d 1031 (Ind. 2021).

Rush, Massa, & Slaughter. Goff concurs in result with opinion, which David joins.

Holdings

(1) Court adopts bright-line rule from *Sheley v. Cross*, 680 N.E.2d 10 (Ind. Ct. App. 1997), which the Court summarized as follows: "landowners owe a duty to passing motorists on adjacent highways not to create 'hazardous conditions that visit themselves upon the roadway'; but when a land use or condition that may impose a visual obstruction is 'wholly contained on a landowner's property, there is no duty to the traveling public.'"

Two caveats noted by the Court: (a) while the common law imposes no duty, legislative bodies could create such a duty for landowners; and (b) a different rule applies when a motorist leaves the road and encounters a dangerous condition wholly contained on the land. *See* 672 N.E.2d 1377 (regarding excavation).

(2) Because Tyson's tall grass was wholly contained on Tyson's property, Tyson owed no duty to the traveling public.

Facts & Procedural History

Harold Moistner pulled his car into an intersection and collided with a motorcycle driven by Walter Reece. Walter suffered catastrophic injuries but survived. A deputy who came to the scene noticed tall grass on the northwest corner of the intersection that would have limited or prohibited Moistner's view of Walter. The tall grass was in a ditch on Tyson's property, but the grass did not extend onto the road.

Walter's wife/guardian sued Moistner and others. Eventually she added Tyson and asserted Tyson negligently allowed grass to grow so high it blocked the view of the road. Tyson moved for summary judgment, which the trial court granted. A split COA affirmed because, when the grass was wholly contained on Tyson's property, Tyson had no duty to the traveling public. The Indiana Supreme Court affirmed summary judgment for Tyson because it had no duty when the grass was wholly contained on Tyson's property.

Goff believed the court should have adopted, rather than *Sheley*, the rule announced by the Seventh Circuit in *Justice v. CSX Transportation*, 908 F.2d 119 (7th Cir. 1990), which is "that a landowner has a duty of care to avoid creating visual obstacles that unreasonably imperil the users of adjacent public ways, even if the obstacle is wholly on his land and merely blocks the view across it." Nevertheless, Goff acknowledged, Reece's case would be dismissed under either standard.

Griffin v. Menard Inc., 175 N.E.3d 811 (Ind. 2021).

David, Rush, Massa, & Slaughter. Goff concurs & dissents with opinion.

Holdings

(1) Where Griffin testified he did not notice anything wrong with the box before he had it off the shelf, there is no reason to infer Menard should have noticed the defective box, even if it inspected the shelves and "front-faced" the products. Without evidence of Menard's knowledge or constructive knowledge of a problem with the box, trial court properly granted summary judgment for Menard on premises liability claim.

(2) Res ipsa loquitur is inappropriate when the injuring instrumentality was not in the exclusive control of the defendant and, here, other customers had access to the box on the shelf, such that Menard did not have the exclusive control required for a res ipsa claim.

Facts & Procedural History

Griffin was shopping for a sink at Menard and found one he liked. When he pulled the box from the shelf, the sink fell out of the bottom of the box and onto Griffin, which caused injuries. Griffin sued Menard under a theory of premises liability. Menard moved for summary judgment based on its lack of actual or constructive knowledge of a problem with the box. Griffin asserted genuine issues of material fact existed about Menard's knowledge, and Griffin added a claim for res ipsa loquitur. The trial court granted summary judgment for Menard. The Court of Appeals reversed and remanded based on genuine issues of material fact regarding knowledge and res ipsa loquitur. The Supreme Court affirmed the trial court's grant of summary judgment for Menard.

Justice Goff concurred that res ipsa was inapplicable in this circumstance, but also dissented because he believed a jury should determine whether Menard had constructive knowledge of the defective box.

Aberdeen Apartments II, LLC, v. Miller, 179 N.E.3d 494 (Ind. Ct. App. 2021).

Najam, Riley, & Brown.

Holdings

(1) Aberdeen was not entitled to summary judgment on the issue of breach because Aberdeen did not designate evidence to demonstrate, as a matter of law, that it did not have constructive notice of the icy conditions that led to Miller's fall.

**"We cannot say, as a matter of law, that a landlord of a multi-unit complex has exercised reasonable care for the safety of its tenants and guests if it has not utilized that technology [for receiving weather alerts 24-hours a day] during the winter months."

(2) Aberdeen was not entitled to relief from judgment based on the final argument of Miller's counsel, which suggested the jury should reward Miller $100-$200 per day because it seemed fair to him, because Aberdeen had a full and fair opportunity to argue its evidence to the jury and to inform the jury what it believed the jury should award.

(3) In light of the fact Miller was unable to work for months and accumulated credit card debt to pay her bills during that time, the award of $80,000 was not "so outrageous that it impresses us at first blush with its enormity."

Facts & Procedural History

In January 2018, Miller was stayed overnight with her boyfriend at his apartment, which was owned and managed by Aberdeen. Miller left around 7:00 am, and as she walked on the sidewalk to her car, she slipped and fell on ice. She fractured her right arm, her recovery was painful, and she was unable to work until the end of March.

Miller sued Aberdeen for negligence that caused her injuries. Aberdeen moved for summary judgment, which the trial court denied. During trial, Aberdeen objected to Miller's closing argument, which the trial court overruled, and then the trial court also denied Aberdeen's request for mistrial after arguments concluded. The jury found Miller 20% at fault and Aberdeen 80% at fault, such that Miller received $80,000 of the $100,000 the jury found as damages. Aberdeen filed a motion to correct error and for relief from judgment. The trial court denied both. The COA affirmed the judgment for Miller.

Landra v. INDOT, 177 N.E.3d 412 (Ind. 2021).

Goff, Rush, & David. Massa dissents with opinion, & Slaughter joins.

Holdings

(1) "[W]hen the government knows of an existing defect in a public thoroughfare that manifests during recurring weather conditions, and when it has ample opportunity to respond, immunity does **not** apply simply because the defect manifests during inclement weather." This holding modifies the rule announced in *Catt v. Bd. of Comm'n*, 779 N.E.2d 1 (Ind. 2002), which held the frequency of a repeated weather condition in the past had not bearing on whether the condition was temporary or permanent.

(2) Because Landra's designated evidence demonstrated INDOT knew of the defect causing the highway to flood, and because INDOT had time to remedy the problem but did not, the trial court erred in granting summary judgment for INDOT.

Facts & Procedural History

Landra was driving home on I-94 when her car encountered flooding that stretched from the left shoulder of the highway to the middle lane. She hydroplaned, struck the median, spun across traffic, and rolled into the ditch. The first officer at the scene reported the flooding was up to his ankle and all the way across the highway. That officer also testified this section of highway floods so consistently that he has called INDOT 10-15 times in six years to come clean the drains. The second responding officer agreed the area was prone to flooding from poor drainage. Just after Landra's accident, INDOT was called out and it took 3 hours to remove the debris from the drains and remove the water from the interstate.

Landra sued INDOT for negligence based on its failure to post warnings or to maintain proper drainage. INDOT moved for summary judgment based on IC 34-13-3-3(3), which gives the State immunity for a "temporary condition of a public thoroughfare . . . that results from weather." The trial court granted summary judgment for INDOT. The COA affirmed based on *Catt v. Bd of Comm'n*, 779 N.E.2d 1 (Ind. 2002), which held past incidents of conditions have no bearing on whether a condition is permanent (rather than temporary), but the COA expressed concern that Catt not only permits government negligence, "it encourages it." The Supreme Court agreed and modified the rule expressed in Catt to allow limited State liability for recurring problems about which the State has knowledge.

Massa dissents because a plain reading of ITCA (IC 34-13-3-3(3)) indicates INDOT is immune because the temporary flooding was due to rain, which is weather event. While immunity may appear "unfair", that was the result the legislature chose.

Staat v. INDOT, 177 N.E.3d 427 (Ind. 2021).

Goff, Rush, David, & Slaughter. Massa concurs in result without opinion.

Holdings

(1) Because conditions continue to be "temporary" during a "period of reasonable response" and "at least until the conditions are stabilized and the responses are completed," the evidence that the storm was worsening, that visibility was greatly reduced, and that it was raining so hard Staat did not feel safe to pull over, demonstrate the condition remained "temporary". The court "cannot demand that INDOT endanger its employees while a heavy rainstorm causes low visibility."

(2) Because the period of reasonable response had not passed, the condition resulted from the weather.

Facts & Procedural History

Staat left home for work, driving eastbound on I-74 during a heavy rainstorm that had begun the night before but intensified during his commute. Staat hit a pool of water that caused his car to hydroplane, lose control, and strike a tree. Staat sued INDOT for negligent maintenance of the highway. INDOT moved for summary judgment based on Indiana Code section 34-13-3-3, which makes the government not liable for injury from a "temporary condition" on a roadway that is "caused by the weather." The trial court granted summary judgment. The Court of Appeals reversed. On transfer, the Supreme Court affirmed the trial court's grant of summary judgment to INDOT.

Wilkes v. Celadon Group, Inc., 177 N.E.3d 786 (Ind. 2021).

Slaughter, Rush, & Massa. Goff concurs & dissents with opinion, which David joins.

Holdings

(1) Court adopted the "*Savage* rule" from the Fourth Circuit, which is that – between carriers and shippers – (a) carriers have the primary duty for loading and securing cargo, and (b) shippers that assume a duty of safe loading become liable only for injuries resulting from concealed or latent defects. Carriers remain liable for injuries resulting from a shipper's loading if the negligent loading was apparent.

(2) If the shipper alone loads the cargo, it assumed the duty of safe loading for purposes of rule.

(3) Hasty or inadequate inspection by a carrier cannot turn an apparent defect into a latent defect.

(4) Designated evidence supported trial court's grant of summary judgment for Celadon because, although Celadon assumed a duty of safe loading, the failure to secure the load was apparent from Wilkes's brief observation of the trailer's contents.

Facts & Procedural History

Wilkes became a commercial truck driver in 2009 and, in 2014, was working for Knight Transportation. Knight assigned him to drive cargo from Indiana to North Carolina. The cargo, which consisted of empty, reusable trays covered in oil for storing engine parts, belonged to Cummins, who contracted with Celadon to ship them to North Carolina for cleaning. Celadon would then hire the cheapest carrier possible for each trip, which in this case was Knight & its driver Wilkes. Celadon directed and supervised the loading of the trays into Knight's trailer, and Celadon's untrained employee stacked the trays into the trailer 13 feet high and without binding, straps or shrink-wrap. Wilkes found the truck already loaded, but with the back door of the trailer open. Wilkes looked inside and saw the 13-foot unsecured stacks, and then he closed and locked the doors. On the way to North Carolina, he did not feel the load shift, but when he opened the trailer doors, trays fell onto him and injured him.

Wilkes sued Cummins, Celadon, and affiliated companies for negligent packing, loading, and failure to secure the load. The defendants moved for summary judgment based on lack of duty and lack of breach. The trial court granted the motions. The COA affirmed summary judgment for Cummins but reversed for Celadon. On transfer, Wilkes did not challenge the summary judgment for Cummins, and the Supreme Court affirmed summary judgment for Celadon. Justice Goff dissented because: (1) adoption of the Savage rule was unnecessary; and (2) a genuine issue of fact existed about whether a latent loading defect existed.

Coplan v. Miller, 179 N.E.3d 1006 (Ind. Ct. App. 2021), *trans denied*.
Vaidik, May, & Crone.

Holdings

(1) To determine whether a warning is required because a patient is an "imminent danger" for purposes of IC 34-30-16-1, all the history known to the mental health service provider must be considered, not just the information provided by the patient that very day.
(2) Nothing in Indiana Code § 34-30-16-1 suggests the duty to warn or take precautions is owed only to those potential victims who are completely unaware of the danger posed.
(3) Physicians assistants are not included in the definition of mental health service provider, as defined in Indiana Code § 34-6-2-80, and therefore, the physician's assistant has neither immunity from liability provided by nor the obligation to warn created by Indiana Code § 34-30-16-1.
(4) To determine a physician's assistant's duty under these circumstances, a court will have to balance the three factors announced in Webb v. Jarvis, 575 N.E.2d 992 (Ind. 1991) (relationship between the parties, the foreseeability of harm to person injured, and public policy concerns).

Facts & Procedural History

On at least four occasions between December 9, 2016, and January 10, 2017, Zachary Miller arrived at the hospital emergency room because of confused, angry, violent, paranoid, suicidal, and/or homicidal thoughts. On one of those occasions, the hospital kept Zachary for three days. On January 1, Zachary threatened to kill his mother, kicked his grandfather, and killed the family dog. On January 8, Zachary went to the hospital and asked to be admitted because he was struggling with running thoughts and external stressors. Hospital staff determined inpatient treatment was not necessary. A few hours later, Zachary killed his grandfather.

Zachary's grandmother sued the hospital, Medical Associates (which staffed the emergency room), and Timothy Held (the physician's assistant who assessed Zachary on January 8th), and alleged Defendants should have admitted Zachary to the hospital or psych unit, and Defendants should have warned his family. The Defendants moved for summary judgment under IC 34-30-16-1, which makes mental health service providers immune from civil liability to persons other than the patient for not protecting those others from the patient, unless the patient communicated a specific threat OR the patient's behavior evidences imminent danger of physical violence to others. Defendants claimed Zachary made no specific threats creating an obligation to warn and his behavior on January 8th did not evidence an imminent threat. The trial court denied their motion for summary judgment but certified the issue for interlocutory appeal. The COA affirmed the denial of summary judgment.

Wiley v. ESG Security, Inc., 187 N.E.3d 267 (Ind. Ct. App. 2022).
Altice, Bailey, & Mathias.

Holdings

(1) Security company's "duty of reasonable care" to provide security for concert attendees does not include a duty to protect from crowd surfing because, considering concert attendees generally, "[g]etting dropped or thrown to the ground from above the heads of other audience members is not the kind of harm normally expected for a concert attendee to suffer."
(2) Evidence that security company requested extra employees for The Devil Wears Prada (TDWP) concert because of behavior of crowd at prior TDWP concert and evidence that security employees had "caught" numerous crowd surfers, including Wiley, at the concert in question (before the time they didn't and Wiley fell to the ground) created a genuine issue of material fact about whether the security company had assumed a duty to assist crowd surfers.
(3) Security company cannot rely on Wiley's assumption of risk or incurred risk to eliminate its duty to Wiley absent express consent by Wiley.
(4) Assumption of risk is instead relevant to issue of breach, which was not before the Court.

Facts & Procedural History

Wiley went to see TDWP at the Murat. The concert was produced by Live Nation, who hired ESG to handle security. Signs and Announcements prohibited crowd surfing and warned of the risk. Nevertheless, attendees crowdsurfed from the back to the front of the crowd, and when they reached the barricades at the front of the crowd, security employees would catch the surfer, put them on the ground on their feet, and escort them out of the 6-foot space between the crowd and the stage. Wiley had surfed multiple times before the time when, because security employees were dealing with another patron, the crowd "surfed" Wiley off the front of the crowd and he fell to the floor between the crowd and the stage.

Wiley sued Murat, ESG, Live Nation and TDWP, and he alleged their negligence was the proximate cause of his injuries because they failed to warn him and failed to keep him reasonably safe from crowdsurfing. ESG moved for summary judgment because it did not have a duty related to crowdsurfing and because Wiley had incurred the risk of his injuries. The trial court denied summary judgment to ESG on the issue of duty, but it granted summary judgment to ESG because of the inherent risk of crowdsurfing. The COA reversed the summary judgment for ESG because Wiley's decision to incur the risk of crowdsurfing could not negate any duty ESG may have had to Wiley.

Lowe v. N. Ind. Commuter Transp. Dist., 177 N.E.3d 796 (Ind. 2021), *cert. denied* 142 S. Ct. 2719 (2022). Slaughter, Rush, David, Mass, & Goff.

Holdings

(1) The ITCA procedural rules apply to FELA suits against state entities.

(2) Indiana's legislature defined the District, which is a separate municipal corporation, as a political subdivision for purposes of the ITCA, which means Lowe was required to provide notice withing 180 days, which he did not do.

(3) Lowe's filing of the tort claim notice with the AG after 263 days did not constitute "substantial compliance" with the ITCA's notice requirements because "substantial compliance is a question of content not timing."

(4) State law concepts of sovereign immunity are distinct from federal Eleventh Amendment immunity, and federal Eleventh Amendment arguments are not appropriate in state court for determining sovereign immunity.

Facts & Procedural History

Clarence Lowe was an employee of the Northern Indiana Commuter Transportation District, which owns and operates a passenger rail line between Chicago and South Bend. In early 2018, Lowe was injured at work while manually hammering spikes into frozen track ties. He sent a notice of tort claim to the Indiana Attorney General 263 days after his injury. The AG responded to say it did not appear to have any connection to the case because the State was not a named party. Lowe then filed a complaint against the District under the Federal Employers' Liability Act (FELA). The District moved for summary judgment because, pursuant to the Indiana Tort Claims Act (ITCA), the District is a "political subdivision" that must receive notice of a tort claim within 180 days of injury. The trial court granted summary judgment to the District. The Indiana Supreme Court affirmed.

6232 Harrison Ave., LLC, v. City of Hammond, 181 N.E.3d 379 (Ind. Ct. App. 2021).

Mathias, Tavitas, & Weissmann.

Holdings

(1) Under the requirement in Indiana Tort Claim Act's that notice be given to a political subdivision "within one hundred eighty (180) days after the loss occurs", the clock begins to run on the 180 days only when: (a) an injury is ascertainable by a claimant; and (b) the injury has in fact been sustained by the claimant.

(2) Herein, where an allegedly illegal payment amount was due to the City between January 1 and April 15, the 180-day clock began to run on March 9, when the landlords paid the alleged illegal amount. The landlords injury was ascertainable on January 1, but the injury was not sustained until March 9.

Facts & Procedural History

There's a long and winding history about how much political subdivisions can charge as a rental registration fee, involving legislative action and Indiana Supreme Court holdings. The City of Hammond charges a yearly fee of $80. Landlords assert the fee cannot be more than $5 per year. Landlords sued under the tort claims act. City asserted the landlords failed to file within 180 days of the injury – because City asserted injury occurred January 1, when the yearly fee first became due. Landlords asserted 180 day clock began to run on March 9, when they actually paid the allegedly improper fee. Trial court dismissed landlord's action. The COA reversed.

Hopkins v. Indpls. Pub. Schools, 183 N.E.3d 308 (Ind. Ct. App. 2022), *trans. denied*.
Crone, Bradford, & Tavitas.

Holdings

(1) The "enforcement immunity" provided by IC 34-13-3-3(8)(B) in Indiana's Tort Claim Act does not provide immunity for a school's failure to follow the dismissal procedures that were intended to protect a seven-year-old's safety when school ended.

(2) The school also could not find immunity under IC 34-13-3-3(10), which protects governmental entities from vicarious liability for third parties, when genuine issues of material fact existed about "which person or persons were ultimately responsible for the misdirection" that removed Yarbrough from the bus line.

Facts & Procedural History

On seven-year-old Yarbrough's second day of first grade at School 58, Yarbrough was waiting in line to ride his bus home when a teacher removed him from the bus line and told him he was designated as a walker. Yarbrough showed the teacher his blue backpack tag, which identified him as a bus rider, but he was forced to go to stand with the walkers. Yarbrough was scared when his parents were not near the congregation area for walkers, because he did not know how to get to his home, which was 1.2 miles away from the school. Yarbrough walked nearly a mile in the wrong direction, was approached by a homeless man in an alley, was chased by dog, crossed a major street at rush hour, and finally was found by a stranger who called the police and the school.

Yarbrough's parents sued the school for breaching its duty of reasonable care and supervision by releasing him to walk home alone. The school claimed governmental immunity in its answer and then filed a motion for summary judgment that claimed immunity based on a number of provisions in the Indiana Tort Claims Act (ITCA). The trial court granted summary judgment for the school based on the theory the school was immune from liability under IC 34-13-3-3(8)(B) for its failure to properly adopt or enforce a school policy regarding dismissal of students. The COA reversed the summary judgment granted to the school and remanded for further proceedings.

Town of Cicero v. Sethi, 189 N.E.3d 194 (Ind. Ct. App. 2022).
Najam, Vaidik, & Weissmann.

Holdings

(1) Sethi did not lack the knowledge or the means of knowledge concerning the facts underlying their fraud and constructive fraud claims, such that they could not file a tort claim notice within 180 days.
(2) Sethi could not rely on equitable estoppel when Sethi did not present clear and convincing evidence that Town's counsel misrepresented the law or facts when he asserted the Town was immune from liability for Sethi's general claim for damages based on the demolition of property.
(3) Sethi could not claim equitable estoppel based on Town counsel's statement that he was going to stop re-answering questions, as that was not an inducement to not file a formal tort claims notice.
(4) Sethi failed to designate any evidence to demonstrate they acted with due diligence to file the tort claim notice after the equitable estoppel would have ceased to operate as a valid defense.
(5) Substantial compliance with the ITCA notice requirement involves "sufficient information for the [Town] to ascertain the full nature of the claim against it so that it c[ould] determine its liability and prepare a defense", and simply informing the Town of "loss" and an intent to sue, without mentioning fraud and constructive fraud, was insufficient to constitute substantial compliance with the notice requirement.
(6) Sethi's designated evidence failed to create a genuine issue of material fact regarding any fraudulent concealment that could justify excusing Sethi's failure to file tort claim notice within 180 days.

Facts & Procedural History

Sethi owned property in Cicero. By 2014 the property was abandoned and not insured. The Town expressed interest in buying the property. In 2017, the fire department inspected the property and issued an "unsafe building advisory". The Town's attorney notified Sethi that the structure had been declared unsafe, needed to either be secured or demolished, and would have a final hearing at the Town Council meeting on February 7. Sethi told a local agent to fix the property, but on February 5 the property was damaged by fire. Sethi's agent attended the Town Council meeting and participated, and then then the Town Council unanimously voted to tear down the structures on the property. The structures were torn down. Sethi demanded damages, which the Town's attorney said the town would not pay as it had acted lawfully.

Sethi filed a second amended complaint against the Town alleging fraud, constructive fraud, and unjust enrichment. The Town filed a motion for summary judgment on the fraud and constructive fraud claims based on Sethi's failure to file tort claim notice within 180 days. The trial court granted the Town's motion after determining Sethi had not substantially complied with the notice requirement. The trial court did not address, however, whether the Town should be estopped from raising the notice defense or whether fraudulent concealment should preclude the Town's notice defense. Then, pursuant to Sethi's motion to correct error, the trial court found Sethi had designated evidence to create a genuine issue of material fact about whether estoppel barred the Town's ITCA notice defense. On appeal, the Town challenged the trial court's determination regarding estoppel, and Sethi asserted it substantially complied with the ITCA notice requirements and fraudulent concealment should toll the notice requirements of the ITCA. The COA affirmed in part, reversed in part, and remanded with instructions.

Dunigan v. State, 2022 WL 2252952 (Ind. Ct. App. 6-23-22)
Tavitas, Riley, & May.

Holdings

(1) Claims of prosecutorial misconduct are not cognizable in a civil action sounding in tort.
(2) Prosecutors have absolute immunity from civil liability under Indiana's Tort Claims Act (ITCA) for alleged misconduct committed during the course and scope of their duty as prosecutors, pursuant to IC § 34-13-3-3.
(3) Dunigan failed to comply with the notice requirements of the ITCA.

Facts & Procedural History

In 2018 Dunigan was convicted of Level 1 felony child molesting and sentenced to forty-two years of imprisonment. In 2020 Dunigan filed a civil complaint in Tippecanoe Circuit Court seeking $100 million in compensation, disbarment of the prosecutors, and overruling of his child molesting conviction because (1) the State of Indiana, by its agents, tampered with some evidence relating to his child molesting conviction, which violated his constitutional rights; and (2) the prosecutors committed nine forms of misconduct. The trial court dismissed Dunigan's complaint because it failed to state a claim for which relief could be granted or was filed against a defendant who is immune to suit under ITCA. The COA affirmed.

K.G. by Ruch & Ruch v. Smith, 178 N.E.3d 300 (Ind. 2021).

Goff, Rush, & David. Slaughter dissents w/opinion & Massa joins.

Holdings

(1) When a caretaker assumes responsibility for a child, and when that caretaker owes a duty of care to the child's parent or guardian, a claim against the caretaker for the negligent infliction of emotional distress may proceed when the parent or guardian later discovers, with irrefutable certainty, that the caretaker sexually abused that child and when that abuse severely impacted the parent or guardian's emotional health.

(2) Trial court erred in granting summary judgment because Ruch survived summary judgment under this new test: (a) the school owed Ruch a duty of care for KG; (b) there is irrefutable certainty that the abuse occurred because Smith confessed; (c) Smith's sexual abuse of KG was hidden from Ruch; and (d) Ruch's discovery of the sexual abuse severely impacted Ruch's mental health.

(3) Trial court also improperly dismissed Ruch's individual claim for economic damages because her complaint contained an adequate allegation that she incurred expenses for the placement of KG in a chronic care facility and the school's summary judgment motion did not address this allegation in her complaint.

Facts & Procedural History

Ruch gave birth to KG in 2004. KG is blind, nonverbal, limited in mobility, and unable to communicate reciprocally. KG attended the New Augusta North Public Academy in Pike Township for instructional and special needs services, which included diaper changes. At some point between October 2015 and January 2016, an instructional assistant, Smith, sexually abused KG. Around this time, KG became combative with caregivers and began having night terrors. In April 2018, Smith confessed to her actions and pled guilty to Level 3 felony child molesting.

Ruch, individually and as KG's parent, sued Smith, the school, and Pike Township school district (collectively "the school"). In her individual capacity, Ruch alleged that she suffered emotional distress as a result of the sexual abuse of KG and that she incurred expenses for placing KG in a long-term care facility. The school moved for summary judgment as to Ruch's individual claims because she had not satisfied the modified-impact rule or the bystander rule to recover for emotional distress. The trial court granted summary judgment to the school. Ruch appealed and asked the Indiana Supreme Court to create a rule that allows a parent to recover in this context. The Supreme Court agreed with Ruch.

Slaughter dissented because he would not set aside the prevailing law to resurrect Ruch's claims, because allowing emotional distress claims without witnessing the tortious conduct could open a floodgate for emotional distress claims and will be hard to apply, and because the policy decisions underlying the change in law adopted herein would be better suited for the legislature's consideration.

Ivy Quad Owners Assoc. v. Ivy Quad Dev., 179 N.E.3d 977 (Ind. 2022).
Rush, David, Massa, Slaughter, & Goff.

Holdings

(1) To be liable for an implied warranty of habitability, an entity must have been involved both in the building and the selling of a home for profit, and to survive a motion to dismiss, a complaint must allege both elements as to each entity.

(2) Herein, as to two of the Matthews Defendants, the HOA alleged they took part in "the design, construction, development, and sale of Ivy Quad," which is sufficient to survive dismissal. As to the other two Matthews Defendants, the HOA alleged involvement with only "design and construction," which is not sufficient to survive a motion to dismiss as to the implied warranty of habitability.

(3) The "economic loss doctrine" prohibits tort liability for negligence that produces "purely economic loss" that can be calculated under contract law. Where personal injury or injury to "other property" are alleged, which cannot be adequately recovered under contract law, the negligence claim may proceed. To determine whether economic loss doctrine precludes tort recovery, we consider: (a) type of damages sought, and (b) contractual relationship between the parties.

(4) Herein, the complaint (a) alleged damages to "other property" inside individual units and (b) stated nothing about the contractual relationship between each of the Matthews Defendants and the HOA. Accordingly, the negligence claim survived the motion to dismiss based on economic loss doctrine.

Facts & Procedural History

Ivy Quad is a 60+ unit residential condo complex. In 2017, the residents began to notice water infiltration and cracking and crumbing concrete. The Home Owners Association (HOA) hired engineers to investigate, and the engineers uncovered numerous construction and design defects. The HOA sued several parties, and at issue in this case are four: Matthews, LLC; DMTM, Inc; David Matthews; and Velvet Canada. The complaint alleged breach of the implied warranty of habitability and negligence. The four Matthews Defendants moved to dismiss under 12(B)(6) because they are not "builder-vendors" as required to be liable for the implied warranty of habitability and because the negligence claim is barred by the economic loss doctrine. The trial court dismissed all four Matthews Defendants and certified the order for interlocutory appeal. The COA reversed and remanded. The Indiana Supreme Court affirmed in part and reversed in part.

Progressive Southeastern Ins. Co. v. Brown, 182 N.E.3d 197 (Ind. 2022).
Slaughter, Rush, David, Mass & Goff.

Holdings

(1) The plain language of the federal statutes (section 30 of the Motor Carrier Act of 1980, codified at 49 USC § 31139) requires MCS-90 endorsements for only (a) intrastate (or foreign) travel or (b) transportation of hazardous material.

(2) Various federal courts apply three different tests to determine whether a trip is interstate or intrastate: (a) trip-specific approach, which looks at what the carrier's employee was doing on the specific trip when the accident occurred; (b) character-of-the-commerce approach, which looks to the "shipper's fixed and persisting transportation intent at the time of the shipment"; and (c) public-policy approach, which looks to whether recovery would serve the purposes of the Motor Carrier Act generally. Indiana Supreme Court rejected the public-policy approach, but declined to pick between the other two, as Brown lost either way because B&T did not intend Brown to leave Indiana on his trip.

(3) Indiana's incorporation of the federal law into the Indiana Code did not expand or alter the requirements of the federal law, and thus Progressive was not required to indemnify B&T for liability arising from intrastate transport of non-hazardous materials. This holding overrules any conflicting language in *Sandberg Trucking v. Johnson*, 76 N.E.3d 178 (Ind. Ct. App. 2017).

Facts & Procedural History

B&T Bulk is a motor carrier in Mishawaka that operates in both Indiana and Michigan. Brown, an employee of B&T, was driving a truck and empty trailer to Logansport to pick up cement that he would deliver to South Bend. During the trip, Brown crossed the centerline and struck the oncoming vehicle of Dona Johnson. Johnson died. B&T had a commercial auto policy from Progressive, but the truck and trailer driven by Brown were not on the policy at the time of the accident. The policy also had an MCS-90 endorsement whereby Progressive agreed to pay certain negligence judgments against B&T.

Johnson's widower filed a wrongful-death action against Brown and B&T. Progressive filed a declaratory action to determine (1) whether it had duty to defend or indemnify B&T or Brown when the truck and trailer were not on the policy; and (2) whether the MCS-90 endorsement applied. Johnson's insurer, State Farm, intervened. Everyone filed motions for summary judgment. The trial court determined Progressive had no duty to defendant or indemnify Brown or B&T because the truck and trailer were not on the policy, but the court determined the MCS-90 endorsement applied. Progressive appealed the MCS-90 determination and the COA affirmed. The Supreme Court granted transfer and reversed the trial court's denial of summary judgment for Progressive because neither federal nor state law made the MCS-90 applicable to intrastate transport of non-hazardous materials.

Ebert et al. v. Illinois Casualty Co., 188 N.E.3d 858 (Ind. 2022).

David, Rush, Massa, Slaughter, & Goff.

Holdings

(1) The liquor liability exclusion in each of the businessowners insurance policies was not ambiguous, and by its language it excluded coverage for bodily injury or property damage arising from an insured contributing to intoxication, furnishing alcohol to a person under the influence of alcohol, or in violation of a statute regarding alcohol. Also excluded were claims arising from employment or monitoring of others, and from failing to provide transportation for persons under the influence of alcohol.

(2) To determine whether all of Eberts' claims fall under those exclusions, the Court adopts the "efficient and predominant cause" analysis from *Property Owners Ins. v. Ted's Tavern*, 853 N.E.2d 973 (Ind. Ct. App. 2006), which look to see the extent to which claims are "inextricably intertwined with the underlying negligence."

(3) Herein, Eberts' claims that defendants were negligent for letting Spence leave and for failing to call police are inextricably intertwined with the underlying allegation that defendants served alcohol to Spence when he was intoxicated. Because Spence's intoxication was the efficient and predominant cause of the Eberts' injuries, the trial court properly granted summary judgment as to the businessowners policies that contained the liquor liability exclusion.

Facts & Procedural History

William Spence drank alcohol at Big Daddy's Show Club in Kokomo and then left driving his truck. Spence failed to stop at a flashing light and collided with a vehicle driven by the Eberts. Spence's blood alcohol content was 0.195%. Before Spence had left Big Daddy's, he was told to leave the premises by Christopher France, who worked as a bouncer for Little Daddy's but was not on the clock at the time. The Eberts sued Big Daddy's, Little Daddy's, and Daniel Parks, who owned both show clubs, for Dram Shop violation, continuing to serve Spence, allowing Spence to drive away, failing to notify police when Spence drove, and failing to obtain other transportation for Spence.

Big Daddy's and Little Daddy's both had businessowners and liquor liability policies with Illinois Casualty that were in effect on the night in question. After initially agreeing to defend Parks & his clubs, Illinois Casualty filed a declaratory action to determine whether it had a duty to defend or indemnify Parks in the underlying lawsuit based on the language of the insurance policies. Illinois Casualty moved for summary judgment, which the trial court granted to Illinois Casualty on three of the four policies – both businessowners policies, which contained explicit liquor liability exclusions, and Little Daddy's liquor liability policy. The COA reversed in part after determining the businessowners policies created a duty to defend. The Indiana Supreme Court affirmed the trial court's grant of summary judgment to Illinois Casualty on the businessowners policies.

Bird v. Valley Acre Farms, 177 N.E.3d 459 (Ind. Ct. App. 2021).
Bailey, Crone, & Pyle.

Holdings

(1) Trial court erred in granting summary judgment based on its determination that a release entered in May had proper consideration, while a release entered in December did not have proper consideration, when both releases indicated they were entered in exchange for $5,000. Further factual development was required.

(2) Even if additional evidence reveals the December release fails for lack of consideration, the May Release must be construed together with the Covenant that was drafted at the same time and makes clear that the May Release was a limited release that released only some parties from further liability.

Facts & Procedural History

Sixteen-year-old John Levi Bird was working at Valley Acre Farms and was instructed to clean out a chicken coop with another minor, D.G. Inside the coop, they found a loaded rifle, and D.G. shot Bird in the abdomen, causing life threatening injuries. Bird survived and, in July 2018, filed a complaint against D.G., D.G.'s parents, Valley Acre Farms, premises owner Geneva Bagshaw, and shareholder David Bagshaw. On May 19, 2020, Bird executed (1) a "Release of All Claims" against D.G.'s parents that included language indicating it was a "full settlement of all claims resulting from said accident"; and (2) a "Covenant not to Execute [against D.G.] on any Judgment in Excess of Available Insurance Proceeds." Then in December 2020 Bird executed a new Release that deleted the "full settlement of all claims language" and included instead: "Nothing herein doe or is intended to release any claims against Valley Acre Farms, Inc., David Bagshaw, or Geneva Bagshaw."

Valley Acre & Bagshaws moved for summary judgment on the basis that the May Release had released them from liability. The trial court concluded the May Release should not be construed together with the Covenant entered the same day and the terms of the May Release "were clear and unambiguous so as to release all defendants from liability; accordingly the trial court entered summary judgment for Valley Acre & Bagshaws. The COA reversed and remanded.

Franciscan Alliance, Inc., v. Padgett, 180 N.E.3d 944 (Ind. Ct. App. 2021).

Bailey, Mathias, & Altice.

Holdings

(1) Employer's claims against employee accrued when damages arose, which was when State sued employer for HIPAA violations rather than when employer learned of employee's actions, such that employer's lawsuit against the employee was timely.

(2) Genuine issues of material fact precluded summary judgment as to whether the Agreement that employee signed regarding HIPAA contained an offer or consideration, as required to make it a contract with employer.

(3) Assuming arguendo an employment contract or other duty existed, genuine issues of material fact remain regarding whether Padgett breached a duty to access confidential information only for "legitimate business purposes" when the Agreement did not define that phrase.

(4) Genuine issues of material fact also exist as to whether Padgett's accessing of personal health information was the cause of Franciscan's damages to the State when Franciscan also had to "implement procedures required by HIPAA."

Facts & Procedural History

Padgett was a patient service representative for Franciscan, which gave her access to confidential patient information. Padgett signed an Agreement to access confidential patient information "only for legitimate business pruposes in accordance with Applicable Requirements" that informed her she could be personally liable for violating the agreement. Between October 2012 and April 2014, Padgett periodically accessed the confidential information of a particular patient, and she alleges she did so to know when the patient had appointments because she wanted to avoid his harassment. In 2018, the State sued Franciscan for alleged HIPAA, including the actions of Padgett and Franciscan's failure to discover Padgett's actions. Franciscan entered a settlement agreement with the State, pursuant to which Franciscan paid $80,000 to the State.

Franciscan then sued Padgett for breach of contract, breach of fiduciary duty, negligence, and indemnification for the $80,000 Franciscan paid the State. Padgett filed an answer and a counter-claim alleging Franciscan's lawsuit was frivolous. Franciscan moved for summary judgment. Padgett moved for summary judgment. The trial court granted summary judgment to Padgett on all of Franciscan's claims and to Franciscan on Padgett's counter-claim. Franciscan appealed the order granting Padgett summary judgment. The COA reversed in part, affirmed in part, and remanded.

Lake Imaging, LLC v. Franciscan Alliance, Inc., 182 N.E.3d 203 (Ind. 2022).
Goff, Rush, David, Massa, & Slaughter.

Holdings

(1) The Medical Malpractice Act (MMA) does not apply to one medical provider's contractual indemnification claim against another medical provider because (a) neither medical provider is a "patient" as defined by the MMA, and (b) expanding the MMA's application to indemnification claims between providers would complicate allocation of risk, require preemptive lawsuits by medical providers who should be collaborating, and conflict with the purpose of having a medical review panel.

(2) Because the MMA does not apply to an indemnification claim, the MMA's two-year statute of limitations did not apply to Franciscan's claim against Lake Imaging. Court declined to determine whether indemnification was a "contract for payment of money" claim that had a six-year SOL or simply a "breach of contract" claim that had a ten-year SOL, because Franciscan's claim was timely either way.

(3) Where the contract between the parties did not contain any clause expressly indicating the obligation to indemnify terminated or expired at the end of the period of the parties' agreement, indemnification continued to be appropriate under the contract as long as the professional negligence occurred while the contract was in effect.

Facts & Procedural History

Lake Imaging provided radiology services for patients of Franciscan, and the contract between Franciscan and Lake Imaging required Lake Imaging to indemnify and hold Franciscan harmless from liability caused by Lake Imaging's negligence in providing radiology services. Lake Imaging misinterpreted a patient's CT scans, the patient died, and the family sued Franciscan under the MMA. Franciscan settled with the family and then sought indemnification from Lake Imaging. Lake Imaging didn't respond, so Franciscan filed suit. Lake Imaging moved for summary judgment based on the two-year SOL of the MMA. The trial court dismissed Franciscan's claim because Franciscan had not presented the claim to a medical review panel. The Indiana Supreme Court reversed the trial court's dismissal of Franciscan's breach of contract claim.

Wilson v. Anonymous Defendant, 183 N.E.3d 289 (Ind. 2022).

David, Rush, Massa, & Goff. Slaughter concurs with separate opinion.

Holdings

(1) Under Restatement (Second) of Torts § 429, as adopted in *Sword v. NKC Hospitals*, 714 N.E.2d 142 (Ind. 1999), an alleged principal cannot be liable for the negligence of an alleged apparent agent unless there is a legal relationship between the alleged principal and alleged apparent agent.

(2) Because Wilson designated no evidence of a legal relationship between Anonymous and physical therapist who injured Wilson, *Sword*'s rule of vicarious liability does not apply.

(3) Court adopts Restatement (Second) of Agency § 267, which allows a principal to be liable for an apparent agent, even without a contractual relationship between the two, if the principal's representations cause a third party to reasonably believe he is dealing with the principal's servant.

(4) Summary judgment for Anonymous is precluded by genuine issues of material fact regarding (a) whether Anonymous's representations about physical therapist instilled a reasonable belief in Wilson's mind that physical therapist was agent of Anonymous, and (b) whether Wilson's belief led her to seek treatment from physical therapist.

Facts & Procedural History

In September 2008, Anonymous, which is an orthopedic physician group, contracted with Accelerated Rehab for Accelerated to provide physical therapy staff to Anonymous. Thereafter Accelerated was acquired by Athletico, and apparently continued operating by the terms of the Accelerated's contract with Anonymous. The record contains no indication of the legal relationship between Athletico and Anonymous. In 2015 and 2016, Darci Wilson received orthopedic care at Anonymous, including a knee surgery in December 2015. After surgery Anonymous told Wilson she needed PT and referred her to the second floor of Anonymous's building. Neither the paperwork Wilson signed nor the signage around the building informed Wilson that the PT was not an employee of Anonymous. The PT performed a procedure that caused Wilson "excruciating pain" and injury that necessitated a second knee surgery.

Wilson filed a proposed medical complaint against Anonymous and the PT for negligence. She later added Athletico and alleged the PT provided therapy "through Athletico . . . under the assumed name of [Anonymous]." Athletico and the PT received summary judgment because they were not qualified healthcare providers under the MMA, and Wilson had not filed suit against them within two years. The trial court also granted summary judgment to Anonymous because Sword did not permit Anonymous to be liable for the PT's actions when there was no evidence of a contractual relationship between Anonymous and the PT. The Indiana Supreme Court reversed summary judgment for Anonymous after adopting Restatement (Second) of Agency § 267 and finding genuine issues of fact.

Justice Slaughter concurred in judgment with a separate opinion. He believed a genuine issue of material fact existed about the legal relationship between the PT and Anonymous, which made adoption of § 267 unnecessary, especially because adoption of § 267 rendered Sword's adoption of § 429 an unnecessary redundancy.

Arrendale v. American Imaging & MRI, et al., 183 N.E.3d 1064 (Ind. 2022).
David, Rush, Mass, Slaughter, & Goff.

Holdings

(1) A non-hospital medical entity, such as a diagnostic imaging center, may be held liable for the negligent acts of its apparent agents under Restatement (Second) of Torts section 429 as was adopted in *Sword v. NKC Hospitals, Inc*, 714 N.E.2d 142 (Ind. 1999), and made hospitals vicariously liable for torts of "apparent agent" independent contractors.

(2) Because the designated evidence created genuine issues of material fact about whether radiologist who read an MRI was an apparent agent of the diagnostic imaging center, the trial court's summary judgment for the imaging center was inappropriate.

Facts & Procedural History

Arrendale's primary care doctor sent him for an MRI at American Imaging, which is an outpatient diagnostic imaging center that is not a qualified healthcare provider under the Medical Malpractice Act. American Imaging contracted with a radiologist, Dr. Boutselis, to read MRIs as an independent contractor. Boutselis's reports regarding MRIs appeared on the imaging center's letterhead and did not indicate he was an independent contractor. Arrendale filed a complaint for medial malpractice because of failure to diagnose a spinal issue from the MRI read by Boutselis. American Imaging argued it was not liable for Boutselis's error because it was a non-hospital entity. Arrendale asserted a genuine issue of material fact existed about Boutselis's apparent agency for American Imaging.

Community Health Network, Inc. v. McKenzie, et al., 185 N.E.3d 368 (Ind. 2022).
Rush, David, Massa, Slaughter, & Goff.

Holdings

(1) The Medical Malpractice Act (MMA) does not apply to Community employee's inappropriate accessing of medical records because the misconduct "lacks a temporal connection to any care provided by Community to the Plaintiffs as patients."

(2) An employee's conduct may fall within the scope of employment even if it was unauthorized and violated an employment agreement, especially if the employee's actions naturally or predictably arose from delegated employment activities within the employer's control.

(3) McKenzie cannot recover under theories of respondeat superior or negligent training, retention, and supervision because they cannot demonstrate physical injury to themselves (impact rule) or a loved one in their presence (modified impact rule).

(4) Indiana recognized a tort claim for public disclosure of private facts, but McKenzie's designated evidence of Gray's disclosure of medical record information to her own family is disclosure to a small group, which is not actionable as a "public disclosure."

Facts & Procedural History

Katrina Gray, a medical-records coordinator with Community Health Network, improperly accessed and disclosed information from the confidential medical records of several people, including Heather McKenzie and her family members. Gray and McKenzie's family had known each other for decades, McKenzie had been married to Gray's stepson, and Gray had helped McKenzie get a job. Community trained Gray regarding HIPPA, and Gray signed agreements that prohibited accessing records of individuals who were not patients at that time of the branch of Community where she worked. Between January and September of 2013, Gray accessed McKenzie family records thirty-four times (along with over 160 other people).

McKenzie sued Community and Gray, alleging claims of respondeat superior against Community; of negligent training, supervision, and retention by Community; and of negligence and invasion of privacy against Gray. Community filed a motion to dismiss in which it asserted the trial court lacked jurisdiction because the Medical Malpractice Act applied. In the alternative, Community filed a motion for summary judgment that asserted Gray's tortious acts were outside the scope of her employment, McKenzie had no damages, and public disclosure of private facts was not actionable in Indiana. The trial court denied the motion to dismiss because McKenzie were not patients of Gray's practice and no medical treatment was provided by Gray's behavior. The court also denied summary judgment because there were genuine issues of material fact about: (1) whether Gray's conduct was within the scope of her employment; (2) whether McKenzie had damages; and (3) whether Gray had publicly disclosed any information from the medical records.

The COA affirmed the denial of the motion to dismiss because the MMA did not apply. The COA reversed the denial of summary judgment as to public disclosure of private facts after determining that tort is not recognized in Indiana. The COA affirmed the denial of summary judgment as to respondeat superior and negligent training, supervision, and retention. The Supreme Court affirmed the denial of the motion to dismiss and reversed the denial of summary judgment for Community.

Health & Hospital Corp. v. Dial, 175 N.E.3d 310 (Ind. Ct. App. 2021), *trans. denied*.
May, Bailey, & Robb.

Holdings

(1) A proposed complaint before the Indiana Department of Insurance (IDOI) is not void ab initio simply because it was filed in the name of a deceased individual as administrator of the estate of a deceased alleged victim of malpractice.

(2) The proposed complaint filed with the IDOI in the name of the deceased administrator tolled the statute of limitations for the filing of the complaint in court, such that malpractice complaint filed by successor administrator within 90 days of decision from medical review panel was timely filed.

Facts & Procedural History

On December 6, 2010, Robert McFerran was admitted to Eagle Valley Meadows, a nursing home in Indianapolis. He primarily stayed there until his death on February 25, 2012. Robert was survived by his wife, Betty, and adult children including Karen Brinsley and Sharon Dial. Betty was the administrator of Robert's Estate until she passed away on October 2, 2013. On October 7, 2013, Betty's attorney filed a proposed complaint with the IDOI that alleged Eagle Valley provided negligent medical care that resulted in Robert's injuries, pain, emotional distress, and death. On December 3, 2013, Karen was named successor administrator of Robert's Estate, for the purpose of pursuing a wrongful death claim. When Karen moved out of state, Sharon became successor administrator in 2015. On October 7, 2019, the medical review panel rendered a decision in favor of Eagle Valley Meadows.

On January 3, 2020, Dial, as administrator of Robert's Estate, filed a complaint in Marion Superior Court alleging Eagle Valley's negligence caused Robert's death. Eagle Valley filed a motion for summary judgment in which is argued Betty's proposed complaint to the IDOI was a legal nullity because Betty had been dead on the day it was filed and, therefore, the proposed complaint had not tolled the statute of limitations for filing the complaint in court. The trial court denied Eagle Valley's motion for summary judgment and certified its order for interlocutory appeal. The COA affirmed.

Woodcox v. Anonymous Hospital, 189 N.E.3d 181 (Ind. Ct. App. 2022), *reh'g denied*.
Friedlander, Crone, & Weissman.

Holdings

(1) Denial of motion for summary judgment is typically an interlocutory order, but where trial court included language indicating "there is no just reason for delay and expressly directs entry of Final Judgment, without prejudice", the order was a final judgment pursuant to Trial Rule 56(C).

(2) Woodcoxes' claim of battery, based on an alleged absence of informed consent, was not outside the scope of the medical review panel process outlined by the Medical Malpractice Act (MMA) because the providers' decision to replace the feeding tube, and the manner in which it was replaced, required providers to exercise professional skill, expertise, and judgment.

Facts & Procedural History

Dylan Woodcox was born in January 2015 with a number of health issues. He was fed through a nasogastric tube. In April 2015, Dylan went to a hospital in respiratory distress. The hospital staff determined his feeding tube should be replaced with a NJ tube. The replacement was made without requesting parents' consent. Dylan died soon thereafter, allegedly due to a perforated small intestine (which then sepsis) caused by the placement of the NJ tube.

Woodcoxes filed a proposed complaint with the Department of Insurance. Before the medical review panel could render a decision, the Woodcoxes filed a declaratory judgment action in the trial court that asked the court to declare the placing of the tube without consent was battery, to determine the battery fell outside the MMA, and to award damages for the battery. Woodcoxes also filed a motion for summary judgment. Defendants moved to dismiss because the medical review panel had jurisdiction over those issues. The trial court denied the Woodcoxes' request for summary judgment and dismissed declaratory judgment action without prejudice. The COA affirmed.

Helman v. Barnett's Bail Bonds, Inc., 175 N.E.3d 826 (Ind. Ct. App. 2021).
Najam, Pyle, & Tavitas.

Holdings

(1) Trial court did not abuse its discretion in declining to give jury instruction indicating that bail bondsmen could not harm or infringe on the rights of third parties because, as trial court said, "no one has the rights to infringe on a third party" and because the rights of the third parties against the bail bondsmen were address by jury instructions regarding the elements of assault, battery, trespass, confinement, burglary, residential entry, criminal organized activity, and civil conspiracy.

(2) The trial court did not abuse its discretion when it failed to provide the jury with verdict forms that asked the jury to assign percentages of fault to the parties under the Comparative Fault Act (IC 34-51-2) when the parties had agreed to divide the trial into a liability phase and a damages phase.

Facts & Procedural History

Gary Helman was arrested on two unrelated criminal cases. His mother, Atta, executed an agreement with Barnett's Bail Bonds to get Gary released from jail, and she paid the $2,500 premium. Gary failed to appear, so the court issued arrest warrants for Gary. Barnett's hired Tadd Martin to apprehend Gary. Daniel Foster and Michael Thomas assisted Martin. The three men approached the house where Gary lived with his parents (Atta & Larry). The plan was for Foster to knock on the front door while Martin and Thomas were stationed at the back door to catch Gary if he attempted to escape. Instead, Martin and Thomas found Atta outside the back door, and they grabbed her. As they tried to get Atta under control, Larry exited the house, shot at Martin once, and then charged at Martin. Martin shot Larry. Gary then came out of the house and shot Martin three times. Martin shot Gary and killed him.

Larry & Atta Helman sued Martin, Thomas, Foster, Barnett's, and Lexington National Insurance and asserted claims of vicarious liability against all of them and intentional torts (including assault and trespass) against Martin, Thomas, and Foster. The jury found in favor of the Defendants on all the claims. The Helmans appealed, and the COA affirmed.

Johnson v. Harris, 176 N.E.3d 252 (Ind. Ct. App. 2021), *trans. denied*.
Weissman, Kirsch, & Altice.

Holdings

(1) The plain language of the Child Wrongful Death Statute (CWDS), IC 34-23-2-1, permits recovery by the parents or by a guardian who has custody of the child at the time of the child's death. As Paternal Grandmother had neither custody of nor guardianship over D.N. at his death, she may not bring the claim.

(2) Probate statute giving power to personal representative to sue for damages owed to Father does not create mechanism for Paternal Grandmother to bring action for Father under CWDS because Father's right to filed the CWDS action expired at his own death.

Facts & Procedural History

Two-year-old D.N. drowned in the backyard swimming pool of his Maternal Grandparents (Harris). Two weeks later, Mother filed for divorce. Soon thereafter, Father retained a lawyer to bring a wrongful death suit against Maternal Grandparents. Four months after D.N.'s death, a court finalized parents' divorce. Four days after the divorce decree, Father died.

Just before the two-year anniversary of D.N.'s death, Paternal Grandmother (Johnson), as personal representative of Father's estate, filed a wrongful death lawsuit against Mother and Maternal Grandparents for the negligence causing D.N.'s death. Mother and Maternal Grandparents moved for summary judgment because the CWDS did not authorize grandparents to file a wrongful death action for a grandchild. The trial court granted summary judgment to Mother and Maternal Grandparents. The COA affirmed.

Goston v. State, 2022 WL 2183343 (Ind. Ct. App. 6-17-22).

Riley, May, & Tavitas.

Holding

(1) Indiana Code § 31-33-18-4, which requires DCS to notify parents of an assessment into the abuse or neglect of their children, does not confer a private right of action on a parent to bring a tort claim for negligence against DCS when it failed to alert a non-custodial parent that his children were being abused.

Facts & Procedural History

Goston was not married to Snyder, but twins were born to Goston and Snyder on August 2, 2006. Snyder had primary physical custody, and the children lived with her and her husband. Goston had parenting time. Beginning as early as two months after birth, both twins required repeated hospital tests and treatment for bruising and injuries to the head and brain. DCS had conducted abuse and neglect evaluations following multiple reports of injuries to the twins. On June 4, 2008, when one of the twins had such severe swelling that surgeons had to remove a portion of his skull to alleviate pressure, DCS contacted Goston for the first time to tell him about the injuries that had been reported over the years.

On October 9, 2020, Goston filed a negligence complaint against numerous defendants, including DCS. DCS moved for summary judgment, which was granted by the trial court. The COA affirmed.

Burris v. Bottoms Up Scuba – Indy, LLC, 181 N.E.3d 998 (Ind. Ct. App. 2021).
Pyle, Bailey, & Crone.

Holding

(1) Paul Burris's report to the diving-instructors association that Michael Ellis, a diving instructor who owned Bottoms Up Scuba, had forged the doctor's signature on Burris's diving paperwork was not an act in furtherance of Burris's right to free speech or in connection with a public issue, and therefore, Burris could not find protection from Ellis's defamation lawsuit in Indiana's Anti-SLAPP statute, IC § 34-7-7-5.

Facts & Procedural History

Ellis and his wife own Bottoms Up, which is a scuba diving company. The Ellises and Bottoms Up were certified by the Professional Association of Diving Instructors (PADI), which certified them to teach students and future instructors. Burris was a scuba student at Bottoms Up, and in 2016 he also completed coursework to become a PADI member and diving instructor. In 2018, Burris heard Ellis had been forging paperwork submitted to PADI, so he contacted PADI for a copy of his own paperwork, where he found a doctor's signature indicating Burris had been cleared for diving by a physician whom Burris had never met. Burris thought the signature looked like Ellis's writing. Burris called PADI to report his paperwork had been forged because he had not had a physical or been examined by the doctor on his form. Burris also sent an email to PADI in which he accused Ellis of forging the doctor's signature. PADI expelled Ellis, his wife, and Bottoms Up from their organization.

The Ellises and Bottoms Up filed a lawsuit against Burris for defamation, tortious interference with a business relationship, and tortious interference with a contract. Burris filed a motion to dismiss pursuant to Indiana's Anti-SLAPP statute, IC 34-7-7-5, and asserted his allegedly defamatory and tortious statements were made in furtherance of his free speech right in connection with a public issue. The trial court denied Burris's request for dismissal, finding the Anti-SLAPP statute did not apply to Burris's private report to a private organization. On interlocutory appeal, the COA affirmed the denial of Burris's motion to dismiss under the Anti-SLAPP statute.

Holland v. Ketcham, 181 N.E.3d 1030 (Ind. Ct. App. 2021).

Mathias, Bailey, & Altice.

Holdings

(1) Pursuant to Indiana Code § 32-18-2-14(a)(1), which makes voidable a transfer or obligation incurred by a debtor if the debtor made the transfer or obligation with the actual intent to defraud any creditor, and IC § 32-18-2-14(b) lists factors a court may use to determine whether the debtor had "actual intent" to defraud, trial court erred in entering judgment for Ketcham because her own admissions indicated her intent was to defraud Holland when she used the cash assigned to her in the divorce proceedings to purchase a home.

(2) Trial court erred in entering judgment for Ketcham's boyfriend based on trial court's determination that boyfriend was not a debtor of Holland under the dissolution decree, because Holland's assertion regarding the boyfriend was not that he was a debtor but that he was part of a civil conspiracy to defraud Holland, and the evidence demonstrated boyfriend acted in concert with Ketcham to defraud Holland.

(3) Because Uniform Fraudulent Transfer Act gives discretion to trial court's to determine an appropriate remedy, the COA remanded for the trial court to decide an appropriate remedy for Holland.

Facts & Procedural History

In January 2018, a dissolution court divided marital assets between Holland and Ketcham and ordered Ketcham to pay Holland an equalization payment of about $200,000 within ninety days. Instead, Ketcham and her new boyfriend used the cash assets Ketcham had received in the divorce to purchase a $200,000 residence because she and her boyfriend had read online that a "homestead exemption" would allow her to avoid paying the judgment to Holland.

Holland sued Ketcham and her boyfriend under Indiana's Uniform Fraudulent Transfer Act, IC 32-18-2. Looking only at a paper record, the trial court entered judgment for Ketcham and her boyfriend. The COA reversed and remanded.

Marchino v. Stines, 182 N.E.3d 253 (Ind. Ct. App. 2022).

Pyle, & Brown. May concurred in result without opinion.

Holding

(1) Neither the lease provision that landlord had to approve pets nor the lease provision providing a right of inspection by landlord overcame the general principle that, when a landlord had transferred control and possession to rental premises to a tenant, the tenant is liable for injuries that occur at the rental location.

Facts & Procedural History

Rex Lott owned a duplex in Indianapolis. One side was rented by the Marchino family, and the other side was rented by Stines, who owned a pit bull named "Boy". Boy chased a neighbor and bit a maintenance man, so Lott asked Stines to remove Boy from the premises. Stines did not. Lott did not follow up with Stines because Lott knew Stines was gravely ill with leukemia. Two months later, the Marchinoes were leaving the house when Stines was leaving the house with Boy. Boy got loose and bit the Marchino son.

Marchino Father filed a negligence action against Lott and Stines. Father alleged Lott knew of Boy's dangerous propensities, but did not allege that Lott was in control of the premises. Lott moved for summary judgment because Stines had exclusive possession of his side of the duplex, so Lott had no duty of care and no liability. Father opposed the summary judgment motion and designated evidence of the rental contract that gave Lott a right of inspection and ability to approve pets. The trial court granted summary judgment for Lott.

Patrick v. Henthorn, 184 N.E.3d 1195 (Ind. Ct. App. 2022).
Najam, Vaidik, & Weissmann.

Holding

(1) To create a genuine issue of material fact to survive summary judgment, Patrick points to conflicting reports from Henthorn about her symptoms just before the accident and her memory of the accident itself; however, conflict about neither of those facts creates a genuine issue of material fact about the dispositive issue – whether Henthorn suffered a medical emergency that was not reasonably foreseeable.

Facts & Procedural History

In 1975, Henthorn was diagnosed with a protein allergy (OTC) that requires daily medication and limited consumption of protein. If she eats too much protein, she gets a headache, gets dizzy & lightheaded, and can pass out. However, between 2007 and August 2017, Henthorn had not experienced an episode of lightheadedness. She had no driving restrictions as a result of her condition, which she and the doctor who had treated her since 1989 called "well controlled." On August 18, 2017, Henthorn was feeling "perfectly fine and in good health" when she left home, but then while driving she suddenly felt light-headed, flushed, and dizzy; lost consciousness; and crashed into multiple cars and a telephone pole. One of the other drivers she hit was Walter Patrick, III, who incurred medical bills totaling more than $50,000.

Patrick sued Henthorn for negligence. Henthorn filed an affirmative defense that asserted she lost consciousness due to a sudden emergency not of her making, and she filed a motion for summary judgment in which she asserted her loss of consciousness was not foreseeable because her OTC was well controlled, she has no driving restrictions, and she felt fine when she left home. The trial court granted summary judgment to Henthorn because her medical emergency was not reasonably foreseeable. On appeal, Patrick argued "the real issue is whether [she] actually suffered a sudden medical emergency on the date of the accident" and he claimed Henthorn's inconsistent statements created a genuine issue of material fact. The COA affirmed the trial court's grant of summary judgment to Henthorn.

Looney v. Nestle Waters N. Am., Inc., 187 N.E.3d 867 (Ind. Ct. App. 2022).
Brown, May, & Pyle.

Holdings

(1) Considering Section 317 of the Restatement (Second) of Torts, Nestle could not be liable for negligent hiring, retention and supervision of Henry when (a) the car crash did not occur on Nestle's premises and (b) Henry was not using chattel of Nestle – one of which was required to find a duty under Section 317.

(2) Nor could Nestle have a duty when Looney was not a foreseeable victim injured by a reasonably foreseeable harm. No evidence indicated that Henry displayed any signs of intoxication while at Nestle or that anyone at Nestle was aware he was consuming alcohol there; moreover, alcohol consumption at work and during work hours violated Nestle employment policy.

Facts & Procedural History

At 4:56 am, a vehicle driven by Joseph Looney was struck by an airborne vehicle operated by Aaron Henry, whose blood alcohol content was .268% even though he had left his employment at Nestle only 15 minutes before the accident. Looney died. Henry was convicted of OWI causing death and sentenced to ten years imprisonment, with three years suspended.

Looney's wife and his estate (Looney) sued Nestle and alleged vicarious liability under respondeat superior, for allowing Henry to consume alcohol at work and then drive, and for negligent hiring, training, retaining, and supervising. Nestle filed a motion for summary judgment and designated evidence of its lack of knowledge that Henry was consuming alcohol at work or on work property, and of its policies (1) prohibiting consumption of alcohol during work hours and on company property, and (2) indicating employees would be disciplined for violating policy. The trial court granted summary judgment for Nestle. The COA affirmed summary judgment for Nestle.

Tippecanoe School Corp. v. Reynolds, 187 N.E.3d 213 (Ind. Ct. App. 2022).
Robb, Riley, & Weissmann.

Holdings

(1) Pursuant to the standards announced in *Pfenning v. Lineman*, 947 N.E.2d 392 (Ind. 2011) (if, while acting without intent or recklessness, a sports participant's conduct ordinary for the sport injures someone, the participant has not breached a duty to the injured party), and *Magenity v. Dunn*, 68 N.E.3d 1080 (Ind. 2017) ("ordinary conduct in the sport" for a *Pfenning* analysis is based on the sport generally, not the specific activity that was happening when the injury occurred), school was entitled to summary judgment on cheerleader's claim of negligence because cheer routine and context in which is was performed were ordinary within the sport of cheerleading as a whole.

(2) A claim that a coach negligently supervised a cheer routine cannot be considered a separate cause of action that eludes the rule announced in *Pfenning*.

Facts & Procedural History

Isabella Reynolds was a cheerleader for a highschool in the Tippecanoe School Corporation (TSC). During warm-ups before a routine, which were performed on a bare hardwood floor, Reynolds was lifted in the air and then dropped to the floor. The impact broke her jaw and knocked out many of her teeth. Reynolds' family sued the cheerleading coach, the athletic director, the high school, and TSC for negligently failing to (1) discover a dangerous condition, (2) warn Reynolds of the dangerous condition, (3) provide proper supervision, and (4) correct the dangerous condition. The parties agreed to dismiss without prejudice the high school, athletic director, and coach. TSC moved for summary judgment on all four claims. Trial court granted summary judgment to TSC on all but the negligent supervision claim, and it certified its order for interlocutory appeal. The COA affirmed summary judgment for TSC as to three claims, and reversed the trial court's denial of summary judgment for TSC as to the negligent supervision claim.

Town of Linden v. Birge, 187 N.E.3d 918 (Ind. Ct. App. 2022), *reh'g denied*.
Tavitas, Bradford, & Crone.

Holdings

(1) The trial court erred as a matter of law when concluded that frequent, periodic flooding of land constituted a permanent physical invasion for purposes of taking analysis. Instead, on remand, the court should consider the factors outlined by the *Penn Central* and *Arkansas Game* cases to determine whether intermitted flooding constituted a taking of the Birges' property.
(2) The trial court did not consider the highest and best use of the property when making its determination about a taking, and the trial court should similarly not consider such arguments on remand.
(3) The evidence supported the trial court's conclusion that the improvements to the drain caused flooding issues on the Birges' property.
(4) Because the Birges purchased their property with the pre-existing easement, they cannot be compensated for a taking based on the land that lies within the easement, and the trial court should exclude that land from calculations on remand.

Facts & Procedural History

The town of Linden and Montgomery County made improvements to an existing regulated drain to alleviate flooding in the Town and surrounding areas during rainfall. The drain ran through a pre-existing easement on the Birges' property, which the Birges rented out to farmers. After the improvements to the drain, Birges experienced more flooding to their property, which they alleged was a governmental taking without proper compensation, so they sued the Defendants for inverse condemnation. The trial court determined the government had committed a permanent invasion of the Birges' property and set the matter for a determination as to damages. The Defendants brought an interlocutory appeal to challenge the court's conclusion there had been a taking. The COA reversed and remanded.

Ind. Dept. of Nat. Resources v. Houin, 2022 WL 2125722 (Ind. Ct. App. 6-14-22).
Mathias, Bailey, & Altice.

Holdings

(1) Indiana Code § 14-27-7.5-15, which is part of the Dam Safety Act, makes DNR immune from liability for the operation of a dam, and as such the Houins' claims for negligent operation of the dam and for nuisance must fail.

(2) DNR's decision to allow the lake level to rise about the court ordered level caused foreseeable flooding and damage to the Houins that constituted a "taking" for which the Houins could recover under inverse condemnation proceedings.

Facts & Procedural History

The Houins own and operate Houin Grain Farms, and 407 acres of their farmland is located in the Lake of the Woods watershed. The watershed area is relatively flat plain, with little elevation difference separating the lake and the surrounding fields. In 1957, a dam was built to help regulate the water in the lake so that the fields could drain. In 1986, the Marshall Circuit Court entered an order that set the levels at which the dam was to be kept to best accommodate use of the lake, while also allowing the field to drain adequately. From 1986 to 2005, the dam level was adjusted in the spring and fall by residents of the area to the levels required by the court order. In 2005, residential owners around the lake did not want the responsibility for adjusting the dam, so that responsibility passed to DNR. In 2009 DNR decided it would not adjust the dam unless the water reached a level 10 inches higher than permitted by the court order. Houins complained to DNR because their farmland continually flooded. DNR refused to open the dam sooner.

Houins filed a Tort Claim Notice with the State because DNR did not operate the dam in accordance with the court order, and then Houins filed a complaint against DNR alleging negligence, nuisance, trespass, and inverse condemnation. DNR claimed immunity under IC 34-13-3-3 and IC 14-27-7.5-15. The trial court found for the Houins and awarded them $485,644 plus any damages later assessed for inverse condemnation. DNR appealed. The COA reversed in part, affirmed in part, and remanded.

ICLEF
INDIANA LAW UPDATE-2022

TORTS

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Premise Liability-

Dog Bite Property Owner

Marchino v. Stines
182 NE 3rd. 253 (Ind. Ct. App. 2022)

- The Owner was Not Responsible for the Dog Bite
- Neither the lease provision that landlord had to approve pets nor the lease provision providing a right of inspection by landlord overcame the general principle that, when a landlord had transferred control and possession to rental premises to a tenant, the tenant is liable for injuries that occur at the rental location.

The Bottom Line was since the tenant had complete control of the premises, the landowner was not responsible for the dog bite, despite knowledge dog resided there and prior notices of bite history.

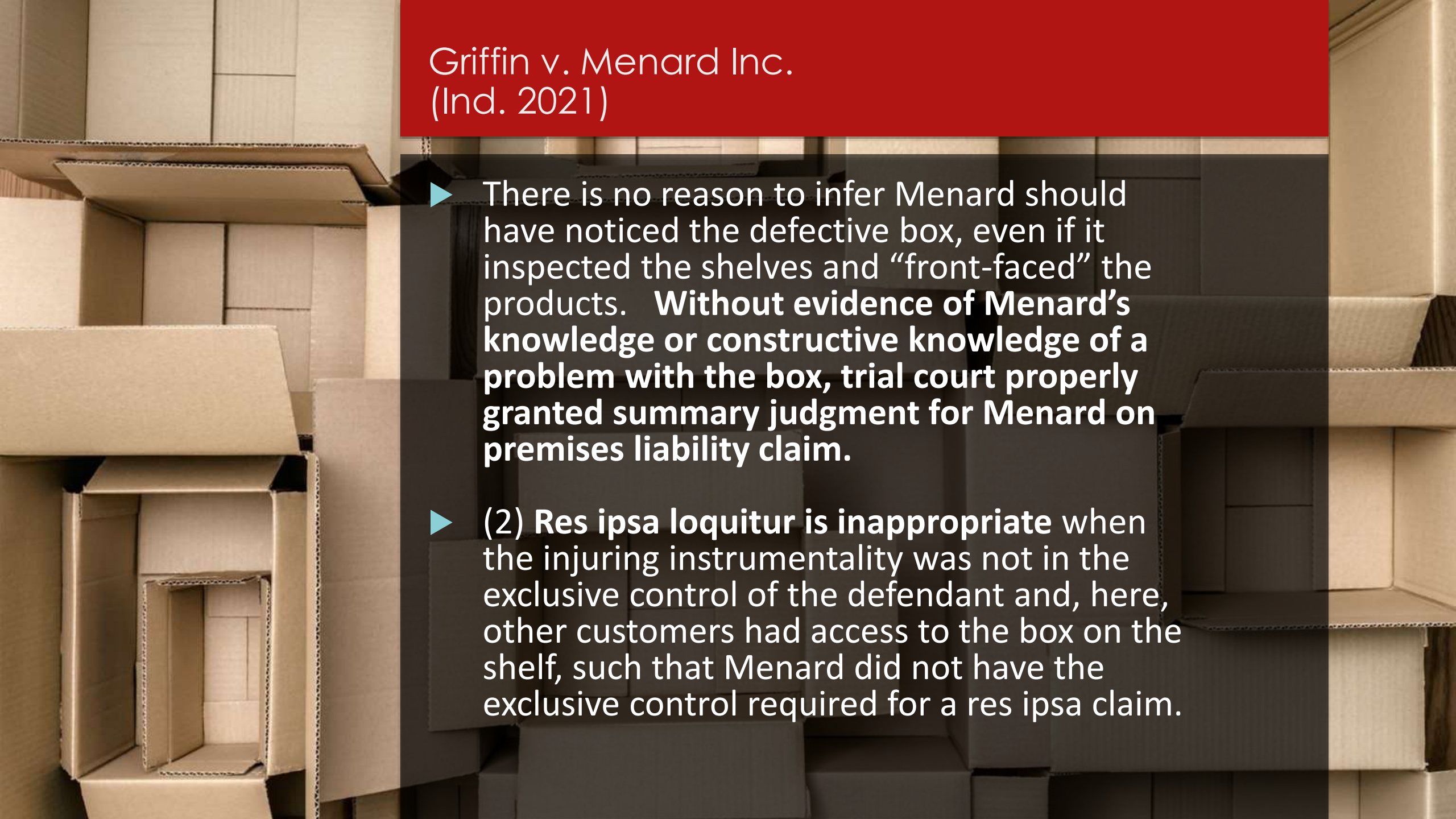
Aberdeen Apartments II, LLC v. Miller (Ind. Ct. App. 2021)

Hensley Legal Group, PC Case

Appeal of SJ & Verdict

Aberdeen Apartments II, LLC v. Miller (cont)

- Plaintiff fell on ice at her apartment;
- Aberdeen Apartments lost summary judgment as the theory of no notice, constructive or otherwise of the icy conditions was not credible as the complex did not utilize technology available for receiving weather alerts during the winter.
- Aberdeen Apartments issue with closing argument was also shot down as they had equal opportunity to argue the evidence in the case and provide a counter to the award requested by the Plaintiff on a per diem basis.
- The verdict was in line with the evidence.



Griffin v. Menard Inc. (Ind. 2021)

- There is no reason to infer Menard should have noticed the defective box, even if it inspected the shelves and "front-faced" the products. **Without evidence of Menard's knowledge or constructive knowledge of a problem with the box, trial court properly granted summary judgment for Menard on premises liability claim.**
- (2) **Res ipsa loquitur is inappropriate** when the injuring instrumentality was not in the exclusive control of the defendant and, here, other customers had access to the box on the shelf, such that Menard did not have the exclusive control required for a res ipsa claim.

Wiley v. ESG Security, Inc (Ind. Ct. App. 2022)

- Duty of Reasonable Care…
- DOES NOT EXTEND TO INJURIES FROM

CROWD SURFING….

BUT (AND IT IS A BIG BUT….)

SJ REVERSED

- SECURITY HIRED EXTRA EMPLOYEES B/C
- OF PRIOR CONCERTS of this nature
- With similar concerns;
- Assumption of Risk When crowd surfing doe negate ESG duty to concert goers like
- WILEY

Sudden Emergency (Medical)

Patrick v. Henthorn (Ind. Ct. App. 2022)

Patrick sued Henthorn for negligence.

Henthorn filed an affirmative defense that asserted she lost consciousness due to a sudden emergency not of her making, and she filed a motion for summary judgment in which she asserted her loss of consciousness was not foreseeable because her OTC was well controlled, she has no driving restrictions, and she felt fine

The trial court granted summary judgment to Henthorn because her medical emergency was not reasonably foreseeable. On appeal, Patrick argued "the real issue is whether [she] actually suffered a sudden medical emergency on the date of the accident" and he claimed Henthorn's inconsistent statements created a genuine issue of material fact. The COA affirmed the trial court's

Reece v. Tyson Fresh Meats (Ind. 2021)

- Property Owner did not owe duty to traveling public because grass "wholly contained" on Defendant's property.
- The key issue was because the grass had not extended onto the road, no duty was owed or breached despite the undisputed evidence that the grass impaired the view of the traveling public at the intersection.
- COA in a split decision affirmed SJ granted by the trial court as did the Supremes.

Motor Carrier Liability

Wilkes v. Celadon Group, Inc.

Wilkes v. Celadon (cont.)

- Court adopted the ***"Savage rule"*** for carriers and shippers –
  (a) carriers have the primary duty for loading and securing cargo, and
  (b) shippers that assume a duty of safe loading become liable only for injuries resulting from concealed or latent defects.

* Carriers remain liable for injuries resulting from a shipper's loading if the negligent loading was apparent.

- Designated evidence supported trial court's grant of summary judgment for Celadon because, although Celadon assumed a duty of safe loading, the failure to secure the load was apparent from Wilkes's brief observation of the trailer's contents.

- Justice Goff dissented because there existed a genuine issue of fact whether there was a latent loading defect.

Cases Involving Alcohol

Looney v. Nestle Waters N. Am., Inc. (Ind. Ct. App. 2022)

- Nestle Employee with .268% BAC left work and caused a crash killing someone fifteen minutes after leaving the Nestle Facility.
- The COA found no duty was owed to the Estate of the deceased. The reasons:
- (1) Not on Nestle Property or Using Nestle Car
- (2) Nestle did not have notice Henry was drinking on the job or intoxicated.

Ebert et. al. v. Illinois Casualty Co. (Ind. 2022).

- Liquor Liability Exclusion was upheld to exclude coverage for bodily injury arising from an insured contributing to intoxication, furnishing alcohol or in violation of a statue regarding alcohol.

SPORTS PARTICIPANT

Tippecanoe School Corp. v. Reynolds

Cases Related to School Liability

Hopkins v. IPS, (Ind. Ct. App. 2022)

- The “enforcement immunity” provided by IC 34-13-3-3(8)(B) in Indiana’s Tort Claim Act does not provide immunity for a school’s failure to follow the dismissal procedures that were intended to protect a seven-year-old’s safety when school ended.
- (2) The school also could not find immunity under IC 34-13-3-3(10), which protects governmental entities from vicarious liability for third parties, when genuine issues of material fact existed about “which person or persons were ultimately responsible for the misdirection” that removed Yarbrough from the bus line.

K.G. by Ruch & Ruch v. Smith (Ind. 2021)

K.G. by Ruch & Ruch (cont.)

- KG attended the New Augusta North Public Academy in Pike Township for instructional and special needs services, which included diaper changes.
- At some point between October 2015 and January 2016, an instructional assistant, Smit sexually abused KG. Around this time, KG became combative with caregivers and began having night terrors.
- In April 2018, Smith confessed to her actions and pled guilty to Level 3 felony child molesting.
- Ruch alleged that she suffered emotional distress as a result of the sexual abuse of KG a that she incurred expenses for placing KG in a long-term care facility.
- The school moved for summary judgment as to Ruch's individual claims because she ha not satisfied the modified-impact rule or the bystander rule to recover for emotional distress. The trial court granted summary judgment to the school. Ruch appealed and asked the Indiana Supreme Court to create a rule that allows a parent to recover in this context. The Supreme Court agreed with Ruch.

Child Wrongful Death
Who Can Bring the Case?

- Johnson v. Harris ***(ind. Ct. App. 2021).***

Government Liability Or Not?

Landra v. INDOT (Ind. 2021)

- Landra was driving home on I-94 when her car encountered flooding that stretched from the left shoulder of the highway to the middle lane. She hydroplaned, struck the median, spun across traffic, and rolled into the ditch. The first officer at the scene reported the flooding was up to his ankle and all the way across the highway. That officer also testified this section of highway floods so consistently that he has called INDOT 10-15 times in six years to come clean the drains. The second responding officer agreed the area was prone to flooding from poor drainage.
- Because Landra's designated evidence demonstrated INDOT knew of the defect causing the highway to flood, and because INDOT had time to remedy the problem but did not, the trial court erred in granting summary judgment for INDOT.

Staat v. INDOT (Ind. 2021)

Staat left home for work, driving eastbound on I-74 during a heavy rainstorm that had begun the night before but intensified during his commute.

Staat hit a pool of water that caused his car to hydroplane, lose control, and strike a tree. Staat sued INDOT for negligent maintenance of the highway.

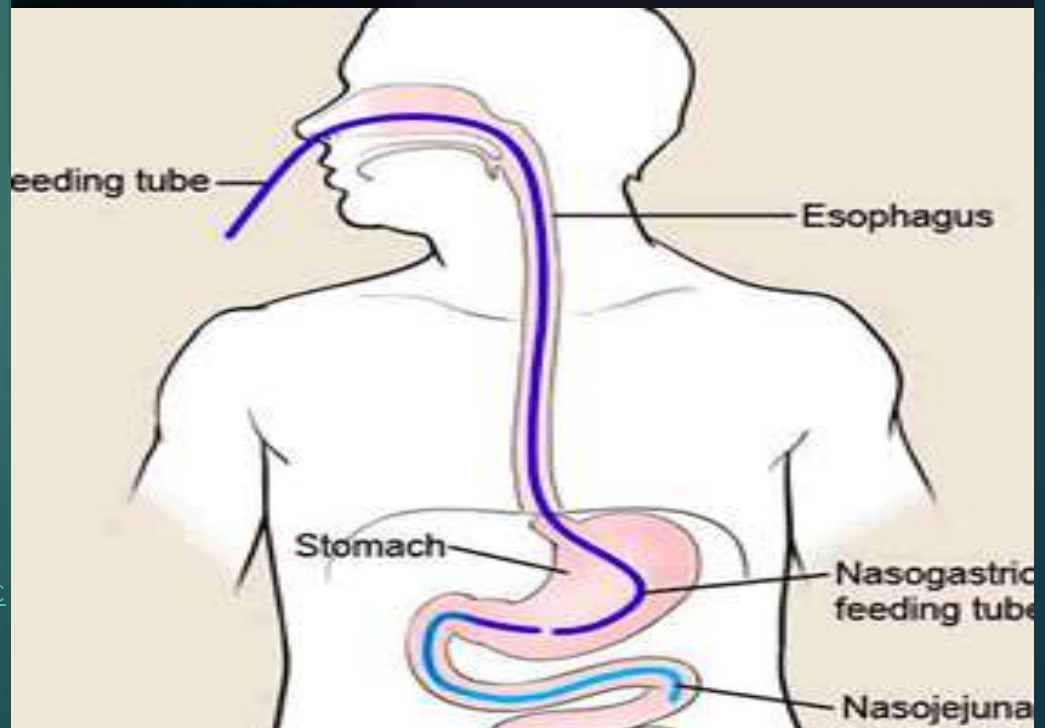
INDOT moved for summary judgment based on Indiana Code section 34-13-3-3, which makes the government not liable for injury from a "temporary condition" on a roadway that is "caused by the weather." The trial court granted summary judgment.

The Court of Appeals reversed. On transfer, the Supreme Court affirmed the trial court's grant of summary judgment to INDOT.

Medical Malpractice

Woodcox v. Anonymous Hospital (Ind. Ct. App. 2022)

- Unique Argument that hospital conduct was Battery therefore outside of the Med Mal Act;
- The trial court and COA disagreed.



Coplan V. Miller (Ind. Ct. App. 2021)

Wilson v. Anonymous Defendant (Ind. 2021)

Miscellaneous

Spainhower v. Smart & Kessler, LLC

- (Ind. Ct. App. 2021)

To Release or Not to Release

BIRD V. VALLEY ACRE FARMS (IND. CT. APP. 2021)

SOL-UM Policy

- Napier v. American Family Mut. Ins.

(Ind. Ct. App. 2021)

- The 2 Year SOL by contract to bring UM Lawsuit was upheld.

Goston V. State (Ind. Ct. App. 2022)

- Indiana Code § 31-33-18-4, which requires DCS to notify parents of an assessment into the abuse or neglect of their children, does not confer a private right of action on a parent to bring a tort claim for negligence against DCS when it failed to alert a non-custodial parent that his children were being abused.

Franciscan Alliance v. Padgett

- Ind. Ct. App. 2021)

Interesting Case Involving HIPPA Violation By Employee

Section Nine

Evidence – Criminal & Civil

Hon. Robert R. Altice, Jr.
Indiana Court of Appeals
Indianapolis, Indiana

Section Nine

Evidence – Criminal & Civil……..…….. Hon. Robert R. Altice, Jr.

INDIANA EVIDENCE UPDATE 2022

Hon. Robert R. Altice, Jr.

Court of Appeals of Indiana

RELEVANCE & EXCITED UTTERANCE EXCEPTION

Turner v. State, 183 N.E.3d 346 (Ind. Ct. App. 2022)

Rules 401 & 803(2)

RULE 404(b)

BAD ACTS EVIDENCE ADMISSIBLE FOR IDENTITY

Attkisson v. State, 190 N.E.3d 447 (Ind. Ct. App. 2022)

RULE 404(b)

Davis v. State, 186 N.E.3d 1203 (Ind. Ct. App. 2022)

SUBSEQUENT

BAD ACTS

Rule 404(b) Bad Acts

&

Rule 609(a)(2) Impeachment

Corbett v. State, 179 N.E.3d 475 (Ind. 2021)

403 Balancing &
613(b) Prior Inconsistent Statement

Hall v. State, 177 N.E.3d 1183 (Ind. 2021)

McClendon v. Triplett, 184 N.E.3d 1202 (Ind. Ct. App. 2022)

Rule 611

Control by trial court over mode and order of examining witnesses

Rule 615

Separation of witnesses

Rule 617

Electronic Recording of Custodial Interrogation

Weed v. State, --- N.E.3d --- (Ind. Ct. App. 2022)

SKILLED WITNESS TESTIMONY
(NOT EXPERT)

Rule 701

Wilburn v. State, 177 N.E.3d 805 (Ind. 2021)

Rule 704

Opinion Testimony on an Ultimate Issue

Neal v. State, 175 N.E.3d 1193 (Ind. 2021)

Rule 704(b) Vouching Testimony

Witness may not testify as to whether it appears child victim had been coached, unless defendant opens the door.

Richardson v. State, 189 N.E.3d 629 (Ind. Ct. App. 2022)

Rule 803(1)

- Present Sense Impression Hearsay Exception

& Silent Witness Theory

Stott v. State, 174 N.E.3d 236 (Ind. Ct. App. 2021)

RULE 803(17) MARKET REPORTS EXCEPTION

"Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations"

Fedij v. State, 186 N.E.3d 696 (Ind. Ct. App. 2022)

Rule 803(17)

Market Reports Exception

Washington v. State, 178 N.E.3d 1275 (Ind. Ct. App. 2021)

Rule 804(b)(2) Dying Declaration

A statement that the declarant,

while believing the declarant's death to be imminent,

made about its cause or circumstances.

Smith v. State, 190 N.E.3d 462 (Ind. Ct. App. 2022)

Rule 901 Authentication

- cell phone and related records

McGill v. State, 160 N.E.3d 239 (Ind. Ct. App. 2020)

Rule 901 Authentication

- iPhone voice recordings

Kerner v. State, 178 N.E.3d 1215 (Ind. Ct. App. 2021)

Rule 1002 Best Evidence Rule & Silent Witness Theory

Hamilton v. State, 182 N.E.3d 936 (Ind. Ct. App. 2022)

CHILD DEPOSITION STATUTE

§ 35-40-5-11.5

Church v. State, 189 N.E.3d 580 (Ind. Ct. App. 2022)

Protected Person Statute § 35-37-4-6

Where a child's recorded statement and live testimony "are consistent and both are otherwise admissible," either may be admitted, but not both. *See Tyler v. State*, 903 N.E.2d 463 (Ind. 2009).

Rosenbaum v. State, --- N.E.3d --- (Ind. Ct. App. 2022)

Dead Man's Statute

§ 34-45-2-4

& Authenticity

Arnett v. Estate of Joel S. Beavins, 184 N.E.3d 679 (Ind. 2022)

FORFEITURE BY WRONGDOING DOCTRINE

Galloway v. State, 188 N.E.3d 493 (Ind. Ct. App. 2022)

Spoliation

Must prove: 1) there was a duty to preserve the evidence, and (2) the alleged spoliator either negligently or intentionally destroyed, mutilated, altered, or concealed the evidence.

Synergy Resources, LLC v. Telamon Corp.,
190 N.E.3d 964 (Ind. Ct. App. 2022)

Destruction of evidence

&

Evid. of voluntary intoxication to prove self-defense

Bennett v. State, 175 N.E.3d 331 (Ind. Ct. App. 2021)

Fifth Amendment Right Against Self-Incrimination

- Defendant directed to smile at the jury to show his teeth.

> *While smiles can convey messages in the ordinary course of life, any such emotional context is removed when the subject smiles because he is directed to do so.*

Murray v. State, 182 N.E.3d 270 (Ind. Ct. App. 2022)

Evid. R. 401 Relevance & R. 803(2) Excited Utterance Exception

Turner v. State*, 183 N.E.3d 346 (Ind. Ct. App. 2022), *trans. denied

Facts: Friends, Janaya and Turner, argued one evening and Janaya's boyfriend, Burgess, stepped into the fray. The fight ended when a gun held by Burgess discharged. Over the next couple weeks, Janaya and Turner "squashed the beef" and hung out together. About a month later, however, things heated back up.

One evening, Janaya and Burgess were talking on the side of the road when Janaya saw Turner jogging toward them. Burgess dropped everything and ran toward Turner. The men threw punches, as Janaya tried to stop them. Using a knife, Turner then stabbed Burgess, who was unarmed, multiple times. Burgess died from a stab wound to his neck.

At trial, Turner claimed self-defense. TC allowed evidence, over objection, that Turner was on parole at time of stabbing and not permitted to be in the county.

Affirmed (Crone, Bradford, Tavitas)

1) **Abuse of discretion admitting evidence of parole status, but harmless error.**

   Evid. R. 401 provides that evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action."

   When a person is not in a place where he has a right to be, a self-defense claim is barred only if there is an *immediate causal connection* between the person's presence in that place and the confrontation.

   Turner's parole status was irrelevant to self-defense claim but overwhelming evidence disproving his claim made impact of this evidence minimal.

2) **Admission of Janaya's police interview was admissible as an excited utterance, R. 803(2).**

   Interview took place within an hour of her seeing blood spraying out of Burgess's neck & trying to stop the bleeding while screaming for help. During interview, she was very upset, crying & "almost hysterical." The murder was a startling event, she was still under stress caused by it, and her identification of Turner was clearly related to the event.

Additional matters addressed in case included waiver of R. 404(b) issue, invited error, and denial of Turner's motion to secure the attendance of a witness incarcerated in another state pursuant to the Uniform Act to Secure Attendance of Witnesses from Outside the State in Criminal Proceedings.

Evid. Rule 404(b)

Attkisson v. State*, 190 N.E.3d 447 (Ind. Ct. App. 2022), *trans. petition filed

Facts: An individual, later identified as Attkisson, dressed in a long wig, scarf, hat, large sunglasses, and carrying a large red purse, walked into a Key Bank in Elkhart. He was described as a light-skinned, Black or Hispanic male, who appeared to have makeup on his neck and face to cover tattoos. Attkisson gave the teller a threatening note, demanding money. He left with cash in his purse.

Three weeks later, at Lake City Bank in Elkhart, Attkisson looked inside the bank but then exited. He was wearing large sunglasses and a hat and holding a bag tightly. A teller took note of this and called 911. A responding officer located Attkisson, who matched the teller's description, walking nearby and carrying a large duffle bag. The bag contained a black wig, sunglasses, a scarf, and a red purse. Also, Attkisson was wearing makeup covering the tattoos on his face and neck.

Attkisson was charged with robbery of the Key Bank. At trial, he objected to introduction of evidence regarding his behavior at Lake City Bank. TC found the evidence admissible for identification, motive, plan, or modus operandi and noted that "it would be very difficult, if not impossible, for the State to explain how Attkisson became a suspect" if the State were not allowed to explain the subsequent events involving Lake City Bank.

Affirmed (Riley, May, Tavitas)

Evidence of uncharged behavior at Lake City Bank was admissible under 404(b)(2).

Standard for assessing admissibility of 404(b) evidence is:

> (1) the court must determine that the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the defendant's propensity to commit the charged act; and
>
> (2) the court must balance the probative value of the evidence against its unfair prejudicial effect pursuant to Evid. R. 403.

Here, Attkisson's unique signature in committing the offense, which was like the uncharged conduct at the Lake City Bank, established his identity as the perpetrator of the robbery.

> "unique elements of the disguise and makeup to cover the facial tattoos"

Probative value outweighed any unfair prejudice to Attkisson.

Evid. Rule 404(b) Subsequent Bad Acts

Davis v. State*, 186 N.E.3d 1203 (Ind. Ct. App. 2022), *trans. petition pending

Facts: Burglary, domestic battery, and invasion of privacy. Domestic violence against girlfriend took place in July 2020 after Davis forced his way into her house. Girlfriend recanted but later testified against Davis.

The State filed a notice, under R. 404(b), of its intent to introduce evidence of two additional incidents of domestic violence – one from April 2020 and another from December 2020. TC allowed only the December incident, finding that it was "relevant and probative to the parties' hostile relationship and goes to the defendant's motive, intent, and state of mind." Girlfriend testified about this additional incident, along with photographs of her injuries.

Affirmed (Najam, Bradford, Bailey)

No abuse of discretion in admitting evidence of Davis's subsequent bad acts.

R. 404(b) prohibits evidence of a crime, wrong, or other act to prove a person's character to show that on a particular occasion the person acted in accordance with the character.

But such evidence "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." This list of permissible purposes is illustrative, not exhaustive.

R. 404(b) cases typically involve prior bad acts, but the wording of the rule does not exclude application to subsequent bad acts.

Intent exception - when defendant goes beyond denying the charged culpability and affirmatively alleges a particular contrary intent, whether in opening statement, by cross-examination witnesses, or in defendant's own case-in-chief.

Self-defense is a claim of contrary intent. Here, during opening, Davis argued that he did not mean to hurt girlfriend and that he acted in self-defense as she sprayed him with mace.

Motive exception – evidence of Davis's hostile relationship with victim.

R. 403 balancing - the prejudicial effect of the subsequent bad acts evidence did not substantially outweigh its high level of relevance in disproving his self-defense claim and in illustrating his motive.

-TC provided limiting instruction; this evidence was only a short part of the 3-day trial; jury was not informed of any charges related to the Dec. incident.

Evid. Rule 609(a)(2) Impeachment by Evid. of Criminal Conviction and Rule 404(b) Bad Acts

Corbett v. State*, 179 N.E.3d 475 (Ind. Ct. App. 2021), *trans. denied

Facts: In 2011, Jim and Linda Miller were brutally attacked in their home in Goshen. Police found Jim was dead in the driveway, stabbed at least fifty times. Linda survived with serious injuries. Although DNA evidence was collected, no suspect was identified, and the case grew cold.

In 2018, a detective sent the DNA evidence to a genealogy company for testing and received Corbett's name as a possible lead. Corbett was sixteen and lived a mile from the Millers in 2011. Having been discharged from the Navy, he lived back in Goshen in 2018. Investigators conducted a trash search, which lead to DNA consistent with the crime scene, as did a subsequent test of Corbett's DNA.

At trial, over Corbett's objection, TC allowed evidence of three attempted home invasions near the Millers' home the same night, ruling it admissible under R. 404(b)(2) to show motive, opportunity, or intent. TC also allowed State to ask Corbett on cross about being punished in the Navy for providing false statements.

Affirmed as harmless error (Vaidik, May, Molter)

1) **Non-judicial punishment received while in Navy was not criminal conviction that could be used for impeachment purposes under R. 609(a)(2), which provides**.

   For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime or an attempt of a crime must be admitted but only if the crime committed or attempted is (1) murder, treason, rape, robbery, kidnapping, burglary, arson, or criminal confinement; or (2) a crime involving dishonesty or false statement, including perjury.

   > Under the Uniform Code of Military Justice, military commanders can punish service personnel through judicial proceedings *or* by imposing non-judicial punishment. *A non-judicial punishment is an administrative rather than a criminal proceeding and, thus, not admissible under the rule*.

   Error, however, was harmless in this case.

2) **Evidence of other attempted home invasions improperly admitted under R. 404(b).**

   Rejected State's argument that evidence was relevant to motive because it showed that perpetrator was looking for any victim, not specifically the Millers.

   > While evidence of motive is always relevant, the value of specific acts evidence to prove motive rests on the strength of proof that the defendant in fact committed the other act. Here, no evidence linking Corbett to the other crimes.

Evid. Rule 403 Balancing & Rule 613(b) Prior Inconsistent Statement

***Hall v. State*, 177 N.E.3d 1183 (Ind. 2021)**

Facts: Murder and conspiracy to commit murder. Hall hired Heald to kill Reynolds, Hall's stepfather, so that her mother could inherit his property, including a substantial collection of NASCAR memorabilia. Mathis, also hired to assist, accompanied Heald when he shot Reynolds in the head with a gun provided by Hall.

At trial, Mathis testified for the State, and Heald was called but refused to testify despite TC ordering him to do so. TC found Heald in contempt and ordered his 2017 depo read into evidence, over Hall's objection. In depo, Heald testified to Hall's offers of compensation and her provision of the gun, among other details. He also confessed that he lied in his 2015 statement to police.

Hall unsuccessfully sought to introduce a copy of Heald's 2015 interview with police, seeking to impeach him by prior inconsistent statements.

Affirmed

No abuse of discretion by admitting 2017 depo and excluding 2015 statement to police.

1) Depo's probative value was not substantially outweighed by danger of unfair prejudice under **Evid. R. 403** balancing test.

   Unfair prejudice looks to the capacity of the evidence to persuade by illegitimate means or the tendency of the evidence to suggest decision on an improper basis.

      No *unfair* prejudice here - purpose was not to exploit or inflame, but to have jury hear testimony from the shooter in murder-for-hire scheme.

   Further, Hall waived argument that it was error to allow depo read into the record rather than showing the actual depo video, as he did not request this below. And TC did not abuse discretion by rejecting Hall's attempt to introduce depo's video footage for first time during closing arguments.

2) No abuse excluding Heald's prior inconsistent statement to police.

   Evid. R. 613(b) permits extrinsic evidence of a witness's prior inconsistent statement if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires.

      Once the jury heard Heald admit in depo and explain that he lied to police b/c he didn't want to look like a "cold blooded killer," his impeachment on this prior statement was complete and further extrinsic evidence regarding his impeachment on this statement was unnecessary.

Evid. R. 611 Control by Court Over Mode & Order of Examining Witnesses

& Evid. R. 615 Separation of Witnesses

McClendon v. Triplett*, 184 N.E.3d 1202 (Ind. Ct. App. 2022), *trans. denied

Facts: Child custody modified in favor of Father. TC allowed 16-year-old child to testify outside the presence of her parents but with counsel for both parties present and allowed to question her. TC also denied Mother's motion to strike testimony from witnesses, including child, who allegedly conversed in violation of separation of witnesses order.

Affirmed (Tavitas, Bradford, Crone)

1) **No violation of Mother's due process rights by manner in which Child was permitted to testify outside parents' presence.**

Process was similar to that allowed by I.C. § 31-17-2-9, which governs in-camera interviews of children during custody proceedings.

Further, Evid. R. 611(a) provides: "The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment."

2) **TC did not abuse its discretion by denying Mother's motion to strike witnesses based on an alleged violation of separation of witnesses order.**

The basic premise of Evid. R. 615 is that, upon request of any party, witnesses should be insulated from the testimony of other witnesses.

Here, TC instructed witnesses to go into hall and not talk about the case. The three witnesses then "chit chatted" while waiting in the hall before any of them testified.

As the conversation occurred prior, the witnesses did not adjust their testimony based upon the testimony of another.

A separation of witnesses order does not necessarily require witnesses to refrain from all communication with other witnesses.

Additionally, no prejudice as there was no indication that the conversation impacted any of their testimony.

Evid. Rule 617 Electronic Recording of Custodial Interrogation

***Weed v. State*, --- N.E.3d --- (Ind. Ct. App. 2022)**

Facts: Convicted of burglary. While a suspect, Weed was arrested in Michigan on unrelated charges. Indiana detective communicated with Michigan detective, who then interviewed Weed regarding the burglary. Michigan detective Mirandized Weed and obtained Weed's consent (which Weed disputes) to search a backpack Weed had at the time of his arrest. Weed was present during the search, which revealed clothing matching that worn during the Indiana burglary. The Michigan detective initiated the electronic recording system but, at some point after the interview, the system malfunctioned. The entire system was replaced, and the recording was lost.

Weed unsuccessfully sought suppression of the evidence seized from his backpack. He argued that the only conclusive proof of his consent to the search was the electronic recording. Because the interview was not recorded, Weed contended the evidence from the search should have been excluded pursuant to Evid. R. 617.

Affirmed (Pyle, Robb, Weissmann)

Evidence admissible under exceptions to Evid. R. 617.

Rule 617(a) provides in part:

> In a felony criminal prosecution, evidence of a statement made by a person during a Custodial Interrogation in a Place of Detention shall not be admitted against the person unless an Electronic Recording of the statement was made, preserved, and is available at trial, except upon clear and convincing proof of any one of the following:
>
> * * *
>
> (3) The law enforcement officers conducting the Custodial Interrogation in good faith failed to make an Electronic Recording because the officers inadvertently failed to operate the recording equipment properly, or without the knowledge of any of said officers the recording equipment malfunctioned or stopped operating; or
>
> (4) The statement was made during a Custodial Interrogation that both occurred in, and was conducted by officers of, a jurisdiction outside Indiana

Clear and convincing evidence requires proof that the existence of a fact is "highly probable." Both of the above exceptions applied here – no evidence malfunction was intentional or know to detective & the custodial interrogation occurred in Michigan.

Evid. Rule 701 Skilled Witness Testimony

***Wilburn v. State*, 177 N.E.3d 805 (Ind. Ct. App. 2021)**

Facts: Midnight robbery at liquor store. Cashier called 911 and described assailant as a Black male wearing dark-colored or black bandana and a dark hoodie and black shoes. A few blocks away, a responding officer saw Wilburn, who was wearing black pants, black boots, and a white tank top, duck behind a bush. Wilburn was breathing heavily and ran when ordered to stop. Wilburn had incriminating evidence on his person and other items, including a black hooded jacket, were found in a nearby yard.

Wilburn filed a motion to exclude evidence regarding infrared photography comparison because he was not given 14-day notice of ISP Sergeant Dolby's expert testimony pursuant to local rule. State argued that Sergeant Dolby was a skilled witness, not an expert witness, and the rule did not apply. The trial court denied Wilburn's motion.

Sergeant Dolby is a crime scene investigator trained in infrared photography. He reviewed the video from the outdoor security cameras, which had infrared technology. The assailant's boots appeared to be two-toned (black and white) in the video with infrared lighting, while the boots recovered from Wilburn were black to the naked eye. Sergeant Dolby took pictures of the boots with his infrared camera and, comparing them to the video, testified that the boots collected from Wilburn and the boots in the surveillance video were *similar*.

Affirmed (Tavitas, Mathias, Weissmann)

Sergeant Dolby was testifying as a skilled witness, not an expert.

Evid. R. 701 governs the admission of opinion testimony by a lay witness and provides:

> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
>
> > (a) rationally based on the witness's perception; and
> >
> > (b) helpful to a clear understanding of the witness's testimony or to a determination of a fact in issue.

The Rule encompasses both ordinary lay witness and skilled witness opinions, with the difference being their degree of knowledge concerning the subject of their testimony.

> Neither has the "scientific, technical, or other specialized knowledge" of experts, Evid. R. 702(a), and both testify from their perceptions alone.
>
> Skilled witnesses, though, possess knowledge beyond that of the average juror and can perceive more information from the same set of facts.

Evid. Rule 704 Opinion on an Ultimate Issue

Neal v. State*, 175 N.E.3d 1193 (Ind. Ct. App. 2021), *trans. denied

Facts: In child molestation case, police detective testified that Neal, during a phone call with a deputy, initially denied touching Child. Neal then indicated, in the same call, that maybe he had grabbed her butt in a playful manner. When he was interviewed in person weeks later, Neal acknowledged that he had touched her thigh and her butt. The detective then testified, without objection:

> That is pretty indicative of somebody's process of, I don't know how to explain it really. They are giving a little bit of details, a little bit more truth with each statement they give and he went as far as touching her thighs while she is wearing the panties but stops short of saying he touched her vagina on purpose.

Because the issue was not preserved below, Neal argued on appeal that the detective's testimony constituted fundamental error.

Affirmed because error was not fundamental (Pyle, Bailey, Crone)

Detective's testimony violated Evid. R. 704(b) but error was not fundamental.

704(a) generally allows opinion testimony to "embrace" an ultimate issue but, as a matter of constitutional right, only a jury may *resolve* an ultimate issue.

However, 704(b) explicitly prohibits, in criminal cases, witness opinion testimony concerning the ultimate issue of guilt.

> Here, detective should have stopped short of testifying that child molesters, as part of their process, will progressively admit more and more facts without confessing to the actual crime. "This is precisely the type of opinion testimony that Evidence Rule 704(b) prohibits because it invades the province of the jury in determining what weight to place on a witness' testimony."

The error was not fundamental.

> One isolated instance of detective's testimony, which considering the other unchallenged evidence, was not so prejudicial to Neal's rights as to make a fair trial impossible. There was a plethora of unchallenged evidence that independently supported the convictions, and the jury could have reached the same conclusion based solely upon this properly admitted evidence.

Evid. Rule 704(b) Vouching

***Richardson v. State*, 189 N.E.3d 629 (Ind. Ct. App. 2022)**

Facts: Richardson molested his six-year-old daughter multiple times before moving out of state, leaving her with mother. Child disclosed the abuse to a friend a few years later and then to her mom. Child participated in a forensic interview in Wyoming, where she lived at time of disclosure.

At trial, detective's testimony on direct included that when he interviewed Richardson, Richardson denied molesting Child and indicated that her mom put her up to it. On cross, detective acknowledged that he had encountered fabrication and coaching by a parent in other sex abuse investigations. On redirect, he testified that he did not see any signs of coaching in Child's forensic interview.

Wilson, a forensic interviewer, then testified regarding coaching and, over defense objection, was permitted to testify that she did not see any signs of coaching during Child's forensic interview.

Affirmed in relevant part as harmless error (May, Brown, Pyle)

Wilson's testimony that Child did not display signs of coaching was impermissible opinion testimony vouching for Child's credibility, but the error was harmless.

Rule 704(b) prohibits a witness from opining regarding "the truth or falsity of allegations" and "whether a witness has testified truthfully."

In *Hoglund v. State*, 962 N.E.2d 1230 (Ind. 2012), our Supreme Court held testimony that a specific child is not prone to exaggerating or fantasizing regarding sexual matters is the functional equivalent of saying the child is telling the truth, and therefore, is barred under the rule.

Three years later, in *Sampson v. State*, 38 N.E.3d 985 (Ind. 2015), the Court clarified that expert testimony "a child has or has not been coached" or "the child did or did not exhibit any 'signs or indicators' of coaching" constitutes impermissible vouching.

Such testimony is permitted if the defendant has opened the door.

Richardson did not open door, as the State was the first to introduce the concept of coaching. But Richardson failed to object to the vouching testimony by the detective on redirect.

Wilson's later testimony, to which Richardson did object, was cumulative of the detective's testimony. Further, other evidence of guilt was substantial. Therefore, harmless error.

Evid. Rule 803(1) Present Sense Impression & Silent Witness Theory

***Antwon Stott v. State*, 174 N.E.3d 236 (Ind. Ct. App. 2021)**

Facts: Police focused on a group of men and two vehicles coming and going from a Marathon station. One was wearing an "all denim outfit." Part of the group left in a Dodge Ram and drove to an apartment and then McDonald's. After McDonald's, three men returned to the Dodge Ram, with the man in the denim outfit driving. Officers then observed a traffic violation and made a traffic stop. The driver sped off before crashing. Only one passenger was apprehended, as the others fled on foot.

An officer later viewed McDonald's surveillance footage, taking pictures on his cellphone. Officer testified he believed a man depicted, appearing to be in an all-denim outfit, was Stott. This was the "only direct evidence identifying Stott as the all-denim-wearing driver of the Dodge Ram."

Reversed (Mathias and Crone; Riley CIR)

1) **Error to admit recording of police-radio traffic after vehicle fled** (and not harmless)

No exception for first layer of hearsay – witness statements to officers.

Present Sense Impression - "statement describing or explaining an event, condition or transaction, made while or immediately after the declarant perceived it." Evid. R. 803(1).

Requirements: (1) must describe or explain an event; (2) must be made during or immediately after event; and (3) must be based on declarant's personal perception of the event.

State failed w/r/t #2 (temporal proximity – 12-min recording was not constant communication but rather condensed and there was time for reflective thought) and #3 (anonymous witness statements did not establish firsthand knowledge).

2) **Error to admit cellphone pics of surveillance footage** (and not harmless)

Silent Witness Theory -

When pics are admitted for substantive purposes as "silent witnesses" to the activity being depicted, foundational requirements are "vastly different" than when admitted as demonstrative aids. Must be "a strong showing of authenticity and competency, including proof that the evidence was not altered."

Here, no testifying witness was inside McDonald's to observe scene the pics depict, and pics were used substantively to ID Stott. State failed to authenticate with witness knowledgeable about the security system.

Evid. R. 803(17) Market Reports Hearsay Exception

***Fedij v. State*, 186 N.E.3d 696 (Ind. Ct. App. 2022)**

Facts: Our criminal code now permits Hoosiers to possess certain cannabis-based products so long as the THC concentration is below a certain threshold. Here, the State's only evidence that Fedij possessed a substance with a THC content above that threshold was what appears to be manufacturers' declarations of the THC content on the outside of the packaging that the substances found in her possession apparently came inside. Fedij objected to the admission of that packaging on hearsay grounds, but TC admitted the packaging into evidence.

Hard Drops package identified contents as "THC INFUSED HARD DROPS," and had a large triangle with a marijuana leaf and exclamation point inside the triangle as well as letters "CA" underneath the triangle. Package also stated the product contained "60 mg THC."

Reversed possession of marijuana conviction (Mathias, Bailey, Altice)

TC abused discretion by admitting the packaging labels under the market reports exception.

R. 803(17) provides that the following are admissible hearsay: "Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations."

In *Reemer*, our Sup. Ct. applied the exception in precursor case to allow State to present labels of cold medicine boxes purchased to prove the identity of compound in defendant's possession (i.e., salt of pseudoephedrine).

-Labeling of the cold medicine subject to federal & state law regarding false/misleading labels. And public routinely relies on regulated manufacturing practices and labeling. Thus, SC held that "labels of commercially marketed drugs are properly admitted…to prove the composition of the drug."

COA distinguished *Reemer*

-Writing/symbols on the packages are in stark contrast to the federally regulated labels on pharmaceuticals.

-No evidence of California labeling laws/regulations.

-Nothing about statements and symbols on the packaging demonstrated substantial trustworthiness of the products' claims.

Evid. Rule 803(17) Market Reports Hearsay Exception

***Washington v. State*, 178 N.E.3d 1275 (Ind. Ct. App. 2021)**

Facts: Possession of schedule II controlled substance. The State did not conduct chemical tests on the pills. Rather, police officer testified that he matched the physical characteristics of the pills to hydrocodone as described on Drugs.com. The testimony was admitted over Washington's hearsay objection. TC also admitted an exhibit, which was a printout from that website showing identifying information for hydrocodone.

Reversed (Mathias, Tavitas, Weissmann)

Website utilized by police officer to identify pills found on defendant's person did not come within exception to rule against hearsay for market reports.

R. 803(17) is a narrow exception intended to apply to a well-defined category of cases and predicated on the two factors of necessity and reliability.

COA not persuaded that the State's identification of the hydrocodone based on Drugs.com was necessary or that the website was reliable.

The lack of a field test for pills is not a bar to having them tested by the State Lab & the State does not explain why the difficulty of obtaining lab tests due to backlogs makes the use of Drugs.com necessary rather than merely convenient.

As for reliability, just because one police department uses Drugs.com does not prove that the website is "generally relied upon either by the public or by people in a particular occupation."

Notably, the State did not introduce any evidence "that Drugs.com is nationally recognized" or commonly used by law enforcement.

Evid. Rule 804(b)(2) Dying Declaration & Fundamental Error

Keith Smith v. State*, 190 N.E.3d 462 (Ind. Ct. App. 2022), *petition for reh'g filed

Facts: Smith and Davis were rival drug dealers. Smith brought an assault rifle inside a bar and stood next to Davis. Davis asked if him intended to use the gun to shoot him, and Smith responded, "no, if it was for you, you would know it." After putting a bounty on Davis, which no one accepted, Smith decided "he was going to have to do it himself."

Later that month, Davis left the home of his fiancée, Daughana, and drove to the barbershop. Smith followed. After the barbershop, Davis started to drive to a liquor store, and Smith again followed. While Davis spoke with Daughana on the phone, Smith pulled alongside Davis's vehicle and shot him eleven times. Daughana testified she heard a "tapping" sound and then Davis said, "Baby, Keith shot me." He died quickly.

Smith filed a notice of alibi that indicated he was in Gary, not Indianapolis. At trial, State presented evidence of location as indicated by cell phone records & tower location data.

Affirmed (May, Riley Tavitas)

Victim's statement to fiancée was admissible as a dying declaration.

Hearsay is a statement (1) not made by the declarant while testifying at the trial; and (2) offered to prove the truth of the matter asserted. Evid. R. 801(c). It is generally not admissible. Evid. R. 802.

Evid. R. 804(b)(2) dying declaration exception where declarant is unavailable:

> "A statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances."
>
> > The character of the wound may itself warrant the inference that the declarant was under a sense of certain and speedy death.

Reliable - a person about to die is less likely to fabricate the guilt of an innocent person than one who would stand to derive some benefit from his falsehood.

Admission of cell phone location data to rebut alibi defense not fundamental error.

Smith made several arguments that were waived because not raised below.

Even if error, harmless given the overwhelming evidence of Smith's guilt. *Harmless error cannot be fundamental*.

> There was sufficient, independent evidence to prove Smith was in Indianapolis based on jailhouse informant's testimony, surveillance camera video, and evidence of items found in suspect truck.

Evid. Rule 901 Authentication

Calvert v. State*, 177 N.E.3d 107 (Ind. Ct. App. 2021), *trans. denied

Facts: Convicted of assisting a criminal for his role as driver in a drive-by shooting. Shooter was Calvert's cousin, Damon. When Calvert was apprehended a week later, a Samsung cell phone was seized from the same house. Based on data extracted from this phone, as well as Damon's, and records from the phone companies, it was determined that: (1) Damon's phone had a contact for a person named K.J. – Calvert's established nickname – with the same number as the Samsung phone; (2) both phones called each other several times before the shooting; and (3) both phones were near the scene of the shooting at the time of the shooting.

At trial, defense objected to the admission of the Samsung cell phone and related records on grounds the State presented no evidence the phone was ever in Calvert's possession, as the officers who apprehended him and seized the phone did not testify. Though acknowledging the connection was "pretty thin," the TC admitted the evidence.

Affirmed (Vaidik, Kirsch, May)

No abuse of discretion in admitting the Samsung cell phone and related records, as the State established a reasonable probability that it belonged to Calvert.

Evid. R. 901 provides that to satisfy the requirement of authenticating or identifying an item of evidence, the proponent "must produce evidence sufficient to support a finding that the item is what the proponent claims it is."

The evidence can be "testimony that an item is what it is claimed to be, by a witness with knowledge." Evid. R. 901(b)(1).

Can also be authenticated through "the appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances." Evid. R. 901(b)(4).

Absolute proof of authenticity is not required, only a reasonable probability the evidence is what it is claimed to be. Any inconclusiveness goes to the exhibit's weight, not its admissibility.

Calvert pointed out the phone was "registered" to someone other than him, but COA determined that such information goes only to the weight of the evidence, not its admissibility.

Evid. Rule 901 Authentication

Kerner v. State*, 178 N.E.3d 1215 (Ind. Ct. App. 2021), *trans. denied

Facts: Horrific double murder in drug deal gone bad. Kerner committed the murders, and Silva was present during and assisted thereafter.

Silva provided investigators with two iPhone voice recordings from his phone – one taken during the shooting of the first victim and the other capturing Silva's and Kerner's in-person conversation two days later. At trial, Kerner objected to admission of these recordings, challenging their authenticity because, according to a forensic scientist, they had been altered.

Affirmed in relevant part (Mathias, Tavitas, Weissmann)

1) **The voice recordings were adequately authenticated under R. 901.**

The forensic scientist testified that each recording had been altered, but his testimony established that the alterations were likely insignificant.

(1) each recording began at its designated start time; (2) there was no evidence specifying what was altered; (3) the alterations could have been caused by simply pausing the recordings in real-time or by later removing portions from the beginning or end; (4) the alterations may have been "as little as one second"; (5) neither recording included an "abnormality," such as somebody recording over the audio "in the middle of somebody talking"; and (6) neither recording was altered using an external program.

Additionally, the State presented significant evidence supporting the authenticity of each recording (such as, corroborating cell-phone records and testimony, voice-identification testimony, and distinctive characteristics).

2) **Additionally, COA held that evidence from Kerner's iPhone was properly admitted**.

Kerner relied on *Seo v. State*, 148 N.E.3d 952 (2020), where our supreme court held constitutional privilege against self-incrimination may be implicated when the State compels individual to surrender unlocked smartphone.

Here, because Kerner voluntarily gave his passcode to law enforcement instead of timely asserting his Fifth Amendment privilege, his disclosure was not a compelled incrimination.

*COA noted that under certain circumstances the privilege is self-executing, but Kerner had not alleged any such circumstance.

Evid. Rule 1002 Best Evidence Rule & Silent Witness Theory

***Hamilton v. State*, 182 N.E.3d 936 (Ind. Ct. App. 2022)**

Facts: Marvin and Maria's home was burglarized, and Hamilton was shown on home surveillance video entering through the back door and leaving with their property. Marvin used his cell phone to record a playback of the video on a screen. The copy was provided to police. Over Hamilton's objection, the copy was admitted at trial.

Affirmed (Najam, Vaidik, Weissmann)

1) **Copy was admissible under Best Evidence Rule**

Evid. R. 1002 provides that an original recording is required in order to prove its content unless the rules of evidence or a statute provides otherwise.

Evid. R. 1003 provides "a duplicate is admissible to the same extent as an original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate."

Hamilton does not explain how the absence of the time & date stamp on the copy undermines its authenticity in light of Maria and Marvin's testimony that the copy was, otherwise, the same as the original.

2) **Copy was properly admitted under the Silent Witness Theory.**

Strong showing of the image's competency and authenticity required.

Witness need not testify that the image is an accurate representation of the scene on the day on which the image was taken but must provide testimony identifying scene that appears in the image sufficient to persuade TC of the competency and authenticity to a relative certainty.

Marvin's testimony identifying scene in the video, along with his testimony regarding how the surveillance system works and the time and date stamp on the original video, sufficient to establish video's "competency and authenticity to a relative certainty."

The fact the edges of the copied video were cropped to exclude the time and date stamp did not constitute a "significant inconsistency" between the original and the copy.

Child Deposition Statute (CDS) I.C. § 35-40-5-11.5

***Church v. State*, 189 N.E.3d 580 (Ind. 2022)**

> **Facts**: Charged with child molesting, Church unsuccessfully sought to depose child victim after the statute went into effect. On appeal, COA reversed, concluding the statute is procedural and impermissibly conflicts with our Trial Rules.

Affirmed the TC and overruled line of COA cases that found the statute invalid.

Even though CDS has procedural elements, Supreme Court concluded it is substantive, because it predominantly furthers public policy objectives of the General Assembly.

> Rather than a mechanical test that simply stops when it finds a process, Court adopted a "thoughtful test that looks at the statute's predominant objective."
>
> Unlike most of the country, Indiana allows criminal defendants to depose prosecution witnesses. *But this right is neither constitutional nor absolute*. In 2020, our General Assembly restricted this statutory right for defendants accused of sexual offenses against children to protect child sex-crime victims from unnecessary re-traumatization.

CDS, **I.C. § 35-40-5-11.5,** restricts a criminal defendant's ability to take deposition of a child victim of a sex offense less than 16 years of age, providing in part:

> (d) A defendant may not take the deposition of a child victim unless the defendant contacts the prosecuting attorney before contacting the child, and one (1) or more of the following apply:
>
> > (1) The prosecuting attorney agrees to the deposition. The prosecuting attorney may condition agreement … upon the defendant's acceptance of the manner in which the deposition shall be conducted.
> >
> > (2) The court authorizes the deposition after finding, following a hearing under subsection (f), that there is a reasonable likelihood that the child victim will be unavailable for trial and the deposition is necessary to preserve the child victim's testimony.
> >
> > (3) The court authorizes the deposition after finding, following a hearing under subsection (g), that the deposition is necessary:
> >
> > > (A) due to the existence of extraordinary circumstances; and
> > > (B) in the interest of justice.

Without approval from prosecutor, defendant must request a hearing & prove by a preponderance of evidence circumstances set forth in (d)(2) or (d)(3).

Court also held that CDS was being applied prospectively b/c depo was sought after statute went into effect and that the statute was not otherwise unconstitutional.

Protected Person Statute (PPS) I.C. § 35-37-4-6

***Rosenbaum v. State*, --- N.E.3d --- (Ind. Ct. App. 2022)**

Facts: Convicted of molesting stepdaughter. Prior to trial, State filed notice of intent to introduce Child's forensic interview pursuant to the PPS. Rosenbaum objected to the use of both Child's recorded interview and her in-trial testimony, arguing that only one form of testimony could be presented. Following a PPS hearing, at which the forensic interviewer and Child testified and were subject to cross-examination, TC found sufficient indicia of reliability of Child's statement for admission at trial.

At trial, State was permitted, over Rosenbaum's objection, to present child's live in-court testimony and her recorded forensic interview. Mother, interviewer, and investigating officers testified but refrained from recounting Child's statements.

Affirmed as harmless error (Riley, Najam, Robb)

TC erred when it admitted both Child's live testimony and the recorded forensic interview, but the error was harmless.

The PPS, **I.C. § 35-37-4-6**, provides for the admission, under certain circumstances, of hearsay statements that would otherwise be inadmissible under the Evidence Rules.

In *Tyler v. State*, 903 N.E.2d 463 (Ind. 2009), SC addressed admissibility of a child victim's recorded statement when the child also testifies at trial.

While PPS explicitly provides for admission of both recorded and live testimony & addresses reliability, SC found PPS "should only be used when necessary to further its basic purpose of avoiding further injury to the protected person."

Thus, SC held that, where a child's recorded statement and live testimony "are consistent and both are otherwise admissible," either may be admitted into evidence, <u>but not both</u>.

Admission of both is cumulative and could be unfairly prejudicial and does not further goal of protecting child from testifying.

Despite error, SC found not reversible because harmless.

Applying *Tyler*, COA reached same result.

In determining statements were consistent, COA looked to other contexts, such as impeachment and held interview and trial testimony were "not irreconcilable" and the differences were "minor in that they essentially describe the same act."

But error was harmless b/c State carefully tailored questioning of other witnesses to avoid "relentless repetition" of Child's allegations.

Dead Man's Statute I.C. § 34-45-2-4 & Authenticity

***Arnett v. Estate of Joel S. Beavins*, 184 N.E.3d 679 (Ind. Ct. App. 2022)**

Facts: Years after Joel organized Stewart Properties, LLC, he & Arnett began conducting business together, with Arnett managing properties owned by Stewart Properties. Later, they met with a broker & signed a letter of intent for a commercial loan to finance a transfer of ownership of the rental properties to Arnett. According to Arnett, they then executed an operating agreement, pursuant to which Arnett would own 82% of Stewart Properties. After Joel died in plane crash, Arnett continued to manage the properties.

Joel's Estate and Stewart Properties filed a complaint against Arnett relating to the rental properties. Arnett counterclaimed. Estate filed for partial SJ on the issue of whether Arnett was a member of Stewart Properties. TC struck portions of Arnett's designated evidence and granted partial SJ in favor of Estate on membership issue.

Affirmed (Crone, Bradford, Tavitas)

1) Part of Arnett's affidavit properly stricken under Dead Man's Statute, I.C. § 34-45-2-4.

Statute guards against false testimony by a survivor by establishing a rule of mutuality, where the lips of the surviving party are closed by law when the lips of the other party are closed by death.

Arnett was a necessary party to the suit and his alleged membership interest in Stewart Properties was adverse to the interest of the Estate.

TC properly excluded portions of affidavit referencing alleged business arrangements between the men during Joel's lifetime.

2) FYI email from Joel and attachment (purported operating agreement) referenced in loan officer's affidavit was not properly authenticated and was properly stricken.

Other than a typed signature block from email address bearing Joel's name and a conclusory statement from loan officer that he received email from Joel, Arnett offered no foundation to support a finding as to the authenticity of the email.

No evidence of contents or other distinctive characteristics of email (such as evidence it was part of a chain) that would indicate circumstantially that Joel was the author of the communication.

Affiant was not a witness with knowledge of the alleged execution of the operating agreement nor could he attest to the attachment's accuracy or validate the signatures on the agreement as genuine.

Authentication of the purported operating agreement was a highly contested issue and, w/o more, the email and attachment were properly stricken.

Forfeiture by Wrongdoing Doctrine

Galloway v. State*, 188 N.E.3d 493 (Ind. Ct. App. 2022), *trans. petition pending

Facts: Convicted of criminal recklessness and attempted murder. Baker, one of the victims, identified Galloway, whom he knew as "Buddha," as the shooter. Baker provided a detailed statement to police. Later, Baker was shot and killed.

Pretrial hearing regarding admissibility of Baker's statement to police. Galloway argued that admission of Baker's statement at trial would violate his right of confrontation under the Sixth Amendment to the U.S. Constitution and Art. 1, § 13 of the Indiana Constitution. TC determined that Galloway had caused Baker's unavailability and, therefore, the statement was admissible under the forfeiture by wrongdoing doctrine.

Affirmed (Altice, Vaidik, Crone)

Admission of deceased witness's statement did not violate Galloway's constitutional right to confrontation.

Forfeiture by Wrongdoing Doctrine

An exception to the right of confrontation exists when the defendant's own wrongdoing caused the declarant to be unavailable to testify at trial.

Protects the integrity of the judicial process.

Defendant must have had in mind the particular purpose of making the witness unavailable.

The State bears the burden of showing by a preponderance of the evidence that the defendant forfeited his right to confrontation under this theory.

-Preponderance standard met here. Detective was informed by "everybody" in the neighborhood where Baker was shot that "Buddha" killed Baker, and, while incarcerated, Galloway made incriminating statements regarding Baker's death to Cain, a fellow inmate and acquaintance of Baker and Galloway since childhood.

Spoliation

***Synergy Healthcare Resources, LLC v. Telamon Corp*., 190 N.E.3d 964 (Ind. Ct. App. 2022)**

Facts: Synergy, a medical billing software company, brought action in 2016 against Telamon, a software company, for breach of contract, alleging that company created and delivered deficient source code after it was hired to convert software to web-based application. The companies parted ways in 2014 and, after being contacted by Synergy's attorney, Telamon sent the source code to Itransition at Synergy's direction, thus relinquishing the only copy of the source code.

During discovery in 2018, Telamon requested of Synergy a copy of the version of the source code that Telamon had delivered to Itransition. Telamon also sent a third-party request to Itransition, but Itransition only had a modified version of the source code.

Telamon filed Motion for Sanctions Due to Spoliation of Evidence, arguing the as-delivered source code was central to the claims and Synergy had a duty to preserve. TC granted the motion and dismissed Synergy's complaint.

Affirmed (Mathias, Brown, Molter)

TC did not abuse its discretion by dismissing complaint as sanction for spoliation.

Party raising a claim of spoliation must prove that (1) there was a duty to preserve the evidence, and (2) the alleged spoliator either negligently or intentionally destroyed, mutilated, altered, or concealed the evidence.

Duty to preserve occurs when a first-party claimant knew, or at the very least, should have known, that litigation was possible, if not probable.

TC has broad discretion to redress spoliation.

Synergy argued (1) no duty to preserve when it never had the source code in its possession; (2) Synergy did not know that litigation was possible in August 2014 when its attorney wrote a letter to Telamon seeking compensation for allegedly deficient software conversion; and (3) there is no evidence that it either negligently or intentionally destroyed the as-delivered source code.

COA disagreed holding: (1) a party with a duty to preserve evidence in the possession of a 3rd party may bear responsibility for spoliation; (2) at time of the demand letter, Synergy knew or should have known that litigation was possible and that the as-delivered source code would be relevant evidence; (3) Synergy was negligent by omission when it failed to direct Itransition to preserve that code when litigation became likely.

Synergy's negligence resulted in severe prejudice to Telamon.

Destruction of Evidence & Evidence of Voluntary Intoxication

Bennett v. State*, 175 N.E.3d 331 (Ind. Ct. App. 2021), *trans. denied

Facts: Convicted of murder after shooting girlfriend during a domestic dispute. Bennett shot victim in head with a muzzleloader and himself in the face with a different firearm.

The State cleaned the muzzleloader while performing tests. Bennett argued that this constituted destruction of materially exculpatory evidence. TC denied his motion to dismiss the charges but provided funding for a ballistics expert, who testified that the cleaning destroyed evidence of powder and residue that could have been analyzed.

Bennett also contested limitations on evidence of his voluntary intoxication, which TC ruled could be used "in other relevant areas besides mens rea." TC permitted Bennett to present witnesses, who testified to physiological and psychological effects of alcohol.

Affirmed (Weissmann, Kirsch, Altice)

1) **Corrosion and buildup removed from muzzleloader was not "materially exculpatory evidence" and, thus, not a violation of due process**

To meet standard of constitutional materiality, evidence must possess an exculpatory value (i.e., tend to clear defendant from fault/guilt) that was apparent before it was destroyed & be of such a nature that defendant would be unable to obtain comparable evidence by other reasonably available means.

Bennett's own expert did not testify that corrosion would cause a misfire. And though the State's expert testified that corroded muzzleloaders can accidentally fire as they are loaded, Bennett testified that he had loaded it before the day of the murder.

Also failed to establish that he could not obtain comparable, as his expert reviewed photos of the corrosion & testified generally to its effects.

When evidence is only "potentially useful" there is no DP violation unless defendant can show bad faith. Bennett has made no such showing.

2) **Intoxication evidence is not admissible to prove self-defense**

I.C. § 35-41-2-5 prohibits consideration of voluntary intoxication to negate the mens rea requirement. To permit such evidence to show defendant's subjective belief that force was necessary, "would impermissibly resurrect the voluntary intoxication defense, which has been lifeless since the Indiana General Assembly enacted Public Law 210 in 1997."

Fifth Amendment Right Against Self-Incrimination

***Murray v. State*, 182 N.E.3d 270 (Ind. Ct. App. 2022)**

Facts: Convicted of dealing in methamphetamine following controlled drug buys. Everyone at trial wore facemasks as a precaution against COVID-19. Murray had a full beard at trial, which, according to witnesses, he did not have during the controlled buys. Witnesses identified him, and a video of one buy was admitted into evidence, showing the dealer wearing a hat, sunglasses, hood and having distinctive teeth. On the State's request, and over Murray's objection, TC directed him to uncover his face, take a "homemade retainer" out of his mouth, and smile at the jury.

Affirmed (May, Brown, Pyle)

Directing Murry to show his teeth to the jury did not violate his Fifth Amendment right against compelled self-incrimination.

"No person ... shall be compelled in any criminal case to be a witness against himself."

Not all compelled, incriminating evidence falls under this constitutional protection, as the evidence must also be testimonial to be protected. That is, the accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information.

While smiles can convey messages in the ordinary course of life, any such emotional context is removed when the subject smiles because he is directed to do so.

The facts here are more like other cases in which we have held no constitution violation occurred. Such as requiring the defendant to hold up hand to reveal missing finger or bare his forearm to display tattoo.

Section Ten

RECENT DEVELOPMENTS IN LABOR AND EMPLOYMENT LAW

By Greg Guevara and Tyler Moorhead
Bose McKinney & Evans LLP

44th Annual Judge Robert H. Staton Indiana Law Update
September 13-14, 2022

Section Ten

Recent Developments in Labor and Employment Law.....Greg Guevara Tyler Moorhead

I. Equal Employment Opportunity Law

A. Disparate Treatment

Swain v. Wormuth, 2022 WL 2914735 (7th Cir. July 25, 2022). The plaintiff suffered an injury for which he received accommodations so that he could perform the essential functions of his position. One of his accommodations was that other employees could assist him with heavy lifting during normal business hours. Though he was eligible for overtime hours, the employer did not consider the plaintiff for overtime because it permitted only one individual in that position to work overtime, and as such, there would be noone else present to help the plaintiff lift heavy objects. The plaintiff filed suit alleging disparate treatment under the Rehabilitation Act. The district court granted summary judgment in favor of the employer. On appeal, the Seventh Circuit affirmed, explaining that the employer was not obligated to create an additional overtime position to assist the plaintiff with lifting heavy objects. Notably, the Court held that an accommodation that is reasonable during normal work hours may not be reasonable during overtime hours.

Tonyan v. Dunham's Athleisure Corp., 966 F.3d 681 (7th Cir. 2020). The plaintiff suffered a series of injuries leading to permanent restrictions preventing her from lifting more than two pounds. The defendant employer's lean staffing model required that the plaintiff's position be able to perform various physical tasks, so it terminated her employment due to her failure to perform the essential functions of the job. The plaintiff then sued the defendant employer for disparate treatment under the Americans with Disabilities Act. The defendant sought and was awarded summary judgment, and the plaintiff appealed, arguing that physical tasks were not essential functions of her position. To determine whether physical tasks were essential, the Seventh Circuit weighed the job description, the employer's judgment (which courts generally do not second guess), the consequences of not requiring the employee to perform those functions, the amount of time the employee spends performing those functions, and the experience of those who previously and currently hold the position. The Seventh Circuit affirmed, holding that all of these factors weighed in favor of physical tasks being essential functions of the plaintiff's position. The Court was not swayed that the plaintiff could delegate some of the physical tasks to other employees because that merely put additional burdens on those employees that sometimes did not get completed. As such, there was no disparate treatment.

David v. Bd. of Trs. of Cmty. Coll. Dist. No 508, 846 F.3d 216 (7th Cir. 2017). The plaintiff, an African-American woman over the age of 40, worked in computer support for the defendant. Her job did not require a bachelor's degree. A month after announcing her retirement, the plaintiff asked for a new job title and a salary increase to account for additional job responsibilities inherited from a male co-worker. Her supervisors failed to properly process her request. When the plaintiff retired, her extra responsibilities reverted back to her male co-worker, but he did not receive a raise for resuming these duties. A year later, another female Hispanic coworker over 40 started performing the plaintiff's old responsibilities, in addition to her original job duties. Both co-workers' job descriptions required a bachelor's degree and both earned annual salaries greater than the plaintiff's. The plaintiff sued the defendant alleging, among other things, that the disparities between her pay and her co-workers' pay evidenced gender, race, and age discrimination in violation of Title VII and the Equal Pay Act. The district court granted summary judgment for the defendant, and the plaintiff appealed. The Seventh Circuit affirmed.

The Court analyzed the plaintiff's pay claims using the *McDonnell Douglas* framework, focusing on whether the plaintiff's proffered comparators were similarly situated to her. While the Court acknowledged that the plaintiff's co-workers performed some of the plaintiff's old job duties, it concluded there was no evidence that either co-worker solely performed duties equivalent to those performed by the plaintiff. Moreover, the plaintiff did not maintain that she was qualified for either of her co-worker's jobs. Because neither person was similarly situated to the plaintiff for purposes of her disparate pay claim, she failed to establish a prima facie case of discrimination.

Baines v. Walgreen Co., 863 F.3d 656 (7th Cir. 2017). The plaintiff, an African-American former pharmacy technician for the defendant, alleged that the defendant retaliated against her in violation of section 1981 and Title VII when it refused to rehire her in 2014 based on race bias charges she leveled against the company years earlier. The district court granted summary judgment for the defendant, finding no evidence linking the plaintiff's protected activity (filing EEOC charges) and the defendant's adverse employment actions (failing to rehire her). The plaintiff appealed, and the Seventh Circuit reversed. The plaintiff offered sufficient circumstantial evidence to satisfy the summary judgment standard. One critical piece of evidence, which the lower court wrongly excluded as inadmissible hearsay, was testimony from the plaintiff's cousin. The plaintiff's cousin—who ironically got the job the plaintiff was denied—stated that the hiring manager let slip that she had wanted to hire someone named "Regina" (the plaintiff's first name), but had been blocked by her district manager. The Court noted that the district manager had been personally involved in handling the plaintiff's EEOC complaints, and the cousin's testimony connected those prior events to the defendant's refusal to rehire the plaintiff. Aside from the cousin's testimony, other evidence of retaliatory intent included: (1) the plaintiff's "mysteriously missing" 2014 application and interview scores; (2) the hiring manager's initial denial to the EEOC that she had interviewed the plaintiff; and (3) the hiring manager possibly lying to the plaintiff about having hired someone else when she told the plaintiff that she had been passed over. Given this circumstantial evidence, a jury could draw a reasonable inference that the employer had acted with unlawful retaliatory intent

Ortiz v. Werner Enters., Inc., 834 F.3d 760 (7th Cir. 2016). The plaintiff, a freight broker, alleged that his employer subjected him to discrimination and harassment based on his Mexican ethnicity, including that his supervisor subjected him to various ethnic slurs, which increased in frequency toward the time of his termination. The defendant responded that it terminated the plaintiff for falsifying business records. The district court granted summary judgment for the defendant, concluding that the plaintiff failed to present a "convincing mosaic" of evidence under either the direct method or the indirect method of proof. The Seventh Circuit reversed and overruled circuit precedent, which previously required employees to prove bias cases through a "direct" or an "indirect" method to establish a "convincing mosaic of discrimination." The Seventh Circuit held that the "convincing mosaic" term never was intended to be a legal test, but only a metaphor to illustrate why courts should not try to differentiate between "indirect" and "direct" evidence. The Seventh Circuit further ruled that the correct legal standard did not involve consideration of "indirect" and "direct" evidence separately, but that the standard simply was whether the evidence as a whole would permit a reasonable fact finder to conclude that plaintiff's race, ethnicity, sex, religion, or other proscribed factor caused the discharge or other adverse employment action. Thus, the Seventh Circuit directed district courts to stop separating "direct" from "indirect" evidence and proceeding as if they were subject to different legal standards. Notably, the Seventh Circuit reasoned that its decision to meld consideration of

"indirect" and "direct" evidence did not concern *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), or any other burden-shifting framework. Turning to the plaintiff's claim, the Seventh Circuit held that under this "unified" standard, the plaintiff presented sufficient evidence from which a reasonable jury could infer that his supervisors directed ethnic slurs at the plaintiff and tried to blame him for losses related to unprofitable shipping transactions because of his Mexican ethnicity, and thereby raised a triable issue of fact with respect to his discrimination and harassment claims.

Mourning v. Ternes Packaging, Ind., Inc., 868 F.3d 568 (7th Cir. 2017). The plaintiff filed suit against her employer for sex discrimination after she and her supervisor were terminated for performance reasons. Eight of the plaintiff's ten subordinates filed written complaints against her. The district court granted summary judgment for the employer, concluding that the plaintiff had failed to establish a claim of sex discrimination under the "indirect" framework established by *McDonnell Douglas*. The plaintiff appealed and the Seventh Circuit affirmed. The Court clarified that, as of their decision in *Ortiz v. Werner Enters., Inc.*, 834 F.3d 760 (7th Cir. 2016), employment discrimination cases do not have separate evidentiary frameworks for indirect and direct evidence, and that instead, the ultimate inquiry was whether the evidence would permit a reasonable factfinder to conclude the plaintiff's sex caused the adverse action. The Court noted that, although the plaintiff's argument tracked the *McDonnell Douglas* framework, the plaintiff "[did] not focus on trying to show that [the decision makers] acted against her because she is a woman." The Court found that the plaintiff failed to show that similarly situated employees outside of her protected class were treated more favorably by the same decision maker, and failed to show that the proffered reasons for her termination were false.

Turner v. Hirschbach Motor Lines, 854 F.3d 926 (7th Cir. 2017). The defendant offered the plaintiff, an African American, a job as a truck driver contingent on his completion of orientation and a drug test. When the plaintiff tested positive for marijuana, he asked the defendant's safety officer for a "split test" so that the second half of his urine could be tested by a different laboratory. The safety officer allegedly cancelled the split test and told the plaintiff the retest would be a "waste of time" and that he was "never going to pass the test" based on his race. The initial drug results were then sent to the defendant, and the defendant refused to hire the plaintiff. The plaintiff subsequently sued under Title VII, alleging that the safety officer's expressed racial animus caused the decision maker not to hire him using a "cat's paw" theory of liability. The district court granted summary judgment for the defendant. The plaintiff appealed and the Seventh Circuit affirmed. The district court correctly concluded that the plaintiff lacked evidence supporting his federal claim for race discrimination under a "cat's paw" theory. The safety officer was not the hiring decision maker, and the cat's paw theory was unavailing because the plaintiff did not show that his drug test was unreliable or that the split test would have been negative. In addition, the hiring decision maker was unaware of the alleged retest request. Accordingly, there was no evidence that the failure to hire the plaintiff was proximately caused by the safety officer's presumably discriminatory action (cancelling the split test).

B. Disparate Impact

Kleber v. CareFusion Corp., 914 F.3d 480 (7th Cir. 2019). The plaintiff was a prospective job applicant who was not selected for employment by the defendant. The plaintiff then brought an ADEA claim against the prospective employer based on the theory that the requested three to seven years of job experience created a disparate impact upon those with more experience. The

district court dismissed the claim, concluding that the ADEA did not authorize job applicants to bring disparate impact claims against a prospective employer. The Seventh Circuit in a divided panel reversed the district court's decision. The Seventh Circuit then granted *en banc* review. The Court affirmed the district court decision, concluding that the disparate impact provision of the ADEA only authorized current, not prospective, employees to bring disparate impact claims. Thus, the plaintiff's claim was dismissed because he was never an employee of the defendant.

Ernst v. City of Chicago, 837 F.3d 788 (7th Cir. 2016). The plaintiffs, five experienced female paramedics, brought claims of gender discrimination after the defendant rejected them for medic jobs when they failed the fire department's physical fitness examination. The plaintiffs challenged the examination as discriminatory based on sex. At the district court level, the case was split into two parts. The plaintiffs' disparate treatment claim was tried by a jury, which ruled against the plaintiffs. The plaintiffs' disparate impact claim was tried in a separate bench trial, at which the Court ruled that the defendant satisfied its burden to validate the examination. The plaintiffs appealed. The Seventh Circuit reversed and remanded. With respect to the disparate treatment claim, the Court held that the district court provided an erroneous jury instruction that the plaintiffs had to satisfy a "but-for" test that the defendant would have hired the plaintiffs if, all other factors being equal, they were male. The Court ruled that the jury should have been instructed that the plaintiffs had to show that the defendant was motivated by anti-female bias when it created the entrance examination that caused the plaintiffs not to be hired. Instead, the instruction led the jury to focus on gender as a factor in the specific decision not to hire the plaintiffs. Therefore, the instruction was misleading or confusing such that it prejudiced the plaintiffs. With respect to the disparate impact claim, the Court reversed because the physical-skills study was neither reliable nor validated under federal law. The Court further held that there were clear errors with the defendant's validation studies for the examination, because the defendant failed to establish that its physical-skills entrance test reflected "important elements of job performance." This lack of connection between real job skills and tested job skills was fatal to the defendant's case.

C. Race Discrimination and Harassment

Abebe v. Health and Hosp. Corp. of Marion County, 35 F.4th 601 (7th Cir. 2022). The plaintiff, a Black woman of Ethiopian origin, brought suit against the defendant alleging discrimination and retaliation in violation of Title VII and 42 U.S.C. § 1981. The plaintiff received a low performance review in 2018 following previous low performance review ratings in previous years. Critiques in the review included suggested improvements in professionalism and respect. The defendant then issued merit-based pay raises based on employees' performances in 2018, but the plaintiff failed to receive a raise. The defendant then placed the plaintiff on a performance improvement plan. The plaintiff filed suit claiming the defendant discriminated against her when it gave her a low performance review resulting in not receiving a raise and retaliated against her when it placed her on a performance improvement plan after she reached out to the EEOC. The district court granted summary judgement to the defendant. On appeal, the Seventh Circuit affirmed the district court's ruling, claiming the plaintiff failed to meet the "similarly situated employees who were not members of her protected class were treated more favorably" element of a Title VII race discrimination suit. While the plaintiff did provide examples of other colleagues who were in similar incidents to the plaintiff, the Court held that the plaintiff focused on the wrong features in her examples, precluding a meaningful comparison. The plaintiff did not provide examples of similar disrespectful or aggressive

communication. Thus, the defendant had a legitimate, non-discriminatory reason for the plaintiff's low performance review scores. Further, the Court held that the defendant's issuance of the performance improvement plan did not establish a "retaliation" claim because the plaintiff could show only that the defendant issued the plan following her outreach to the EEOC, and "suspicious timing alone is not enough to establish a causal connection between the adverse action and the protected activity."

McKinney v. Office of Sheriff of Whitley Cnty., 866 F.3d 803 (7th Cir. 2017). In 2013, the plaintiff became the first-ever black police officer to be hired by the Whitley County, Indiana, sheriff's office. After he was fired nine months later by the same sheriff who hired him, the plaintiff sued under Title VII for race discrimination. The district court granted summary judgment to the defendant, and the plaintiff appealed. The Seventh Circuit reversed and remanded. The Court opined that the district court had "overestimated the strength of the 'common actor' inference" when it concluded that, had the hiring sheriff wanted to discriminate against the plaintiff, he would have refused to hire the plaintiff in the first place. The Court noted that while the inference is useful in limited situations, it should be considered by the ultimate trier of fact and not on summary judgment. The Court also observed that the defendant offered eight different reasons for firing the plaintiff, but that this "ever-growing list of rationales" fell apart in the face of the plaintiff's evidence. Indeed, the Court noted that the lawsuit was most striking because of the sheer number of the defendant's rationales and the quality and volume of the plaintiff's evidence, much of which was so specific that a jury could conclude that the defendant's rationales were not only mistaken, but dishonest.

Johnson v. Advocate Health & Hosps. Corp., 892 F.3d 887 (7th Cir. 2018). The plaintiffs, a group of African-American hospital janitors, all claimed that they faced race discrimination at the hands of their supervisors. The plaintiffs' five allegations included: (i) janitors were paid unequally based on race; (ii) African-American janitors were regularly denied promotions and raises; (iii) African-American janitors were more scrupulously disciplined than other janitors; (iv) African-American janitors were given more strenuous and less desirable assignments than other janitors; and (v) supervisors subjected African-American janitors to a hostile work environment. The district court granted summary judgment to the employer on all counts, holding that there was no basis for employer liability and that the plaintiffs did not experience severe or pervasive race-based harassment. The plaintiffs appealed. The Seventh Circuit affirmed as to the first four claims, finding that the plaintiffs failed to make a sufficient factual showing, but reversed and remanded the hostile work environment claim. First, considering all the supervisors' racial slurs and negative racial comments, the Court reasoned that a jury could determine that they were sufficiently severe and pervasive. Second, the Court found that the plaintiffs demonstrated a basis for employer liability by showing that they complained about many of the remarks to human resources, but the remarks persisted. The Court found that there was sufficient evidence of notice to the employer to proceed past summary judgment.

Fellers v. Brennan, 699 F. App'x 554 (7th Cir. 2017). The plaintiff, a Caucasian man, worked as a custodian at a United States Postal Service facility. The plaintiff's supervisor asked him to wax the floors in both the men's and women's locker rooms with the specific instruction to discourage his co-workers from entering the locker rooms while he worked. While waxing the men's locker room, a Caucasian co-worker entered the locker room and called the plaintiff a "f------ a--hole" when the plaintiff asked him to refrain from entering. Another male co-worker, this time of Asian descent, entered the locker room immediately after the first co-worker, leaving a

series of footprints on the freshly waxed floor. Next, after moving to the women's locker room, the plaintiff again faced opposition from co-workers. Two female co-workers disregarded the plaintiff's sign designating the locker room as closed and proceeded to enter. After the plaintiff asked the two women to stay out, a black female co-worker called the plaintiff a "dumb, stupid snowflake," a "dumb, stupid white boy," and a "dumb, stupid f------ a--hole white boy." The other woman, of Asian descent, did not say anything to the plaintiff, but upset him by changing her clothes in his presence. The plaintiff submitted formal complaints to his direct supervisor as well as the women's supervisor. After the Postal Service failed to take any action, the plaintiff sued alleging that it violated Title VII by subjecting him to a hostile work environment. The district court granted the defendant's motion for summary judgment, holding that the plaintiff's co-workers' comments and actions "were not sufficiently severe, pervasive or offensive" to rise to the level of a hostile work environment. The district court also explained that there was no evidence that the defendant had failed to end the harassment once managers were alerted, explaining that "there is no evidence that the harassment continued after plaintiff reported it." The plaintiff appealed. The Seventh Circuit affirmed, explaining that, although the co-workers' conduct was offensive, the plaintiff was not physically threatened and the comments were not frequent or pervasive, as they all occurred on a single day. Additionally, while the comments referred to race and sex, the Court explained that isolated epithets were not sufficient to defeat summary judgment.

Cable v. FCA US LLC, 679 F. App'x 473 (7th Cir. 2017). The plaintiff, an African-American, sued her employer under Title VII, alleging that her employer subjected her to a hostile work environment because of her race. The plaintiff pointed to five different incidents that occurred over a fourteen-month period. She testified, for example, that her team leader displayed a black voodoo doll with string tied around its neck and that letters "NIG" and "N" were etched on control box near one of her workstations. The district court granted summary judgment for the employer because the racial harassment was not sufficiently pervasive or severe and her employer was not liable for the harassment. The plaintiff appealed, and the Seventh Circuit affirmed. The Court questioned the first reason, taking issue with the trial court's observation that the etchings were less severe than seeing or hearing "N-word" spelled out. However, the circuit Court ultimately affirmed the district court's grant of summary judgment because the plaintiff lacked a legal basis to hold her employer accountable. The plaintiff failed to show that her employer was negligent either in discovering or remedying the harassment. The voodoo doll was never seen again after the team leader was told not to bring it back to work, and the offensive etchings were quickly removed or covered up. In addition, the employer promptly interviewed the plaintiff's co-workers and supervisors to ascertain who had made the etchings. Because the employer acted reasonably in responding to the racial harassment, the district court correctly concluded that there was no basis for liability.

Gates v. Bd. of Educ. of the City of Chicago, 916 F.3d 631 (7th Cir. 2019). The plaintiff was subjected to three racial slurs from his supervisor which occurred within a sixth-month period. The Seventh Circuit reversed the district court's summary judgment ruling in favor of the defendant employer and instead found that the plaintiff was subjected to a hostile work environment. The Court noted that harassment from a supervisor, rather than a coworker, is more pervasive and can quickly lead to a hostile work environment claim. The Court weighed the fact that the district court incorrectly used the "hellish" standard as the required standard for harassment instead of recognizing that a hostile work environment can occur well before it reaches a hellish atmosphere. Finally, the Court held that three racial slurs within a six-month

period were sufficiently frequent and severe because a supervisor said them directly to the employee.

Davis v. Ford Motor Co., 751 F. App'x 949 (7th Cir. 2019). The defendant's Indianapolis plant closed, and the plaintiff agreed to a permanent transfer to the defendant's Kentucky plant. When the defendant opened another Indianapolis plant years later, the plaintiff's request to transfer back to Indianapolis was denied so she sued the defendant for race and gender discrimination. The Seventh Circuit affirmed the district court's summary judgment ruling in favor of the defendant because the plaintiff failed to show similarly situated employees who were treated more favorably. Further, the record showed no mention of the plaintiff's race or gender; her sheer belief there was discrimination was insufficient. The defendant also sufficiently supported its position with a nondiscriminatory explanation – that the signed agreement stated she would remain at the Kentucky plant *permanently*.

Friend v. Nice-Pak Prod., Inc., No. 117CV03033JPHDML, 2019 WL 2476680 (S.D. Ind. June 13, 2019). The plaintiff was terminated by the defendant after he threatened to put a co-worker "in the concrete." The plaintiff sued the defendant for discrimination and retaliation under Title VII alleging he was punished more severely because he is white and complained of discrimination. The defendant filed for summary judgment. The Court stated that when a plaintiff is not a member of a protected class, he can allege "reverse discrimination" by showing "background circumstances showing that the employer has reason or inclination to discriminate invidiously against whites or evidence that there is something 'fishy' about the facts at hand." The plaintiff argued he met this standard by showing a similarly situated African-American co-worker who was not disciplined for violating the defendant's violence policy and by showing that the plaintiff's performance was satisfactory up until his termination. The Court agreed, concluding that the plaintiff established a prima facie case of discrimination. The Court found pretext because even though the plaintiff violated the policy, there was sufficient evidence to create an issue of fact as to whether the defendant was selectively enforcing the policy against whites. The Court denied summary judgment on the retaliation claim for the same reasons.

D. Sex and Pregnancy Discrimination

Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022). On June 24, 2022, the Supreme Court of the United States issued its opinion in *Dobbs*, holding that the federal constitution does not provide a right to abortion, and authority to regulate abortion must be returned to the states. The case did not involve a Title VII claim, though the ruling is likely to bring attention to sex and pregnancy discrimination claims in the workplace. Even after this decision, Title VII and the Pregnancy Discrimination Act will continue to protect employees from reproductive health-related discrimination and harassment in the workplace. The case law is yet to develop post-*Dobbs*, but it is likely that employers may still be held liable for treating individuals differently for having had an abortion, seeking one, or choosing not to have one.

Starkey v. Roman Catholic Archdiocese of Indianapolis, Inc., 21-2524, 2022 WL 2980350 (7th Cir. July 28, 2022). The school defendant did not renew the plaintiff's (a former guidance counselor) employment contract following its discovery that the plaintiff was in a same-sex civil union. The plaintiff filed a discrimination claim against the school and the Archdiocese of Indianapolis alleging violations of Title VII, Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, and two other Indiana state tort claims. The district court concluded that the

plaintiff was a "minister," which exempts all of the plaintiff's claims under the First Amendment "ministerial exception." On appeal, the Seventh Circuit affirmed the district court's decision. It concluded the ministerial exception applied because the school "expressly entrusted" the plaintiff with "the responsibility of communicating the Catholic faith to students" and guiding the religious mission of the school, which barred all of her claims, federal and state. The opinion expressly did not reach the Title VII, RFRA, or other constitutional arguments.

Eggl v. Chosen Healthcare, No. 1:18-CV-310, 2020 WL 4059184, at *1 (N.D. Ind. July 20, 2020). The plaintiff, a pregnant woman, was close to her due date when she submitted FMLA paperwork to cover the time she expected to be off work after having her baby. Around that same time she received a complaint from a customer that led to her suspension pending an investigation at work. While on suspension, the plaintiff had her baby and was fired one week later as a result of the investigation into the customer complaints. The plaintiff then brought suit, in part, claiming that her previous employer discriminated against her in violation of Title VII, as amended by the Pregnancy Discrimination Act. The defendant employer sought summary judgment, arguing that the plaintiff could not satisfy her *prima facie* case because the decision makers did not know she was pregnant. The District Court for the Northern District of Indiana agreed, explaining that though HR might have known about her pregnancy due to the FMLA paperwork, there was no evidence that the upper level management who made the termination decision know of her pregnancy. The Court did not find a cat's paw theory (where the lower level employee improperly influenced the decision maker) because the HR employee who knew of the pregnancy had no discriminatory animus towards the plaintiff. Summary judgment on the pregnancy discrimination claim was granted in favor of the employer.

Owens v. Old Wis. Sausage Co., Inc., 870 F.3d 662 (7th Cir. 2017). The plaintiff, a human resources manager, sued her employer for sex discrimination and retaliation under Title VII after being terminated for failing to disclose her personal relationship with a subordinate, poor performance, and uncooperative behavior. After the plaintiff's other subordinates submitted complaints about their relationship and preferential treatment, the company attempted to interview the plaintiff to ascertain the nature of her relationship with her subordinate, as was the company's practice. The plaintiff stated that the questions she was asked were "borderline sexual harassment," and she refused to answer any questions about her relationship with her subordinate. After the plaintiff's termination, she filed a lawsuit against the company alleging sex discrimination and retaliation under Title VII. The plaintiff argued that she was terminated for refusing to answer questions about her relationship with her subordinate, which constituted sex discrimination, and for complaining about "borderline sexual harassment" during her questioning, which constituted retaliation. The district court granted summary judgment for the employer, and the plaintiff appealed. The Seventh Circuit affirmed. The Court noted that the plaintiff failed to present evidence that similarly situated employees outside her protected class were treated more favorably. The plaintiff attempted to introduce three male supervisors as proper comparators, but the first male manager had informed the company of his relationship with his subordinate, the second male manager did not directly supervise the employee with whom he was in a relationship with, and the third male manager attempted to hide the relationship with his subordinate, but was questioned about his relationship by the company. As to the plaintiff's retaliation claim, the Court found that the plaintiff did not engage in protected activity because she did not have a good-faith, reasonable belief that the questioning was "borderline sexual harassment." The Court noted that the plaintiff knew other employees had complained about her relationship with her subordinate and potential conflicts of interest, and the

plaintiff further testified that she was aware of another manager who was questioned about his relationship with his subordinate.

E. Sexual Orientation/Gender Identity Discrimination

Hively v. Ivy Tech Comm. Coll. of Ind., 853 F.3d 339 (7th Cir. 2017). The plaintiff, a part-time adjunct professor, alleged that she was "[d]enied full time employment and promotions based on sexual orientation" in violation of Title VII. The district court granted the defendant's motion to dismiss on the ground that Title VII does not apply to claims of sexual orientation discrimination. The plaintiff appealed. After a panel affirmed the district court's ruling, the Seventh Circuit granted the plaintiff's petition for rehearing *en banc*, and ultimately reversed the district court's dismissal. The Court found that sexual orientation necessarily falls within unlawful sex discrimination under Title VII, stating that "it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex[.]" The Court noted that had the plaintiff been a man, but everything else remained the same, including the sex or gender of her partner, the defendant would not have discriminated against her. Thus, the Court explained, the defendant "is disadvantaging [the plaintiff] because she is a woman." The Seventh Circuit further held that the line between a gender nonconformity claim and one based on sexual orientation "does not exist at all." Lastly, the Court held that sexual orientation discrimination also constitutes sex discrimination under an associational theory. Relying on *Loving v. Virginia*, 388 U.S. 1 (1967), and its progeny holding that an employer violates Title VII when it discriminates against an employee because the employee's spouse is married to a racial minority, the Seventh Circuit held, "[T]o the extent that [Title VII] prohibits discrimination on the basis of the race of someone with whom the plaintiff associates, it also prohibits discrimination on the basis of … the sex of the associate." The dissent criticized the majority's opinion for providing a meaning to Title VII that was not within Congress's contemplation at the time the statute was enacted.

Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034 (7th Cir. 2017), *cert. dismissed sub nom.* 138 S. Ct. 1260 (2018). The plaintiff, a transgender student, brought this action against the board of education and superintendent in his school district, alleging that the school's unwritten policy barring him from using the boy's bathroom after he started his female-to-male transition violated Title IX and the Equal Protection Clause of the Fourteenth Amendment. The district court denied the defendants' motion to dismiss and granted the plaintiffs' motion for preliminary injunction. The defendants appealed. The Seventh Circuit affirmed, concluding that the plaintiff was likely to succeed on the merits of his Title IX claim under a theory of sex discrimination based on sex-based stereotyping. The Court explained that a policy that requires an individual to use a bathroom that does not conform to his or her gender punishes the student for his or her gender stereotype non-conformance – violating Title IX. The defendants providing a gender-neutral restroom as an alternative was seen by the Court as merely continuing to treat the plaintiff differently than other students. The Court also determined that the plaintiff was likely to succeed on the merits of his Equal Protection Clause claim. The Court explained that the school's policy treats transgender students, who do not conform to the sex-based stereotypes associated with their sex at birth, differently. The defendants' legitimate interest in protecting student privacy in the restrooms did not dissuade the Court, as the record showed no complaints from other students regarding the plaintiff's use of the restroom.

Bostock v. Clayton Cty., Georgia, 140 S. Ct. 1731 (2020). The U.S. Supreme Court consolidated three cases regarding whether sexual orientation and gender identity discrimination are prohibited forms of sex discrimination under Title VII. In the first case, *Altitude Express v. Zarda*, the plaintiff filed suit in a New York district court claiming his employer terminated his employment because he was gay in violation of Title VII. The district court dismissed the case, stating that Title VII did not allow for claims alleging discrimination based on sexual orientation. The plaintiff appealed, and the U.S. Court of Appeals for the Second Circuit reversed the holding, concluding that Title VII does apply to discrimination based on sexual orientation as a form of sex discrimination. In the second case, *Bostock v. Clayton County, Georgia*, the plaintiff brought a claim under Title VII alleging that his employer falsely accused him of mismanaging public money so that it could fire him, when in reality he was fired for being gay. The Georgia district court dismissed his claim, stating that Title VII did not apply to discrimination based on sexual orientation, and the U.S. Court of Appeals for the Eleventh Circuit affirmed. Finally, in *R.G. & G.R. Harris Funeral Homes v. EEOC*, the formerly male plaintiff told her employer that she now identified as a female and wanted to begin wearing women's clothing to work. The employer fired the plaintiff, and the Equal Employment Opportunity Commission filed suit alleging that the plaintiff was fired based on her transgender status violating Title VII's prohibition of sex discrimination (and sex stereotyping under the *Price Waterhouse v. Hopkins* decision). The Michigan district court ruled in favor of the employer, and the U.S. Court of Appeals for the Sixth Circuit reversed, ruling in favor of the employee. In a 6-3 opinion, the SCOTUS ruled upon these cases collectively concluded that Title VII's prohibition on sex discrimination encompasses discrimination based upon a person's sexual orientation and transgender status. The Court explained that discrimination based on homosexuality or transgender status requires one to treat the individual differently because of their sex, the very status that Title VII protects. In other words, the Court explained that "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second."

F. Sexual Harassment

Equal Employment Opportunity Comm'n v. Costco Wholesale Corp., 903 F.3d 618 (7th Cir. 2018). The EEOC brought a Title VII claim on behalf of a female former employee, alleging that the employer had subjected her to a hostile work environment by tolerating a male customer's harassment of her. Over a 13-month period, the customer followed the employee through the employer's warehouse while she worked, at times disguising his appearance or filming her. The customer touched the employee with his shopping cart multiple times and touched her face and wrist. He repeatedly asked her on dates; commented on her appearance; asked which male employees she spoke with and whether she had a boyfriend, among other things; and acknowledged that his attention scared her. When the employee complained to management, the employer told the customer to avoid her, but the employer denied her request to park near the store entrance to avoid being alone in the parking lot. The employee ultimately obtained a restraining order against the customer and went on a medical leave of absence. The employer could not confirm a violation of its harassment policy through its investigation, but instructed the customer to shop at a different location. Pursuant to company policy, the employer terminated the employee because her medical leave of absence had extended beyond 12 months. The jury returned a verdict for the EEOC, and the district court denied the employer's motion for judgment as a matter of law. The employer appealed, but the Seventh Circuit affirmed. The Court rejected the employer's argument that the at-issue conduct was not objectively severe or

pervasive enough to create a hostile work environment. Instead, the Court held, a reasonable jury could find that the customer's behavior, which continued despite the involvement of management and the police, was pervasively intimidating or frightening to an average person. The employer did not challenge the decision that while it did respond to the employee's complaints about the customer, its response was unreasonably weak.

Smith v. Rosebud Farm, Inc., 898 F.3d 747 (7th Cir. 2018). The plaintiff, a butcher, sued his employer, a small grocery store, alleging sex discrimination in violation of Title VII. Within weeks of starting work, male co-workers began consistently—if not constantly—grabbing the plaintiff's genitals and buttocks, groping and grabbing him, and miming oral and anal sex on the plaintiff and each other. The behavior continued for years, and the plaintiff's supervisor participated in the behavior on one or two occasions. After the plaintiff filed a charge of discrimination with the EEOC, the supervisor told the meat-counter employees to stop the "goofing off" and "horseplay." The employees reacted by banging meat cleavers and pointing large knives at the plaintiff, and on one occasion the plaintiff found his car—which he had parked in a gated employee parking lot— with slashed tires and a cracked windshield. The jury returned a verdict for the plaintiff, and the district court denied the employer's motions for judgment as a matter of law and a new trial. The defendant appealed, and the Seventh Circuit affirmed. The Court agreed that unwanted sexual behavior is not necessarily actionable under Title VII, but rejected the employer's argument that the plaintiff experienced "sexual horseplay" and not sex discrimination. The Court held that the plaintiff had offered direct comparative evidence that only male employees experienced the same treatment as the plaintiff, and thus the jury was free to conclude that the plaintiff had been discriminated against on the basis of sex. The Court also rejected the argument that the plaintiff's comparative evidence was insufficient because the meat counter was exclusively staffed by male employees. Even were that true, the Court noted, the alleged male-on-male harassment took place elsewhere in the store, including in areas where female employees worked.

Hunt v. Wal-Mart Stores, Inc., 931 F.3d 624 (7th Cir. 2019). The plaintiff was subjected to several unprofessional remarks made by her supervisor over a four month period. The plaintiff filed a complaint with the defendant's human resources. The defendant investigated the matter and concluded it was unable to substantiate the plaintiff's claim. The plaintiff then filed this suit claiming her supervisor sexually harassed her by creating a hostile work environment in violation of Title VII. The district court granted the defendant's motion for summary judgment concluding that the defendant established the *Faragher-Ellerth* affirmative defense. The plaintiff appealed. The Seventh Circuit affirmed the decision, concluding that the defendant satisfied this affirmative defense because it: (1) exercised reasonable care to prevent and promptly correct the sexually harassing behavior; and (2) the plaintiff unreasonably failed to take advantage of preventive or corrective opportunities provided by the defendant. The plaintiff could not defeat this defense because she was not subject to an adverse employment action.

G. Age Discrimination

Lauth v. Covance, Inc., 863 F.3d 708 (7th Cir. 2017). The plaintiff began working for the defendant in 2006 at the age of 54. Following six years of mediocre performance reviews, the plaintiff was placed on a performance improvement plan in 2012, which indicated, among other things, that he needed to improve his "communication practices." In October 2012, four of the plaintiff's subordinate employees complained that the plaintiff was "intimidating,"

"unprofessional, condescending, and non-communicative." The plaintiff's supervisors investigated the complaints, and ultimately terminated the plaintiff based on "continued performance deficiencies in violation of his PIP." The plaintiff subsequently sued, alleging age discrimination and retaliation under the ADEA. The defendant moved for summary judgment, arguing that the plaintiff failed to establish a dispute of material fact as to why the plaintiff was terminated. The district court granted summary judgment for the defendant, and the plaintiff appealed. The Seventh Circuit Affirmed. The plaintiff offered only his own arguments that concerns about his purported problematic and condescending communication style with managers, peers, and subordinates had no basis. His belief was not enough to counter the defendant's performance concerns about the plaintiff, which were raised repeatedly over six years. Further, the plaintiff failed to identify younger supervisors who received more lenient discipline despite similar behavior.

Huttle v. Porter Hospital, LLC, 2019 WL 3216011 (N.D. Ind. July 17, 2019). The defendant initiated a reduction in force and chose those employees it was letting go based upon an evaluation completed by one manager. The plaintiff, a 64 year old, was one of the individuals terminated because he had the second to lowest score on the evaluation sheet. Another 28 year old employee had the second to highest score and survived the reduction in force. The plaintiff filed suit against the defendant claiming discrimination on the basis of age in violation of the ADEA, pointing to the 28 year old as a similarly-situated younger employee who received more favorable treatment and claiming that the evaluation sheet was mere pretext. The defendant moved for summary judgment. The Court denied the defendant's motion by concluding that a jury may see the evaluation as mere pretext because the evaluation's credibility was questionable. The plaintiff successfully created issues of fact regarding the evaluation because the 28 year old's score in certain categories was not supported by his personnel file. For example, his perfect score in attendance was countered by multiple write-ups for missing shifts or being tardy. Further, the plaintiff's personnel file did not justify his low scores. This was additionally supported by the plaintiff's supervisor's testimony that the evaluation was incorrect based upon the plaintiff's behavior and experience.

Marnocha v. St. Vincent Hosp. & Health Care Ctr., Inc., 986 F.3d 711 (7th Cir. 2021). The plaintiff, a neonatologist, alleged an age discrimination claim asserting that the defendant terminated her employment and failed to rehire her for an open position related to a reduction in force due to her age. The district court granted summary judgment in favor of the defendant, and the Seventh Circuit affirmed. As a required element of an age discrimination claim, the Court weighed whether similarly situated substantially younger employees were treated more favorably by the employer. The neonatologists who worked at the employer's other facility (where the plaintiff did not work) were not similarly situated to the plaintiff. With respect to the facility in which the plaintiff worked, all five of the neonatologists were terminated, including one under age 40. Therefore, there was no disparate treatment.

H. Disability Discrimination and Reasonable Accommodation

Muckenfuss v. Tyson Fresh Meats, Inc., 3:19-CV-536 DRL-MGG, 2022 WL 196369 (N.D. Ind. Jan. 21, 2022). The plaintiff, who is deaf, requested in part that his supervisor be trained in basic, surface-level American Sign Language ("ASL") as an accommodation to his disability. The employer refused, and the plaintiff filed suit claiming disability discrimination under the American with Disabilities Act. The defendant argued that this accommodation would be unreasonable as a matter of law and that courts have been reticent to require employers to provide accommodations that necessitate the enlistment of another employee. The defendant related this to similar case law concluding that a blind person cannot insist that the employer teach her Braille. The Court agreed, and held that the accommodation of requiring employees to be trained in surface-level ASL was unreasonable.

Whitaker v. Wisconsin Dep't of Health, 849 F.3d 681 (7th Cir. 2017). The defendant terminated the plaintiff, a support specialist with chronic back pain, when she did not come back to work after exhausting her unpaid medical leave. In response, the plaintiff sued the defendant, claiming that it failed to accommodate her disability and terminated her employment in violation of the Rehabilitation Act. The district court granted summary judgment for the defendant, concluding that (1) the plaintiff failed to establish that she was capable of performing essential functions of her job with or without a reasonable accommodation; (2) the plaintiff admitted she was not terminated "solely by reason of her disability;" and (3) the plaintiff's accommodation request "amounted to an open-ended leave request." The plaintiff appealed. The Seventh Circuit affirmed, explaining that the plaintiff was unable to show that she was an "otherwise qualified" employee under the Act. Her position required regular attendance as she was responsible for answering telephone calls, attending in-person meetings with clients, and using the defendant's internal computer system. The plaintiff was unable to provide any evidence that attendance was not an essential function of her job; nor did the plaintiff offer evidence regarding the effectiveness of her treatment or likelihood of recovery. Accordingly, there were no genuine issues of material fact, and the plaintiff's claims could not survive summary judgment.

Guzman v. Brown Cnty., 884 F.3d 633 (7th Cir. 2018). The plaintiff, a former 911 dispatcher, sued her employer, alleging it discriminated against her because she was disabled and refused to accommodate her disability. After being diagnosed with sleep apnea, the plaintiff used a machine to treat the condition until she underwent gastric bypass surgery, at which point she disposed of the machine. She was not re-diagnosed with sleep apnea following the gastric bypass surgery, but over the next several years she was disciplined a number of times for violations of the employer's policy requiring employees to report to work on time. When the plaintiff eventually was suspended for an incident of tardiness, she blamed sleeping through alarms, but did not mention her sleep apnea diagnosis. When the plaintiff was again late for work, her supervisor reported it to the call center supervisor, who decided to terminate the plaintiff's employment. The plaintiff offered to provide a doctor's note in a meeting with her supervisor that day, and may have mentioned her sleep apnea, but her supervisor did not inform the call center supervisor. The plaintiff then obtained a note from her doctor stating that she probably suffered from recurrent sleep apnea. In a meeting shortly thereafter, the employer terminated the plaintiff's employment and she provided the doctor's note, but the parties dispute the order of events. The district court granted summary judgment for the employer and the plaintiff appealed. The Seventh Circuit affirmed. The Court held that the plaintiff could not establish that any adverse action occurred as a result of her alleged disability because she failed to identify any

evidence showing that the employer knew of her sleep apnea before deciding to terminate her. That the plaintiff's repeated violations of the employer's tardiness policy were a side effect of undiagnosed sleep apnea, the Court opined, did not change the analysis. Further, the plaintiff could not show that the employer failed to accommodate her disability because there was no evidence that the employer was on notice of her disability, and the conduct for which the plaintiff was terminated had already occurred by the time the plaintiff first mentioned the sleep apnea diagnosis.

Monroe v. Ind. Dep't of Transp., 871 F.3d 495 (7th Cir. 2017). The plaintiff sued his former employer alleging that it violated the ADA and the Rehabilitation Act when it terminated his employment. The plaintiff's supervisor initiated an investigation of the plaintiff's conduct after seven or eight of the plaintiff's subordinates complained about his treatment of them. During the investigation, the plaintiff disclosed that he recently had been diagnosed with PTSD. Decision makers for the defendant extensively discussed this claimed diagnosis and ultimately decided to terminate the plaintiff for creating a hostile and intimidating work environment. The plaintiff contended that by discussing his diagnosis during meetings about his conduct and the proper course of action, the defendant had discriminated against him because of his diagnosis. The district court granted summary judgment to the defendant, and the plaintiff appealed. The Seventh Circuit affirmed. The Court held that the fact that the decision-makers discussed the plaintiff's claimed diagnosis during the meeting at which they decided to discharge him did not establish that their stated reason for discharge was a pretext for discrimination. The Court observed that the at-issue discussion concerned whether the plaintiff actually had PTSD, given the fortuitous timing of his diagnosis, and thus it was "illogical" to argue that the discussion proved the decision-makers' intent to discriminate based on the diagnosis. Moreover, the Court noted, even if the defendant believed that the plaintiff's PTSD caused his volatility and sleeplessness, this still would not establish pretext because employers may terminate employees for inappropriate behavior even when the employee's disability precipitates that behavior.

Severson v. Heartland Woodcraft, Inc., 872 F.3d 476 (7th Cir. 2017). A former employee brought a claim against his employer for terminating his employment in violation of the ADA rather than providing additional unpaid leave as a reasonable accommodation. The plaintiff had exhausted the entirety of his FMLA allotment, and on the final day of his protected leave, he had back surgery and requested an additional two to three months off from work. The district court granted the defendant's motion for summary judgment, and the plaintiff appealed. The Seventh Circuit affirmed, and held that a long-term leave of absence cannot be a reasonable accommodation, stating that "the ADA is an antidiscrimination statute, not a medical-leave entitlement." The Court did not analyze whether granting the plaintiff additional time off would constitute an undue hardship on the employer. Rather, it disagreed with the EEOC's position that extended leave may be required under the ADA because an employee who needs long-term medical leave cannot work and therefore is not a "qualified individual" under the ADA. However, the Seventh Circuit noted that a brief leave of absence of "a couple of days or even a couple of weeks" may be analogous to a part-time work schedule, and thus, that short medical absences may be required by the ADA in certain circumstances.

Painter v. Ill. Dep't of Transp., 715 F. App'x 538 (7th Cir. 2017). A former employee alleged that her employer required her to undergo unnecessary mental health examinations in violation of the ADA. At issue were two of five fitness-for-duty examinations ordered by the defendant. The first exam was conducted by a psychiatrist and precipitated by the plaintiff's colleagues'

complaints that she "snapped and screamed at them, gave blank stares and intimidating looks, ranted, constantly mumbled to herself, repeatedly banged drawers in her office, and had mood swings," "glared and growled at them," "was rude, angry, abrasive, aggressive, and threatening," kept a log detailing coworkers' conversations and actions, and generally inspired fear. The second exam occurred after complaints that the plaintiff engaged in argumentative, confrontational, insubordinate, and disruptive behavior. The psychiatrist also reviewed e-mails suggesting that plaintiff suffered from a personality disorder and paranoid thinking, which he observed is a risk factor for violence. The district court granted summary judgment to the defendant, reasoning that the challenged examinations were job-related and consistent with business necessity. The plaintiff appealed. The Seventh Circuit affirmed. The Court observed that "[p]reventing employees from endangering their co-workers is a business necessity," and that even multiple inquiries concerning an employee's psychiatric health may be permissible where they reflect concern for the safety of other employee and the public. Because both examinations were based on the defendant's reasonable concern for its employees' safety, the defendant met its "quite high" burden of establishing business necessity for the examinations.

Scheidler v. Indiana, 914 F.3d 535 (7th Cir. 2019). A discharged state employee who had been diagnosed with mental health conditions filed an action against the state agency employer and state officials, alleging claims for disability discrimination and retaliation under the ADA, sex discrimination and retaliation under Title VII, First Amendment retaliation under § 1983, and other claims. The district court granted summary judgment in favor of the defendants, in part, and subsequently entered judgment in favor of the defendants, upon a jury verdict, on the remaining claims. The plaintiff appealed. The Seventh Circuit affirmed the dismissal of the ADA claim because the plaintiff's single event did not create a need for accommodation, and it was permissible for the defendant to terminate her based on threatening conduct – even if her mental illness was the cause of her threatening conduct. The plaintiff's retaliation claim failed because she never alleged discrimination to her employer, and thus, did not engage in protected activity.

Atkinson v. SG Americas Sec., LLC, 693 F. App'x 436 (7th Cir. 2017). After suffering an off-duty accident that led to his hearing loss and brain injury, the plaintiff returned to work for the defendant. The plaintiff did not like his workspace, his password expired, and he did not like his laptop. He complained to the defendant, and the defendant gave him a new workspace, a different computer, an ergonomic keyboard, and a new fixed start time that he wanted. Despite these accommodations, he continued to complain about his workspace, access to systems, and start time. The defendant asked that the plaintiff undergo an independent medical examination to determine if the further accommodations he sought were medically necessary, but the plaintiff refused. Due to unsatisfactory job performance, the plaintiff was then reassigned to a new position. He resigned a year later. The plaintiff filed suit alleging that his former employer did not accommodate his hearing loss and brain injury disability and discriminated and retaliated against him in violation of the ADA. The district court granted defendant's motion for summary judgment, and the plaintiff appealed. The Seventh Circuit affirmed. His retaliation claim was quickly disposed of because the evidence showed that the defendant accommodated his requests and was justified in seeking medical evidence regarding further accommodation. His other claims were similarly dispelled due to the lack of evidence that his reassignment was motivated by his disability.

Freeman v. Metro. Water Reclamation Dist. of Greater Chicago, 927 F.3d 961 (7th Cir. 2019). While working for the defendant, the plaintiff drove a company vehicle to transport water

samples. He was then arrested for a DUI, lost driving privileges, and underwent alcohol counseling. Since he could not drive, the plaintiff brought a bike to work to transport water samples, he asked to use a go-cart to transport water samples, and he applied for an occupational driving permit from the state. The defendant subsequently terminated the plaintiff. The plaintiff, an African-American man who suffers from alcoholism, sued the defendant for discrimination, retaliation, and failure to accommodate under 42 USC §§ 1981 and 1983, Title VII, and the ADA. The district court dismissed the complaint for failure to state a claim due to its lack of specificity, and the plaintiff appealed. The Seventh Circuit overturned the district court's decision to dismiss the discrimination and retaliation claim under the ADA because only notice pleading was required. The Court did not require the plaintiff to allege his alcoholism substantially limited a major life activity because he sufficiently alleged he was *regarded* as an alcoholic by the defendant. He also sufficiently alleged he could perform his job duties with a reasonable accommodation (bike, go cart, or occupational permit). In totality, these allegations stated a claim for discrimination and retaliation under the ADA.

Mack v. Chicago Transit Auth., 732 F. App'x 480 (7th Cir. 2018). The plaintiff, a former bus driver who is visually impaired, filed suit under the ADA against her former employer after it fired her without considering her for a position that does not require driving. The district court granted the defendant's motion to dismiss, concluding that the ADA never requires an employer to accommodate an employee's disability by placing her in a different position. The plaintiff appealed. The Seventh Circuit reversed because the district court erred in the legal proposition that accommodating a new position was not required. The Court concluded that the ADA does require employers to appoint disabled employees to vacant position for which they are qualified if doing so is reasonable and would not present an undue hardship. Under that legal premise, her complaint did state a claim.

I. Retaliation

Hamer v. Neighborhood Hous. Servs. of Chicago, 897 F.3d 835 (7th Cir. 2018). The plaintiff worked at a mortgage help center. After a younger, male colleague received a promotion that the plaintiff had applied for, she met with a human resources director to voice her concern that she was not given the promotion due to age and sex discrimination. During the meeting, the plaintiff discussed her intention to file a charge with the EEOC. A few days later, a deputy director of the help center informed the director that the plaintiff would be removed from the mortgage help center, explaining that the plaintiff's removal was due to the plaintiff's ongoing communication issues, which the plaintiff's supervisor had observed for some time. The plaintiff's employer did, however, allow the plaintiff to work temporarily at the employer's central office, where she was ultimately offered a permanent position that came with a 25% pay cut. The plaintiff then sued her employer for discrimination and retaliation under Title VII and the ADEA. The district court granted summary judgment to the employer, and the plaintiff appealed the retaliation claim only. The Seventh Circuit affirmed, holding that the plaintiff had failed to develop a causal link between her discrimination complaint and either adverse action. The Court explained that the plaintiff only offered mere speculation, as the director was the only person who knew about the plaintiff's EEOC charge, and the director neither told anyone about the charge nor made any decisions regarding the plaintiff's employment. Moreover, the managers who decided to remove the plaintiff from her position all filed affidavits asserting they were never told about the EEOC charge. Thus, because it is impossible to retaliate against a complaint that a person does not know about, the plaintiff failed to establish a causal nexus.

Owens v. Chi. Bd. of Educ., 867 F.3d 814 (7th Cir. 2017). The plaintiff was a 61-year old former janitor in the Chicago public school system. When the plaintiff was placed under a new manager, he told the manager about a pending age discrimination lawsuit he had filed against the school system. The manager allegedly told the plaintiff that he was crazy if he thought that he could keep his job after filing a lawsuit against his employer. The manager gave the plaintiff an unsatisfactory rating, which meant during the next string of layoffs, due to budget concerns, the plaintiff was selected for layoff. The plaintiff subsequently brought suit against his employer for retaliation and age discrimination. The district court granted summary judgment to the school on both claims, and the plaintiff appealed. The Seventh Circuit affirmed the district court's summary judgment with regards to the age discrimination claim and reversed as to the plaintiff's retaliation claim. The Court held that there was sufficient evidence to show that the employer's proffered reasons were legitimate and that the plaintiff failed to show pretext because other similarly-aged managers had not been let go during the layoffs. However, the Court reversed the district court's order regarding the retaliation claim, finding that the manager's alleged statements were sufficient to create a dispute of fact regarding whether the unsatisfactory rating was given for performance reasons or in response to the plaintiff's lawsuit.

Barter v. AT&T, Inc., No. 117CV00622SEBDML, 2019 WL 483648 (S.D. Ind. Feb. 7, 2019). The plaintiff filed suit against the defendant employer because she believed she was retaliated against after complaining of sexual harassment. The Court denied the defendant's motion for summary judgment because the plaintiff showed sufficient suspicious timing and pretext. There was suspicious timing because the plaintiff was fired the day after she complained of sexual harassment. The Court stated there were also genuine questions of material fact regarding pretext because the plaintiff might have sufficiently been performing her job duties at the time of her termination.

Igasaki v. Illinois Dep't of Fin. & Pro. Regul., 988 F.3d 948 (7th Cir. 2021). A 62-year-old gay Japanese man with gout brought claims of race discrimination, sex discrimination, age discrimination, disability discrimination, and retaliation against his former employer. As it relates to his retaliation claim, Title VII prohibits employers from retaliating against employees for engaging in the protected activity of opposing an unlawful employment practice or making a charge, testifying, assisting, or participating in an investigation, proceeding, or hearing. The question is whether a retaliatory motive caused the discharge or other adverse employment action. The district court granted, and then the Seventh Circuit affirmed, summary judgment against the plaintiff. The Court explained that for an inference of the required element of causation to be drawn solely on the basis of suspicious timing, the Court usually allows no more than a few days to elapse between the protected activity and the adverse action. Therefore, the two-month gap between the plaintiff's protected activity and requesting a reasonable accommodation, without any other evidence, was insufficient to show retaliation on its own. When suspicious timing alone is insufficient to carry the plaintiff's burden, a plaintiff may survive summary judgment if there is other evidence that supports the inference of a causal link. However, the plaintiff did not present additional evidence that could corroborate and strengthen his assertion of a causal connection based on suspicious timing.

J. Religious Discrimination and Accommodation

Demetria Tomlinson v. Heart of CarDon, LLC, Case No. 3:17-cv-00129-RLY-MPB (S.D. Ind. May 23, 2019). After working for the defendant as an activities assistant for four years, the plaintiff became a practicing Jehovah's Witness which precluded her celebrating holidays, birthdays, or materially participating in holiday or birthday-themed events and activities. Many of these abstentions directly conflicted with her responsibilities as an activities assistant charged with planning and furthering birthday and holiday parties and events. After a year of accommodating the plaintiff's numerous requests to abstain from these events, the defendant finally refused to continue accommodating the plaintiff and instead offered her the accommodation of a transfer to a lateral certified nursing assistant position with the same compensation and benefits and which did not present any job duties conflicting with her Jehovah's Witness faith. The plaintiff initially accepted the new position but then later refused to report to that position for work and was terminated for insubordination. The plaintiff then filed suit against the defendant claiming failure to accommodate her religion, religious discrimination, and retaliation in violation of Title VII. The defendant moved for summary judgment, which the Court then granted. The Court reasoned that the plaintiff's failure to accommodate claim failed because the plaintiff could not perform the essential functions of her job and that the defendant correctly responded by offering the reasonable accommodation of a position with the same pay and benefits and that solved any religious conflict. The plaintiff further failed to establish a *prima facie* case of religious discrimination because she was not legitimately meeting her job expectations because she could not perform the essential functions of her job, and the evidence showed she was terminated for the non-discriminatory reason of insubordination. Similarly, her retaliation claim failed because there was no causal link between her protected activity and being fired for insubordination.

Demkovich v. St. Andrew the Apostle Par., Calumet City, 3 F.4th 968 (7th Cir. 2021). The plaintiff, a gay man with diabetes, worked as a music teacher at a religious school in Chicago, and he was supervised by the school's priest. The plaintiff filed a complaint against the school alleging a hostile work environment on the basis of sex, sexual orientation, marital status, and disability under federal, state, and county statutes. After several rounds in the district court, it certified a question of law for the Seventh Circuit: does the ministerial exception ban all claims of a hostile work environment brought by a plaintiff who qualifies as a minister, even if the claim does not challenge a tangible employment action? (The ministerial exception is a legal doctrine stemming from the First Amendment of the Constitution's Religion Clauses. Specifically, the Establishment Clause and the Free Exercise Clause have led courts to determine that the government, including courts, cannot interfere in disputes between religious institutions and certain employees. While these employees are often labeled as "ministers" for purposes of analyzing the exception's application, the employees who qualify have extended beyond clergy.) In a 7-3 decision, the majority found that adjudicating the plaintiff's hostile work environment claims would "lead to impermissible intrusion into, and excessive entanglement with, the religious sphere." The majority focused on how the plaintiff's allegations would force the court to involve itself in the dispute between one ministers and the priest. According to the majority, how these individuals interacted and the work environment that resulted is "a religious, not judicial prerogative." Three judges issued a dissent, in which they argued that the majority overly weighed the religious liberty interest without properly weighing other interests that favored the hostile work environment claims being heard.

K. Coverage of EEO Laws

Perkins v. Mem'l Hosp. of S. Bend, 121 N.E.3d 1089 (Ind. Ct. App. 2019). The plaintiff, an employee at the hospital defendant, was terminated for stealing food from the cafeteria. The plaintiff brought a claim for wrongful termination alleging that he was actually terminated for testifying at a former co-worker's unemployment benefits hearing, even though he only testified because he believed he had been subpoenaed to do so. The defendant sought summary judgment, arguing that the plaintiff was an at-will employee, and because he was not actually subpoenaed to testify, no exception to the at-will doctrine applied. The trial court accepted as true that Plaintiff was terminated in retaliation for testifying at a former co-worker's unemployment benefits hearing, but nonetheless determined that because the plaintiff did not have a duty to testify under Indiana law, he did not establish that he was entitled to the protections of the public policy exception to the employment-at-will doctrine. The Indiana Court of Appeals affirmed, concluding that the plaintiff had no statutory right or duty to testify because he was never issued a subpoena. Thus, regardless of the plaintiff's honest belief he was subpoenaed, absent the exercise of a statutory right or a duty, the public policy exception did not apply.

L. Arbitration

Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018). The defendant maintained an arbitration agreement with its employees that required its employees to resolve employment disputes via individual arbitration and to waive their right to participate in or receive benefits from any class or collective action. A former employee then sued the defendant, on behalf of himself and others similarly situated, for overtime violations under the FLSA. The defendant moved to dismiss the action based on the waiver provision of the arbitration agreement. The district court and then the Seventh Circuit both denied the defendant's motion to dismiss, stating that the arbitration agreement violated the NLRA and FAA. The Supreme Court held (in a 5-4 decision) that neither the FAA nor the NLRA provided a basis for refusing to enforce arbitration agreements with class and collective action waivers. The Court explained that the FAA instructs courts to enforce arbitration agreements according to their express terms, and the NLRA does not even mention class or collection action procedures so it cannot displace the FAA. Further, the Court refused to accord *Chevron* deference to the NLRB's contrary interpretation of the NLRA and FAA. Properly drafted arbitration agreements between employers and employees providing for individualized proceedings should be enforced.

M. Litigation and Trial Issues

Beverly v. Abbott Labs., 817 F.3d 328 (7th Cir. 2016). The plaintiff, a senior financial analyst, alleged national origin discrimination and retaliation claims under Title VII and disability discrimination claims under the ADA. During mediation, both parties to the action signed a handwritten document which reflected that the defendant offered the plaintiff $200,000 plus mediation costs to settle her claims. It also reflected that the plaintiff demanded $210,000 plus mediation costs to settle, and that each side left its offer open for five days. The following day, the defendant's attorney communicated to the plaintiff's attorney that the defendant agreed to the $210,000 settlement demand. As a result, the plaintiff's attorney responded, "Oh happy days! Best $10,000 Abbott has ever spent. You are a gem." However, the plaintiff later refused to sign the draft settlement agreement. The defendant moved to enforce the handwritten agreement. The district court found the handwritten agreement sufficient to settle the plaintiff's employment

discrimination claims, and the plaintiff appealed. The Seventh Circuit affirmed. The Court reasoned that state law governed the enforceability of settlement agreements, where a meeting of the minds on all materials is required, and objective proof of the parties' intent governs. The Court found the handwritten document enforceable because it sufficiently defined the intentions of the parties. Furthermore, the fact that both sides and their attorneys signed the handwritten document constituted further evidence that both parties intended to be bound by the terms within. The Court determined that the jubilant response of the plaintiff's attorney served as further evidence that the handwritten agreement's terms should govern.

Sommerfield v. City of Chicago, 863 F.3d 645 (7th Cir. 2017). The plaintiff, a German-Jewish police officer, sued his employer, alleging discrimination based on ethnicity and religion in violation of Title VII. He alleged that his supervisor made offensive remarks about the plaintiff's ethnicity. A jury awarded the plaintiff $30,000 and his attorney requested attorneys' fees of $1.5 million. The district court reduced the award to $430,000. The plaintiff appealed, challenging the district court's handling of the case and its refusal to grant his attorney the full $1.5 million in fees. The Seventh Circuit affirmed. The district court properly adjusted the award to $430,000. Among other reasons, the officer lost on most claims, the requested hourly rate was not justified, and over 800 of the claimed hours of work were found to be unnecessary or frivolous.

II. Retaliation and Whistleblowing Claims

A. Element One: Protected Activity

Scheidler v. Indiana, 914 F.3d 535, 543 (7th Cir. 2019), *reh'g and suggestion for reh'g en banc denied* (Mar. 1, 2019). The plaintiff, who had been diagnosed with mental health conditions and was being provided reasonable accommodation based on those conditions, was terminated for improper conduct after making the following comment in regards to the state employer's promotion practices: "It's who you know and who you blow." The plaintiff then brought suit, in part, based on retaliation, claiming that this comment was protected activity. The district court granted summary judgment for the defendant, and the plaintiff appealed. The Seventh Circuit affirmed, explaining that the plaintiff's comment was not a complaint of *quid pro quo* sexual harassment. Protected activity requires a subjective (sincere, good faith) belief that the plaintiff is opposing an unlawful practice, and it requires an objectively reasonable belief that the complaint must involve discrimination that is prohibited by Title VII. Fatal to her claim, the plaintiff testified that she believed her comment was not sexual in nature at all, and that she was merely referencing blowing hot air. Further, the plaintiff presented no other evidence that suggested improper hiring or promotion practices. Because the plaintiff was not complaining of sex discrimination, she was not engaging in protected activity under Title VII. Summary judgment in favor of the defendant was affirmed.

B. Element Two: Adverse Employment Action

Lesiv v. Illinois C. R.R. Co., 39 F.4th 903 (7th Cir. 2022). The plaintiff accused the defendant employer of retaliation after plaintiff's brother filed a discrimination suit in state court in which the plaintiff testified. Three months later, plaintiff had a heated confrontation with a supervisor in which, the following day, the supervisor assigned plaintiff to a dangerous task—that typically takes two people to perform safely—alone. The district court granted summary judgment in favor of the employer, and the employee appealed. As it relates to whether the assignment was a

materially adverse action, the Seventh Circuit sided with the employee. The Court explained that for a retaliation claim, a materially adverse action is defined as an action "that a reasonable employee would find to be materially adverse such that the employee would be dissuaded from engaging in the protected activity." The Court held that a jury could reasonably determine the assignment of the task to be materially adverse because it was sufficiently dangerous to potentially deter the plaintiff from engaging in the protected activity. In any event, refusal to perform the dangerous task led to the plaintiff being suspended, which was obviously an adverse employment action.

Malekpour v. Chao, No. 16-3440, 2017 WL 1166872 (7th Cir. Mar. 29, 2017). The plaintiff, while employed by the defendant, was reassigned to a new job, was told by management there would be consequences if he did not attend a meeting, and was suspended without pay after personal charges were found on his company credit card. The plaintiff then filed suit against his employer claiming he was discriminated against because of his religion and national origin and was retaliated against in violation of Title VII. The district court granted summary judgment to the defendant, and the plaintiff appealed. The Seventh Circuit affirmed, concluding that the first two incidents did not rise to the level of an adverse employment action. His job reassignment was not adverse because it did not affect his hours, compensation, or career prospects. Further, no evidence suggested the threat of consequences for missing a meeting was adverse, regardless of if the EEOC thought the threat was retaliatory. As such, these actions did not satisfy the initial element required for his claims. The Court reasoned that the only action that was actually adverse was his suspension without pay. However, the Court explained that though it was an adverse action, there was no inference that his suspension was discriminatory; he was suspended for the legitimate reasons of improper spending on the company credit card.

Burton v. Bd. of Regents of Univ. of Wisconsin Sys., 851 F.3d 690 (7th Cir. 2017). The plaintiff, a professor at the defendant school, filed with the EEOC a charge of discrimination and retaliation against the defendant. The plaintiff was then subjected to pressure from coworkers to drop the charges, a threat of discipline for canceling a classroom session, and a letter of direction and subsequent complaint to the chancellor; all of which the plaintiff relied upon for her subsequent suit claiming retaliation. Regarding this retaliation suit, the district court granted summary judgment for the defendant, and the Seventh Circuit affirmed. First, the Court explained that pressure from others was not an adverse action because it did not cause the plaintiff any harm. Similarly, unfulfilled threats of discipline are not materially adverse actions. The only actual adverse action was the letter of direction and complaint to the chancellor, for which there was no indirect or direct evidence suggesting retaliation or discriminatory motive.

C. Element Three: Proof of Causal Connection

Robinson v. Perales, 894 F.3d 818 (7th Cir. 2018), *reh'g denied* (July 24, 2018). One of the plaintiffs, an African American police officer with the university defendant, experienced several incidents in which he was directed to take action in a retaliatory manner against a fellow African American officer. The plaintiff refused and was subjected to discipline. He then brought suit against the defendant claiming race-based discrimination, harassment, and retaliation in violation of Title VII. The district court granted summary judgment in favor of the defendant on the retaliation claim because the employee who demoted the plaintiff did not know the plaintiff engaged in protected activity, i.e. the causation element was not met. The plaintiff appealed. The Seventh Circuit reversed, concluding that there was causation because even if the employee who

demoted the plaintiff did not have a retaliatory motive, the supervisor who did have motive was the individual who convinced the other employee to demote the plaintiff. This was sufficient to establish causation for the adverse employment action.

III. Wage and Hour and Wage Payment Law

A. General Issues

Berger v. National Collegiate Athletic Association, 843 F.3d 285 (7th Cir. 2016). Former student athletes at private universities brought FLSA minimum wage claims against more than 120 universities, claiming student athletes were entitled to wages. The defendants' motion to dismiss was granted, and plaintiffs appealed. The Seventh Circuit affirmed, concluding that student athletes are not employees for purposes of the FLSA. The Court refused to use the traditional multi-factor employee to employer relationship analysis because the student athletes failed to capture the true nature of the employment relationship. Further, the department of labor handbook indicates student athletes are not employees under the FLSA and athletics are a mere "extracurricular" under the FLSA. The FLSA never intended student athletes to be employees of their respective universities.

Simpkins v. Dupage Housing Authority, 893 F.3d 962 (7th Cir. 2018). The plaintiff entered into an "Independent Contractor Agreement" with the defendant governing his work for general labor on vacant properties. After working for the defendant for a few years, the plaintiff sued his employer for FLSA overtime violations. The district court granted the defendant's motion for summary judgment based upon the plaintiff's status as an independent contractor and not an employee. The plaintiff appealed, and the Seventh Circuit reversed. The Court explained that there were a number of issues of fact as to the economic reality of the employee to employer relationship. For example, the defendant controlled the plaintiff's work schedule, purchased his tools, he performed unskilled labor, and the termination date of the agreement was uncertain. These factual disputes precluded summary judgment.

B. FLSA Exemptions.

On January 1, 2020 an important change to the overtime exemption for "white collar" workers under the FLSA took effect. The rule amended the overtime eligibility of over one million workers who were previously classified as "exempt" (non-overtime eligible) under the executive, administrative, and professional exemptions. The DOL utilized 2020 salary projections to increase the minimum salary threshold – commonly known as the "salary basis test" for the white collar exemptions under the FLSA – from $455 per week ($23,660 annually) to $679 per week ($35,308 annually). Under the new rule, the DOL will conduct reviews of the salary threshold every four years and require fresh notice-and-comment rulemaking for any new proposed increase in the threshold. Other highlights of the rule include that employers are now allowed to use nondiscretionary bonuses and incentive payments (including commissions) that are paid annually or more frequently to satisfy up to 10 percent of the standard salary level, and certain "catch up" payments are permissible as well. The total annual compensation threshold for highly compensated employees subject to a "minimum duties test" increased from $100,000 to $147,414 – the 90th percentile of all salaried workers. The "duties tests" for the executive, administrative, and professional exemptions remain unchanged.

C. Wage Claims.

Duvall v. Heart of CarDon, LLC, No. 117-CV-04439-JRS-MJD, 2020 WL 1274992 (S.D. Ind. Mar. 17, 2020). The plaintiff brought a class and collective action suit against her former employer for Indiana state wage and FLSA overtime violations resulting from wage deductions that covered the cost of her criminal history check, and purchase of uniforms and a laptop through third-party providers. The parties cross-moved for summary judgment. The plaintiff challenged the form of the criminal history check and uniform wage assignments because they were revocable at any time "upon ten days' written notice" rather than "revocable at any time" which is the language in the wage assignment statute. (*See* Ind. Code § 22-2-6-2.) As a matter of first impression, the Court held that "a wage assignment is revocable 'at any time' within the meaning of the statute so long as it is revocable at any time before the wages are earned. Given Heart of CarDon's practice of issuing paychecks nine days after the end of each pay period, the ten-day notice provision did not impair Duvall's option to revoke the assignments 'at any time' as to unearned, future wages, but only as to earned but unpaid wages, so the assignments complied with" the statute. The plaintiff also challenged the laptop wage assignment because it was entered into between the third-party provider and not the employer, and because a copy was not delivered to the employer within ten days of its execution as required by the wage assignment statute. Again, the Court ruled in favor of the employer, holding that a wage assignment does not have to be entered into solely between an employer and employee, and that the employer substantially complied with the statute because it still timely made the deduction that was required even if it didn't have a copy of the agreement within ten days. The plaintiff then challenged the purpose of the uniform and criminal history check wage assignments. The wage assignment statutes permits wage assignment covering the amount of a loan as evidenced by a written instrument. The criminal history check and uniform wage assignments stated that the employer considered and would treat the transaction like a loan, and thus, the employer argued that it fell within the permitted purposes of statute. The plaintiff, however, argued that the transaction was not really a loan because the employer did not extend money to the plaintiff; the employer just paid the third-party entities itself and then deducted that expense from the plaintiff's wages. The Court agreed with the defendant employer, stating that the plaintiff's interpretation of a loan was too narrow, as many loans are handled in the same manner that the employer handled this loan. Though the uniform deduction wage assignment had the same language, the Court ruled in favor of the plaintiff to the extent that the deduction for uniforms was greater than five percent of the employee's net wages, the statutory limit imposed by the wage assignment statute.

Allen v. City of Chicago, 865 F.3d 936 (7th Cir. 2017). Current and former police officers filed suit against the defendant for FLSA violations relating to the off-duty work they performed on their phones and electronic devices. After a bench trial, the district court entered judgment in favor of the defendant, and the plaintiffs appealed. The Seventh Circuit affirmed. The Court explained that while the FLSA defines employ broadly to include time that employers "permit" employees to work, it does not require the employer to pay for work it did not know about and had no reason to know about. The Court concluded that there was no evidence that the defendant had even constructive knowledge about this off-duty work or that it should have acquired knowledge through reasonable diligence. Further, the Court ruled that the defendant did not discourage its employees from completing the time slips upon which the employees should have recorded off duty time.

Tesler v. Miller/Howard Investments, Inc., No. 116CV00640TWPMPB, 2019 WL 1003334 (S.D. Ind. Mar. 1, 2019). The plaintiff, a former employee of the defendant, filed suit against the defendant, asserting that the "Terms of Employment and Compensation" handed to him on his first day of employment was a contract that promised an ongoing three percent commission on accounts generated while he was employed there. On summary judgment, the Court dismissed the plaintiff's unjust enrichment, negligence, and breach of fiduciary duty claims, but denied summary judgment as to the breach of contract claim. The Court ultimately concluded that not all contracts can be interpreted as a matter of law so that the Court was not obligated to make a determination on the existence of a contract. On reconsideration, the Court did reverse its previous determination and applied the two-year statute of limitations for claims based upon conditions of employment, rather than a six-year statute of limitations for claims based upon contracts for the payment of money. Thus, the plaintiff could only pursue claims of lost commission from the two-year period before he filed suit.

Weil v. Metal Technologies, Inc., 925 F.3d 352 (7th Cir. May 29, 2019). The plaintiffs filed class and collective actions against the defendant alleging that the defendant paid employees only for the hours that they were scheduled to work even when the employees' timecards showed they were clocked in longer. The district court conditionally certified, then decertified, these claims and the plaintiffs proceeded in their individual capacities and secured a modest damages award. The plaintiffs also alleged that the defendant withheld wages from employees' paychecks for uniform *rentals*, even though Indiana law authorized withholding wages only for uniform *purchases*. The district court entered summary judgment for the class on the wage deduction claims and the plaintiffs' secured a large damage award. Both sides appealed. The plaintiffs contested the decertification of their time-rounding claims, amount of attorneys' fees awarded, and that costs were not awarded. The defendant contested the wage deduction ruling, that the plaintiffs recovered too much in attorneys' fees, and that the defendant was not awarded costs. The Seventh Circuit first vacated the judgment in favor of the plaintiffs' wage deduction claims. The Court acknowledged that a recent amendment to Indiana wage deduction law authorized withholdings for uniform *rentals*, and that the amendment was retroactive. Thus, the Court remanded the issue for the district court to consider the wage deduction claim in light of the recent amendment – noting that it was unlikely the plaintiffs would be successful, but stating that they should at least be given a try. The Seventh Circuit also concluded that the district court should reconsider the attorneys' fees award on remand as well. The Seventh Circuit then affirmed the decertification of the time-rounding claim, stating that the district court was correct in determining that the employees' timecard is not a *per se* record of the time worked because FLSA regulations support the interpretation that employees should not be compensated for early or late clock punching if they are not actually working during those times.

Indiana Code § 22-2-6-2. The Indiana wage deduction statute was amended to include uniform *rentals*, rather their previously including solely uniform purchases. The language of that specific section reads a wage assignment may be made for the purpose of paying for "The purchase, rental, or use of uniforms, shirts, pants, or other job-related clothing at an amount not to exceed the direct cost paid by an employer to an external vendor for those items." Ind. Code § 22-2-6-2(b)(14).

IV. Family and Medical Leave Act

A. Practical Issues Facing Employers Under the FMLA

Lutes v. United Trailer Inc., No. 2:17-CV-00304 RLM, 2019 WL 1285418 (N.D. Ind. Mar. 20, 2019). The plaintiff injured his rib while playing with his grandchildren. The plaintiff received medical treatment that confirmed he fractured his rib. The plaintiff refrained from work for 17 days. For the first 11 days, the plaintiff called his employer's hotline to report his absence – as required per the employer's policy. However, the last six days of work the plaintiff failed to report his absences to his employer. The employer terminated the plaintiff for failing to abide by its attendance policy. The plaintiff sued his employer for interference and retaliation under the FMLA. The Court granted the employer's motion for summary judgment, concluding that the plaintiff cannot establish a *prima facie* case of interference or retaliation because the employer terminated the employee for the legitimate reason of failing to abide by the employer's absentee policy. The Court further reached this conclusion because the plaintiff failed to provide notice to his employer that he intended to take FMLA leave. The plaintiff is currently appealing this matter.

Purvis v. Wal-Mart Stores E., LP, No. 1:17-CV-102-TLS, 2019 WL 1361866 (N.D. Ind. Mar. 26, 2019). The defendant maintained two policies important to this case. First, that no-call / no-show absences by employees would subject the employee to occurrences, which could lead to their termination. Second, that if employees wanted to request FMLA leave, they had to contact the defendant's third-party FMLA vendor. The plaintiff, a former employee of the defendant, attempted to request FMLA leave via the third-party vendor. The third-party vendor did not have the plaintiff's correct address so communications were delayed. The plaintiff eventually obtained her FMLA form from the third-party vendor two days before the deadline to submit the form. The plaintiff provided the form to the third-party vendor after the deadline. The plaintiff did not show for work the following day because she was unaware of the status of her FMLA leave application and whether her missing the deadline had already resulted in her termination. The plaintiff's supervisor informed her that the FMLA had been granted, but that the plaintiff did not call-in when she failed to show up for work the previous day. The defendant terminated the plaintiff because her no-call / no-show resulted in sufficient occurrences for her termination per its attendance policy. The plaintiff subsequently brought suit against the defendant for interference under the FMLA, and the defendant sought summary judgment. The Court granted the defendant's motion for summary judgment, concluding that the plaintiff was fired for violating the defendant's attendance policy for an absence not related to her request for FMLA leave.

V. Traditional Labor Law Developments

A. Recent Significant Labor Law Decisions

Jam Prods., Ltd. v. NLRB, 893 F.3d 1037 (7th Cir. 2018). Jam petitioned the Seventh Circuit for review of an NLRB order requiring it to bargain with the union. Jam alleged that in the period prior to the election, the union sought to influence the election by steering high-paying jobs to Jam employees. When it raised these concerns with the Regional Director, the Regional Director declined to interview any of the individuals named in Jam's offer of proof, or to require the union to turn over any business records. Further, in rejecting Jam's request for a hearing on the

issue, the Regional Director acknowledged that the employees had received union jobs during the critical period but concluded that Jam had not demonstrated that the union made a gift of "tangible economic value" to garner union votes. Noting that the Act prohibits "both crude and subtle forms of vote-buying" by unions, the Seventh Circuit concluded that the "financial benefit of higher-paying jobs immediately preceding the election could plausibly be seen as an economic inducement to secure votes in favor of [the union]."As a result, the Seventh Circuit found that Jam raised "substantial and material factual issues" sufficient to find that the NLRB abused its discretion by failing to hold an evidentiary hearing regarding Jams' objections. The Court granted the employer's petition for review and remanded the case to the NLRB for a hearing on its election objections.

Operating Engineers Local 399 v. Village of Lincolnshire, No. 17-1300, 2018 BL 353521 (7th Cir. Sept. 28, 2018). The defendant maintained an ordinance that purported to (1) forbid the inclusion of union-security or hiring-hall provisions in collective bargaining agreements; (2) forbid the mandatory use of hiring halls; and (3) forbid dues checkoff arrangements. The union sought an injunction and won summary judgment on preemption grounds. The defendant appealed, and the Seventh Circuit affirmed. The Seventh Circuit, noting a split on the issue, held that the authority conferred on states in Section 14(b) does not extend to political subdivisions of states, and affirmed the district court's holding that the defendant's ordinance was preempted by the NLRA. Specifically, the Court first conducted an analysis of whether such ordinance provisions would be preempted by the NLRA. It noted that laws banning union security and hiring hall provisions clash with Section 8 of the NLRA, and thus can be "saved only if the fall within the scope of Section 14(b)." Further, the Court reasoned that "[a] local union-security provision would seriously undermine the objectives of the NLRA in any state that has not taken advantage of section 14(b) to forbid agency shops." Finally, the Court held the dues-checkoff regulation was preempted because "it permits employers to remit dues only pursuant to fully revocable checkoffs, while federal law requires employers to bargain in good faith over checkoff proposals that bind both parties for up to one year." Having found each provision of the ordinance preempted, the Court analyzed whether these provisions could be saved by the defendant's argument that Section 14(b) authorizes political subdivisions, as well as states, to override federal law. The Court held that interpreting the words "State or Territory" in 14(b) to permit state delegation of labor law to local units of government "would thus do violence to the broad structure of labor law – a law that places great weight on uniformity." As a result, the Court held that "Section 14(b) of the NLRA does not permit local governments on their own authority to ban agency-shop, hiring hall, or checkoff agreements."

Constr. & Gen. Laborers' Union No. 330 v. Town of Grand Chute, 915 F.3d 1120 (7th Cir. 2019). The union brought suit against the town alleging that the town's sign ordinance prohibiting all signs violated the union's free speech rights under the First amendment. The union believed it should be able to voice its protesting message on a twelve foot inflatable rat. The Seventh Circuit affirmed the district court's ruling in favor of the town. The Court concluded that the sign ordinance placed reasonable restrictions and that there was no evidence the ordinance was enforced selectively. The Court further concluded that the union's attempt to replace the sign ordinance did not present a ripe Article III case or controversy.

B. Recent NLRB General Counsel Guidance

The Right to Refrain from Captive Audience & Other Mandatory Meetings, MEMORANDUM GC 22-04, 2022 WL 1078095, at *1 (Apr. 7, 2022). On April 7, 2022, NLRB General Counsel, Jennifer Abruzzo, issued a memorandum asserting that captive audience meetings "inherently involve an unlawful threat that employees will be disciplined or suffer other reprisals if they exercise their protected right not to listen to such speech." *Id.* The General Counsel explained that she believes "that the NLRB case precedent, which has tolerated such meetings, is at odds with fundamental labor-law principles, our statutory language, and our congressional mandate." As such, she promised "to urge the Board to reconsider such precedent and find mandatory meetings of this sort unlawful." According to General Counsel, these meetings are improper when employees are forced to convene on paid time, and even when approached by management while performing their job duties. The General Counsel proposed that captive audience meetings would be lawful only if the employees are informed that participation is truly voluntary. On April 12, 2022, General Counsel made this same argument in a brief in support of exceptions to the ALJ decision in Case 28-CA-230115. The brief reasserts General Counsel's position on this front, and her belief that the Board should set safeguards, such as that: (i) attendance at the meeting be voluntary; (ii) if employees choose to attend, they are free to leave at any time; (iii) nonattendance will not result in reprisals (including loss of pay if the meeting occurs during regularly scheduled work hours); and (iv) there will be no benefits to employees by attending. The General Counsel also asked that the Board preclude employers from telling employees that they will not have direct access to management if they unionize. The Board has not yet issued its decision in this case.

Full Remedies in Settlement Agreements, MEMORANDUM GC 21-07, 2021 WL 4243175, at *1 (Sept. 15, 2021). On September 15, 2021, General Counsel issued a memorandum detailing its position on non-admission clauses in settle agreements with the NRLB. It stated "Regions are reminded that non-admission clauses in informal settlement agreements should remain the exception and that, absent special circumstances, Regions should continue insisting on the exclusion of non-admission clauses in all settlement agreements and strongly consider the inclusion of admission clauses for repeat violators." This memorandum suggests that the exclusion of non-admission clauses is not necessarily to obtain a contractual advantage, but it is more likely a result of the NLRB's new perspective of seeking full remedies and punishment. Further, Section 10130.8 of the NRLB Casehandling Manual states that "Nonadmission clauses should not be routinely incorporated in settlement agreements. A nonadmission clause may be incorporated in a formal settlement only if it provides for a court judgment."

VI. Labor and Employment Law Developments Related to the Coronavirus

A. Families First Coronavirus Response Act

New York v. United States Dep't of Labor, No. 20-CV-3020 (JPO), 2020 WL 4462260 (S.D. N.Y. Aug. 3, 2020). The State of New York brought suit under the Administrative Procedure Act, claiming that many features of the U.S. Department of Labor's Final Rule implementing the FFCRA exceed the agency's authority under the statute. New York challenged the Final Rule's exclusion of paid leave to those whose employers did not have work for them, the definition of "health care provider" being too broad, that it requires employer consent for intermittent leave, and that the Final Rule required the employee to provide documentation prior to taking leave

under the FFCRA. The Court ruled that the Department of Labor exceeded its authority by: excluding employees from family and sick leave provisions of the FFCRA when their employers had no work for them; broadly defining "health care provider," for purposes of the Act, as anyone employed at any doctor's office, hospital, health care center, clinic, nursing home, pharmacy, post-secondary educational institution offering health care instruction, or many other similar entities; requiring employer consent for intermittent leave; and requiring that employees submit to their employer, prior to taking leave under the Act, certain documentation. The Court ruled that the agency did not exceed its authority, however, insofar as it promulgated Final Rule provision banning intermittent leave based on qualifying conditions that implicated an employee's risk of coronavirus transmission.

B. EEOC Guidance on Coronavirus in the Workplace

In May 2021, the EEOC issued technical assistance guidance concerning employer compliance with applicable EEO laws in relation to the COVID-19 pandemic. The regulations can be found here: https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws. This guidance was updated as recently as July 12, 2022, to reflect the EEOC's position with respect to the ADA standard for conducting medical examinations related to worksite COVID-19 viral screening testing. Some of the most relevant portions of the guidance are addressed below.

1. Mandatory Vaccines

The federal EEO laws, like Title VII and the ADA for example, do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for the Coronavirus. Such a mandate, however, would be subject to reasonable accommodation requirements of the ADA and Title VII (religious discrimination). Employers should be sure that the vaccine mandate does not create a disparate impact on employees based on their protected status, with the concern being that some segments of the population may have less access to the vaccine. Employers making the vaccine available to all employees at the place of employment may be one method to curb any disparate impact. As with all policies, the vaccine mandate must be implemented in a way that treats all employees the same regardless of their protected status.

2. Incentives to Vaccinate

Employers are permitted to offer employees certain incentives to obtain the Coronavirus vaccine and offer proof of vaccination. This may include, for example, offering modest bonus payments, extra days or time off, or prizes. The incentive, however, must not be so substantial as to be coercive. The incentive must also not be so substantial that it unfairly discriminates against those that cannot obtain the vaccine. For example, the incentive must be sufficiently *de minimis* so that those that cannot obtain the vaccine are not precluded from a benefit of employment offered to other employees.

3. ADA Disability and Title VII Religious Accommodations Related to Vaccine Mandates

Any employer policy requiring that employees obtain a Coronavirus vaccine would be subject to reasonable accommodation requests under both the ADA and Title VII. As it relates to the ADA, employees may be unable to receive the vaccine due to preexisting health conditions or a

disability. Employers may require the employee to provide medical documentation verifying their medical restriction in relation to vaccination. As it relates to Title VII, employees may request reasonable accommodation due to a sincerely held religious belief that precludes them from being vaccinated. In this context, sincerely held religious beliefs are defined broadly, and employers should likely not question an employee's religious beliefs other than in narrow exceptions. Upon request for such accommodations, the employer must engage in an interactive discussion with the employee to determine if reasonable accommodations exist that do not otherwise impose an undue burden on the employer. Examples of reasonable accommodations may be that the employee must wear a mask while at work, socially distance, be tested for the Coronavirus weekly, telework, job reassignment, or daily temperature checks. These are all likely reasonable accommodations that satisfy the company's objective of workplace health and safety without interfering with the employee's disability or sincerely held religious belief.

4. Treatment of Vaccination Records as Confidential Health Records Under the ADA

With limited exceptions, the ADA requires employers to keep confidential any medical information regarding employees or applicants. As related to the Coronavirus, this includes records of diagnosis, treatment, temperature checks, vaccination records, and the fact that the individual requested or is receiving a reasonable accommodation. Employers should store this information in the employee's medical file, which should be maintained separately from the employee's standard personnel file so as to keep it secure and confidential. Though medical information should be kept confidential, this does not prevent supervisors from reporting to the company their knowledge that another employee has the Coronavirus or is exhibiting symptoms. The company may then contact the employee and obtain a list of coworkers with whom the infected employee was in contact. Employers may then contact coworkers to inform them that "someone" they were in contact with tested positive for the Coronavirus, but the employer should not name the specific infected employee unless the employee gives permission to do so.

C. Occupational Safety and Health Administration

OSHA issued emergency temporary standards specifically for the healthcare industry regarding the coronavirus and how such healthcare employers should protect workers and patients from the coronavirus. (29 C.F.R. § 1910.502.) Its general duty clause nonetheless requires employers to furnish to each worker "employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm." As a general principle, employers are expected to comply with CDC guidelines as well as state and local health requirements in their workplaces. OSHA did enact a regulation governing reporting of coronavirus in the workplace. In all instances in which a worker tests positive, the employer must make a determination as to whether the illness is work-related and, if so, record the illness on OSHA logs. Workplace deaths related to the coronavirus must be reported immediately. OSHA will evaluate the reasonableness of the employer's investigation and the evidence available to the employer at the time of the investigation in determining whether the employer properly reported workplace coronavirus instances.

D. Case Law

Klaassen v. Trustees of Indiana Univ., No. 21-2326, 2021 WL 3281209 (7th Cir. Aug. 2, 2021). Indiana University issued a policy that required students to be vaccinated against COVID-19 or wear masks and be tested twice a week, and the students sought an injunction claiming the policy violated the Due Process Clause of the Fourteen Amendment. The district court denied the injunction, and the students filed a motion for injunction pending appeal. The Seventh Circuit denied the requested injunction, relying heavily on legal precedent from 1905 that permitted statewide vaccination against smallpox. The Court reasoned that here, Indiana University's policy was enforceable because it was less problematic than the prior statewide vaccination case law. Specifically, Indiana University's policy permitted exceptions for medical necessity and religious belief, the policy applies only to students seeking to attend the university, and the students were free to pursue their education elsewhere if they did not agree with the policy. As such, the Court determined the policy was not constitutionally problematic.

Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661, 211 L. Ed. 2d 448 (2022). On November 5, 2021, OSHA issued an emergency temporary standard requiring employers with at least 100 employees to develop, implement, and enforce policies that required employees to either obtain the COVID-19 vaccine or wear face coverings while at work and be subjected to testing. Litigation ensued, and on January 13, 2022, the Supreme Court of the United States ruled in favor of those challenging OSHA's rule, concluding that the challengers were likely to succeed on the merits of their claim that the rule was an overreach of authority. The Court reasoned that OSHA's rule was an attempt to expand its authority beyond its reasonable bounds. The rule was effectively a broad public health measure rather than a workplace safety standard. In short, the States and Congress, not OSHA, have the authority to decide how to respond to the pandemic. After the Court's ruling, OSHA withdrew its controversial rule.

VII. Indiana Restrictive Covenant Updates

Heraeus Med., LLC v. Zimmer, Inc., 135 N.E.3d 150 (Ind. 2019). After a former employee created a competing company and solicited employees away from his former employer, the employer brought suit to enforce the employment agreement entered into by the parties. Specifically, the employment agreement contained a non-solicitation covenant that prevented the former employee from soliciting "any" of the employer's employees to work for a competing business. The employer sought an emergency injunction, and the trial court granted the injunction and enjoined the former employee from soliciting these employees. The former employee appealed, and the Indiana Court of Appeals determined that the non-solicitation provision was overly broad and unenforceable because it applied to "any" of the employer's employees, not just those who possessed knowledge that would give a competitor an unfair advantage. The Court of Appeals, however, made the non-solicitation provision enforceable by adding limiting language to this effect pursuant to a provision in the employment agreement giving courts authority to amend the agreement should it be found to be unenforceable. Upon transfer, the Indiana Supreme Court vacated the Court of Appeals decision because the blue pencil doctrine does not allow courts to add language to the agreement, even if a provision in the agreement says that courts have that authority. As a result, the Indiana Supreme Court ruled that the non-solicitation agreement was void and unenforceable because it applied to all of the

employer's employees, rather than solely to those employees that possess knowledge that would give a competitor an unfair advantage.

Indiana Code § 25-22.5-5.5 *et seq.* (Physician Non-Compete Agreements). In July 2020, Indiana passed a new statute relating to physician non-compete agreements entered into after July 1, 2020. To be enforceable, the physician non-compete agreement must include provisions relating to notifying patients of the physician's departure from employment, requiring the employer to provide the physician's current contact information to patients that request it, requiring that the physician have access to his or her patients' medical records upon receipt of consent, and allowing the physician the option to purchase a release from the non-compete for a "reasonable price." What constitutes a "reasonable price" is not defined by the statute, and case law has yet to determine how this term will be interpreted.

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Indiana Continuing Legal Education Forum

Employment Law Update 2022

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OSHA Requirements

- General Duty clause – employers must furnish "employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm."
- Employers must report Covid cases in their OSHA 300 logs if:
  - Confirmed case of CV19
  - Reasonable basis to conclude it is work-related
  - Illness is otherwise reportable (i.e., medical treatment, lost time, etc.)
  - Employee death related to workplace Covid exposure must be reported to OSHA immediately

OSHA Large Employer Vaccine Mandate

- *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, Occupational Safety & Health Admin., 142 S. Ct. 661 (January 13, 2022)
  - On November 5, 2021, OSHA issued an emergency temporary standard requiring employers with at least 100 employees to develop, implement, and enforce policies requiring mandatory CV-19 vaccination or testing in the workplace
  - Several states and business groups challenged the ETS, and the U.S. Supreme Court stayed implementation of the mandate, finding that OSHA had not met the requirements for the emergency rule (which foregoes the regularly rule-making process)

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OSHA Large Employer Vaccine Mandate

- *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, Occupational Safety & Health Admin., 142 S. Ct. 661, 211 L. Ed. 2d 448 (January 13, 2022)
  - The Court found that the OSH Act did not plainly authorize the Secretary of Labor to issue such a mandate, which is limited to "workplace safety standards, not broad public health measures
  - OSHA subsequently withdrew the ETS

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ADA: Employee Health Screening/Testing

- Americans with Disabilities Act (ADA) considerations
  - Medical exams/inquiries under ADA (employees only) must be "job-related and consistent with business necessity"
  - Employers may require negative CV19 test as condition of entering the workplace
  - Test results are confidential medical records under ADA
  - Identity of CV19-positive employee also must remain confidential
  - HIPAA does not apply to most employers as non-covered entities, but does apply to contract nurses or health care professionals

COVID-19 and Disability Accommodation

- CV19 usually will not be considered a "disability" under the ADA because of its short-term nature; long COVID may be considered a disability, however
- Underlying health conditions that make employee at higher risk of CV19 illness may be a disability (e.g., diabetes, auto-immune disorders, etc.)
- If potential disability is identified, may need to evaluate reasonable accommodation
- Reasonable accommodation may include remote work, extended leaves of absence, modified work schedule
- Age is not a disability so no accommodation is required

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Workplace Vaccine Mandates

- EEOC CV19 Workplace Guidance (Updated May 2021)
  - Employers may require vaccinations as a condition of employment for all employees entering the workplace, with two exceptions
    - Under the ADA, employers must accommodate employees whose medical condition prevents them from being vaccinated
    - Under Title VII, employers must accommodate the "sincerely held religious beliefs" of employees who are opposed to vaccination on religious grounds, as well as employees who are pregnant

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Workplace Vaccine Mandates

- Reasonable accommodation may include:
  - Remote work
  - Socially distanced work space
  - Mandatory Covid testing
- Vaccination records are considered confidential medical records under the ADA and should be kept in a separate medical file
- Employers may also create incentives for employees to be vaccinated, as long as those incentives are not coercive
  - Common incentives include extra PTO/holidays, vaccination bonuses, and gifts/prizes

ADA Reasonable Accommodation: Medical Leave

- *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476 (7th Cir. 2017)
  - Plaintiff sought extended medical leave of absence as a reasonable accommodation under the ADA after his FMLA leave expired, but the employer denied his request and terminated his employment
  - Seventh Circuit affirmed summary judgment for the employer, finding that an extended leave of absence is not a reasonable accommodation: "the ADA is an antidiscrimination statute, not a medical-leave entitlement."

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ADA Reasonable Accommodation: Medical Leave

- *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476 (7th Cir. 2017)
  - Court noted, however, that a brief leave of absence of "a couple of days or even a couple of weeks" may be analogous to a part-time work schedule, and thus, short medical absences may be required by the ADA in certain circumstances

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ADA Reasonable Accommodation: Helper

- *Swain v. Wormuth*, 2022 WL 2914735 (7th Cir. July 25, 2022)
  - Plaintiff offered accommodation which included others assisting him with lifting heavy items during normal business hours
  - Overtime hours were only available on limited basis and employees had to work alone, so Plaintiff was denied overtime
  - Seventh Circuit affirmed SJ for employer, as requiring the employer to provide an extra working to accommodate Plaintiff's overtime request created an undue hardship on the employer

ADA Reasonable Accommodation: ASL Training

- *Muckenfuss v. Tyson Fresh Meats, Inc.*, 3:19-CV-536 DRL-MGG, 2022 WL 196369 (N.D. Ind. Jan. 21, 2022)
  - Deaf plaintiff requested that his supervisor be trained in American Sign Language as a reasonable accommodation of his disability
  - Court held that requiring an employer to train another employee in ASL would impose an undue hardship on the employer and therefore was not a reasonable accommodation

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Title VII: Sexual Orientation/ Gender Identity Discrimination

- *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (June 15, 2020)
  - Title VII prohibits discrimination against an employee or applicant on the basis of such individual's sexual orientation or transgender status
  - The Court found that discrimination on the basis of sexual orientation or transgender status is a form of sex discrimination: "That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."

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Title VII: Religious Employers

- *Starkey v. Roman Catholic Archdiocese of Indianapolis, Inc.*, 21-2524, 2022 WL 2980350 (7th Cir. July 28, 2022)
  - Catholic school did not renew the employment contract of a teacher who in a same-sex marriage
  - Plaintiff brought claims under Title VII, among other statutes
  - The Seventh Circuit affirmed the district court's holding that the teacher was a minister because she was responsible for teaching the Catholic faith, and therefore she was exempt from Title VII under the ministerial exemption

Title VII: Abortion Access in Employment

- *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022)
  - U.S. Supreme Court ruled that the right to abortion is not protected by the Constitution, and states are free to regulate abortion access, overturning *Roe v. Wade* (1973)
  - Prior caselaw has held that Title VII and the Pregnancy Discrimination Act prohibit discrimination against "women affected by pregnancy, childbirth, or related medical conditions," including abortion
  - Current EEOC guidance provides that employers are not required to provide abortion coverage unless the life of the mother is endangered or medical complications from abortion ensue

Title VII: Sexual Harassment

- Sexual Harassment is form of prohibited sex discrimination under Title VII and the Indiana Civil Rights Act
- Defined by EEOC as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when submission or rejection of this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile or offensive work environment"

Elements of Sexual Harassment

- Conduct may be *verbal or physical* (including visual)
- Conduct must be *sexual in nature*
- Conduct must be *unwelcome*
- Conduct must be *intimidating, hostile, or offensive* – both objectively and subjectively
- Conduct must be *sufficiently severe or pervasive* to affect the victim's work environment
- The harasser can be a supervisor, a co-worker, or a non-employee of the same or opposite gender

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Types of Harassment Claims

- *Quid Pro Quo*: Required to submit to sexual advances as a condition of employment
- *Hostile Work Environment*: Severe or pervasive behavior of a sexual nature that interferes with the employee's ability to perform his or her job

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Other Types of Harassment

- Other Hostile Environment Claims (not *quid pro quo*):
  - Gender (including sexual orientation or transgender status)
  - Race
  - National origin
  - Religion
  - Age
  - Disability

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Affirmative Defense To Liability

- Strict liability for employers in *quid pro quo* sexual harassment cases
- Affirmative defense available in hostile environment cases if:
  - Employer exercises reasonable care to prevent and correct promptly any sexually harassing behavior (*e.g*. sexual harassment policy and reporting procedure with prompt remedial action)
  - Victim unreasonably failed to take advantage of any preventative or corrective opportunities (*e.g.*, knew about the anti-harassment policy but failed to report)

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NLRB Captive Audience Speeches

- *The Right to Refrain from Captive Audience & Other Mandatory Meetings*, MEMORANDUM GC 22-04, 2022 WL 1078095, at *1 (Apr. 7, 2022)
  - Under long-standing NLRB law, free speech rights allow employers to hold "captive audience" speeches in the face of union organizing campaigns, as long as they refrain from threats or promises in those presentations
  - The NLRB General Counsel issued a memorandum calling for a change in this rule, providing that the meetings themselves are inherently coercive unless they are entirely voluntary

NLRB Settlements

- *Full Remedies in Settlement Agreements*, MEMORANDUM GC 21-07, 2021 WL 4243175, at *1 (Sept. 15, 2021)
  - The new General Counsel is also taking the position that settlement agreements with the Board must achieve a complete remedy for the charging party, which limits the employer's ability to settle contested cases for anything less than full back pay and reinstatement
  - Further, the Board will no longer include non-admission of liability language in its settlement agreements unless the settlement provides for a court judgment

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NLRB Mail Ballot Elections

- Under long-standing NLRB precedent, the Board has favored in-person voting over mail ballots in union certification and decertification elections except in "extraordinary circumstances"
- During the Covid-19 pandemic, the Board began to conduct mail ballot elections on a routine basis, which has continued to the present

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NLRB Mail Ballot Elections

- On August 15, 2022, Starbucks sent a letter to the NLRB members and GC alleging mail ballot fraud based upon collaboration between union organizers and Board agents, including providing duplicate and triplicate ballots, allowing unmonitored in-person voting at NLRB locations, providing real-time information about ballots to the union, and mishandling ballots
- Starbucks called for a wide-scale investigation and requested the suspension of all mail ballot elections in the U.S.

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Indiana Non-Compete Law

- *Heraeus Medical, LLC v. Zimmer, Inc.*, 135 N.E.3d 150 (December 3, 2019):
  - Indiana continues to follow the blue-pencil rule in enforcing restrictive covenants (i.e., non-competition/non-solicitation provisions); courts cannot "reform" an overbroad covenant even if the parties included a reformation provision in their agreement
  - Employee non-solicitation provisions must be limited to those employees who "have access to or possess any knowledge that would give a competitor an unfair advantage."

Wage Deductions

- *Duvall v. Heart of CarDon, LLC*, No. 117-CV-04439-JRS-MJD, 2020 WL 1274992 (S.D. Ind. Mar. 17, 2020)
  - Indiana Wage Deduction statute provides that wage assignments meet several specific criteria to be valid, one of which is that it be "revocable at any time"
  - Plaintiff brought class action wage claim challenging employer's wage deduction form that was revocable "upon 10 days' written notice" rather than at will
  - District Court held that a wage assignment is revocable "at any time" as long as the revocation took effect before wages were earned (but not as to wages that had already been earned)

Wage Deductions

- *Duvall v. Heart of CarDon, LLC*, No. 117-CV-04439-JRS-MJD, 2020 WL 1274992 (S.D. Ind. Mar. 17, 2020)
  - Given the employer's practice of paying wages nine days after the end of the pay period during which wages were earned, the form was valid and complied with the statute because the plaintiff had time to revoke the assignment before the wages were earned

Workplace Drug Testing Rules

- In general, employers may continue to enforce drug-free workplace and drug testing rules
  - Pre-employment drug screens
  - Random testing
  - "Reasonable suspicion" testing following workplace accident or injury
- Due to shortages of qualified workers, many employers are choosing to relax drug testing standards or eliminate pre-employment testing
  - Risks must be assessed in safety sensitive positions
  - Co-worker liability limited to worker's compensation, but not customers or members of the public

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Workplace Drug Testing Rules

- Some state have also adopted laws prohibiting employers from testing for marijuana use or taking adverse action against employees based upon marijuana use
  - Indiana has no such protections, but be sure to check laws of states where your employees are employed

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Mandatory Arbitration of Class Claims

- *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018): The Federal Arbitration Act requires the enforcement of arbitration agreements even when such agreements waive the right to proceed on a class (or collective) basis
  - Three consolidated cases from the Fifth, Seventh, and Ninth Circuits resolving a circuit split on enforceability of class and collective action waivers in arbitration
  - The right to participate in class action lawsuits or collective claims under the Fair Labor Standards Act is not a form of "protected concerted activity" under the National Labor Relations Act

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Salary Threshold for "White Collar" Exemptions

- FLSA Overtime Exemptions: Executive, Administrative, Professional, Computer, Outside Sales
  - One criterion for most executive, administrative, professional, and some computer employee exemptions is a minimum weekly salary (the salary basis test)
  - Effective January 1, 2020, minimum weekly salary increased from $455/week (23,660/year) to $684/week ($35,568/year)
  - Highly Compensated Employee salary threshold increased from $100,000/year to $107,432/year
  - Nondiscretionary bonuses and incentive payments may be considered to satisfy up to 10 percent of salary level

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Thank You!

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Section Eleven

State & Federal Tax Update

Richard L. Bartholomew
Girardot, Strauch & Co.
Lafayette, Indiana

Section Eleven

State & Federal Tax Update……..……Richard L. Bartholomew

PowerPoint Presentation

STATE & FEDERAL TAX UPDATE

By

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THE ANTI-MALPRACTICE OPPORTUNITY PROCEDURE

- Revenue Procedure 2022-32 (7/8/22) allows for an extended period for filing late portability elections for unused estate tax exemptions of the first spouse to die
- Portability only applies of you file a 706 estate tax return after the first spouse dies
- Extends to 5 years the time to file 706 for election

WHY SHOULD YOU CARE?

- Exemption amount scheduled to reduce to about $6.5 Million in 2026
- No current changes on the horizon
- Real estate values continue to increase as does the stock market in general, and/or
- Possible inheritance from a relative might push surviving spouse into a taxable estate

FREE DO-OVER

- Might be a good time to reconsider filing a return and locking in the portable exemption
- “FILED PURSUANT TO REV. PROC. 2022-32 TO ELECT PORTABILITY UNDER Section 2010(c)(5)(A)” at the top of the return

K-2 AND K-3 FORMS

- These forms are not your friends
- Failure to file them could cost you at least $6,720 per year (and that is a two-person entity)
- Higher penalty if you have more partners or shareholders

K-2 and K-3 TAX FORMS

- What entities are subject
  - Partnerships (1065).
  - S corporations (1120S)
  - US persons required to file form 8865
    - Return of U.S. persons with respect to certain foreign partnerships
  - Not C corporations (1120 or 1120-F) and
  - Not fiduciary (1041).

K-2 and K-3

- What is it?
  - Supplemental forms for the IRS
  - Replaces two lines on schedule K and K-1
    - Lines 16 and 20 on form 1065
    - Lines 14 and 17(d) on form 1120S

HOW MANY PAGES

- Form 1065
  - 19 pages for form K-2
  - 20 pages for form K-3
- Form 1120S
  - 14 pages for form K-2
  - 15 pages for form K-3

WHAT DOES EACH FORM DO

- Form K-2 provides supplemental information for schedule K (entity numbers)
- Form K-3 provides supplemental information for the schedule K-1 (partner/shareholder numbers)

HOW MANY CLIENTS

- I estimate between 1% and 5% of partnerships and S corporations will need to fill out these forms depending on the activity of the entity, or the request of a single partner/shareholder

How Many of your clients will you need to take action on

100%

TRANSITIONAL PENALTY RELIEF PROVISIONS

- Notice 2021-39 in response to outcry
  - Requires good faith effort
    - Taxpayer must have made changes to its systems, processes, and procedures for collecting and processing information relevant to the filing of the K-2 and K-3

NOTICE 2021-39 Cont.

- ***IRS will also take into account the steps taken by the schedule K-2/K-3 filer to modify the partnership or S corporation agreement or governing instrument to facilitate the sharing of information with partners and shareholders that is relevant to the determination of whether and how to file schedules K-2 and K-3***

SOUNDS TO ME

- It sounds to me like the best practice would be for each of you to contact your partnership or S corporation clients about modifying their agreements or governing instruments to require the shareholders or partners to tell the partnership or S corporation each year whether they will be or are required to file form 1116 concerning the foreign tax credit

WHAT IF YOU DON'T PREPARE RETURNS?

- Can you zone out?
- Or do you need to stay alert so you know what to discuss with your clients when you talk about choice of entity?
  - Single member LLC's might look more attractive (none of those penalties)

NOW FOR THE POTENTIAL BOMB

- Section 1446 Withholding tax on foreign partners' share of effectively connected income
- Regulation 1.1446-1(c)(3) states that in the absence of a valid W-9 or similar statement, an individual partner is presumed to be a foreign person

THEN WHAT

- Section 1446 then requires withholding on a (presumed) foreign partners' share of effectively connected income – generally at the highest rate of tax for an individual partner
- That is a partnership obligation and may cause liability of the GP or managing members of an LLC

WHAT WE DON’T KNOW

- Will the IRS take the position (now) that unless you have a W-9 for every partner, that you are required to presume they are a foreign partner and have withholding?
  - They haven’t in the past, but ?????

EXPIRING PROVISIONS FROM 2021

- Child Tax Credit
  - Was $3,000 for 2021
  - Will go back to $2,000 for 2022
- Non-itemizer charitable contribution of $600
  - Available in 2021
  - Gone in 2022

1099-K

- Third Party Settlement Organizations (like PayPal) will be filing 1099-K to report cumulative annual payment of over $600 instead of $20,000 starting in 2022

LAST YEAR FOR 100% BONUS DEPRECIATION

- In addition to Section 179 election to expense certain assets (like office equipment), Congress added Bonus Depreciation that allows a taxpayer to deduct assets acquisitions without the limitation of only reducing net income to $0
- In 2023 bonus depreciation starts its phase down by only allowing 80% of the cost of an asset to be deducted in the first year

INFLATION REDUCTION ACT OF 2022

- New Corporate Alternative Minimum Tax
- 15% on adjusted financial statement income
- If average annual adjusted financial statement income for 3-year period exceeds $1 Billion

IRA of 2022 Cont.

- 1% excise tax on publicly traded stock repurchases
- Exceptions include
  - Reorganizations
  - Purchase to contribute to an ESOP
  - Amounts less than $1 Million

DRUG MANUFACTURERS EXCISE TAX

- For manufacturers, producers and importers for the period of time of their “noncompliance”
- Excise tax can range from 185.71% to 1,900% of the selected drug’s price depending on how long the noncompliance lasts
- Applies to Designated Drugs.

PREMIUM TAX CREDIT EXTENDED FOR 2023-2025

- For taxpayers who enroll in the exchange-purchased qualified health plans and who aren't eligible for other qualified coverage or affordable employer sponsored health insurance plans providing the minimum value.

SEVERAL EXTENDED AND MODIFIED CREDIT FOR ELECTRICITY PRODUCED FROM CERTAIN RENEWABLE SOURCES

- Lots of restrictions such as prevailing wage requirements and extra credit if the steel, iron or manufactured products are produced in the US

EXTENSION & MODIFICATION OF THE ENERGY CREDIT

- Applies to all business and investors (not just for producers for sale).
- Construction must begin before 1-1-25
  - But Ground water heating and cooling can start as late as 1-1-2035

NON-BUSINESS ENERGY PROPERTY CREDIT

- Extended from 2022 until 1-1-2033
- 30% of the amount paid for qualified energy efficiency improvements
- Plus amounts spent for home energy audit up to $150.

NON-BUSINESS ENERGY PROPERTY CREDIT CONT

- Now removes requirement that home must be your primary residence
- Uses an annual limitation instead of lifetime limitation.
  - $1,200 per year in general
  - Further limits for windows and doors
  - But $2,000 for specified heat pumps and heat pump water heaters

EFFECTIVE DATES

- Some provisions are effective for property placed in service after 12-31-22
- But some is effective after 12-31-21

NEW (UPDATED) CLEAN VEHICLE CREDIT

- Old maximum credit was $7,500
- New credit generally still $7,500
- No more limitation based on the number of autos sold by manufacturer
- Final assembly requirement – must happen in North America
- Critical mineral requirement after 12-31-24

Clean vehicle price limitation

- Manufacturer suggest retail price limitation
  - Vans, SUV's and pickups = $80,000
  - Other vehicles = $55,000
- No Credit for high income taxpayers
  - Modified AGI over $300,000 (MFJ), $150,000 (single) and $225,000 (Head of Household)
- Can transfer credit to dealer

CREDIT FOR PREVIOUSLY-OWNED CLEAN VEHICLES

- Credit of 30% of vehicles sale price up to a max of $4,000
- No credit if Purchasers Modified AGI exceeds $150,000 (Joint) $75,000 (Single) or 112,500 (Head of household)
- Must be at least 2 years old and sold by a dealer for a price of $25,000 or less.
- Other limitations apply

MORE CLEAN CREDITS

- Alternative Fuel Vehicle Refueling Property Credit
- Qualifying Advanced Energy Project Credit

SUPERFUND TAX REINSTATED

- Beginning after 2022 superfund tax is reinstated and increased from 9.7 cents per barrel to 16.4 cents per barrel (which will then be adjusted for inflation)

INCREASE IN QUALIFIED SMALL BUSINESS PAYROLL TAX CREDIT FOR INCREASING RESEARCH

- Certain qualified small business may now take a credit against employer payroll taxes up to $250,000
- QSB has gross receipts of less than $5 Million for current and previous 5 years

EXTENSION OF EXCESS BUSINESS LOSS FOR NON-CORPORATE TAXPAYERS

- Business losses in excess of $250,000 shall be disallowed and carried forward
- Was to expire in 2026
- Now will expire 2030

NO SURPRISE – IRS GETTING FURTHER BEHIND

- 15 Million unprocessed returns as of April 2022
- Couldn’t process so they destroyed 30 million forms like paper W-2’s and 1099’s
- Before new tax act, the IRS was trying to hire $10,000 new workers for the backlog

NEW FUNDING FOR IRS

- Won’t create army of $87,000 auditors to harass the middle class.
- Will help add phone services where there are 15,000 employees available to answer nearly 200 Million calls (13,000 calls per operator)
- Hopefully IRS will be able to update some computer programs from using 1980’s software (COBOL)

PENSION DISTRIBUTIONS AFTER DEATH

- Generally, 10-year payout if there is a (person) other than the spouse named as a beneficiary
- Spouse can still roll it over into their own IRA
- Named estate or trust typically have a 5 year pay out (unless a conduit trust)

PENSION DISTRIBUTIONS AFTER DEATH CONT.

- Caution: There is a proposed regulation that says that even though the inherited IRA (by most non-spouse beneficiaries) must be distributed within 10 years of the death of the original owner, the IRA must now make annual distributions within the 10 years at least as much as if the decedent was alive.
- No more 10-year cliff.

NOT SURE

- We aren’t sure when or if the proposed regulation will be finalized

STATUTE OF LIMITATIONS LANDMINE

- Bad facts make (potentially) bad law
- The IRS said Seaview Trading LLC (a tax shelter to the tune of $35,000,000) didn’t file their 2001 return and asked for a copy in 2005
- The taxpayer faxed a signed copy in 2005
- When they were told they were under audit, the taxpayer mailed another signed copy to the IRS in 2007

SEAVIEW CONT.

- In 2010 the IRS disallows all deductions
- IRS and Tax Court held that since the return wasn't mailed to the service center, it wasn't ever "filed" (and thus never started the S/L)
- 9th Circuit Count of Appeals held that giving it to the agent was "Filing" the return

BUT

- There was a dissent, and the Tax Court need not follow that holding in our Circuit (the 7th)
- Therefore, is asked for a second copy since the IRS says they didn’t get the first, you better also mail one to the Service Center

IRS DIRTY DOZEN

- The IRS makes a list of what they call the Dirty Dozen, things like abusive tax shelters
- This year, the organizations that claim they can settle your tax liability for pennies on the dollar (if you owe at least $10,000 in back taxes) have made the list
- Don’t necessarily believe everything you hear

STILL TIME FOR ERTC REFUNDS

- Employee Retention Tax Credit is a refundable payroll tax credit allowed to employers for paying (non-owner) employees either during a period of shutdown due to government order, in a quarter where gross income was down (50% in 2020 compared to 2019, or 20% in 2021 compared to 2019)

AMOUNT OF CREDIT

- 2020 – 50% of qualified wages up to $5,000 per employee
- 2021 – 70% of qualified wages (per quarter) up to $7,000 per quarter per employee (but only for the first three quarters)

BUT BE CAREFUL

- We have heard of some cases where the preparers have taken some positions involving inability to get key components due to government shutdown that don’t even pass the smell test.

STATE & FEDERAL TAX UPDATE

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Section Twelve

Cybersecurity and Ethical Pitfalls of Everyday Law Office Computing

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Section Twelve

Cybersecurity and Ethical Pitfalls of Everyday Law Office Computing…… Paul J. Unger

Cybersecurity and Ethical Pitfalls of Everyday Law Office Computing

Presented for ICLEF Indiana Law Update 2022

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Protection of client information, confidences and secrets is one of the most sacred traits defining the relationship between lawyers and their clients. Without a proper understanding of technology, you may be compromising that relationship. Email, cloud computing, traditional computers, smartphones, tablets, networks, viruses, worms, spyware, metadata, electronic court filings, just to name a few, may already be compromising that relationship without you even knowing it.

Take email as an example. In 2022, the average legal professional will receive between 125-150 email messages daily and that doesn't include additional messages through applications like MS Teams or Slack. Without question, email is one of the most important technological communication advancements of the past 100 years. It has fundamentally changed the way we communicate with clients and the way that we do business. Major corporations and law firms are run via email communication instead of face-to-face communication. For lawyers, emails present a wide array of issues that most of the business world and ordinary consumers will never face.

In Canada and the U.S., lawyers have a duty to take reasonable steps to protect their client's confidential information, whether it is in the form of paper or electronic. Under ABA Model Rule 1.6, lawyers have a broad obligation to act competently and reasonably protect client information and confidences. Rule 1.6 (replacing DR 4-101) revised the scope of confidential information. Similarly, in Canada, Model Code of Professional

Conduct, Rule 3.3 requires the same protection of client information and confidences. Practicing law without technology (and email) has almost become an impossibility. However, law and technology have become so intertwined that you can find yourself in many ethical dilemmas pretty quick. This seminar and article seek to address these issues that may lead to an ethical violation or malpractice.

"Competence" Re-Defined and Taking Reasonable Steps to Protect Client Information

Trend in North America – Examples

The U.S. is not alone in requiring a lawyer to understand the benefits and risks of technology. On October 19, 2019, the Federation of Law Societies of Canada formally amended its Model Code to include the duty of technical competence. Comments to Rule 3.1-2 say:

> [4A] To maintain the required level of competence, a lawyer should develop an understanding of, and ability to use, technology relevant to the nature and area of the lawyer's practice and responsibilities. A lawyer should understand the benefits and risks associated with relevant technology, recognizing the lawyer's duty to protect confidential information set out in section 3.3.
>
> [4B] The required level of technological competence will depend on whether the use or understanding of technology is necessary to the nature and area of the lawyer's practice and responsibilities and whether the relevant technology is reasonably available to the lawyer. In determining whether technology is reasonably available, consideration should be given to factors including:
>
> (a) The lawyer's or law firm's practice areas;
>
> (b) The geographic locations of the lawyer's or firm's practice; and
>
> (c) The requirements of clients.

Of course, individual Canadian provincial and territorial law societies still must adopt the rule, but that is anticipated over time. Like the U.S. the new language simply makes explicit what is already implied in the existing rules. Regardless, the act of making it explicit has clearly triggered a much higher awareness and we are seeing lawyers take significantly more steps to protect client electronically stored information.

Pennsylvania (approved October 22, 2013)

Rule 1.1 – Comment 8: Maintaining Competence
[8] To maintain the requisite knowledge and skill, a lawyer must keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Pennsylvania was the first state to adopt the new language. 38 states have adopted the Duty of Technical Competence. Some of those include:

Alaska (effective October 15, 2017)
Arkansas (effective June 26, 2014)
Arizona (effective January 1, 2015)
California (effect March 22, 2021)
Colorado (approved April 6, 2016)
Florida (effective January 1, 2017)
Indiana (effective January 1, 2018)
Illinois (effective January 1, 2016)
Kansas (effective March 1, 2014)
Kentucky (effective January 1, 2018)
Louisiana (adopted April 11, 2018)
Michigan (effective January 1, 2020)
Minnesota (approved February 24, 2015)
Missouri (approved Sept. 26, 2017)
New Hampshire (effective January 1, 2016)
New York (adopted March 28, 2015)
North Carolina (approved July 25, 2014)
Ohio (effective April 1, 2015)
Oklahoma (adopted September 19, 2016)
Pennsylvania (effective October 22, 2013)
South Carolina (approved November 27, 2019)
Virginia (effective March 1, 2016)
Washington (effective Sept.1, 2016)
West Virginia (effective January 1, 2015)
Wisconsin (effective January 1, 2017)

Some states have not yet adopted the new language within their rules of professional responsibility. As of February of 2021, those include:

Oregon
Nevada
South Dakota
Mississippi

Alabama
Georgia
Maine
Maryland
New Jersey

Some states have not adopted the rule change but have addressed it in an ethics opinion. For example, **Oregon** in Formal Opinion 2011-187 imposes a duty of technical competence *when dealing with metadata* and cites Arizona Ethics Op No. 07-03. It is reasonable to conclude that all Oregonian lawyers should have general technical competence (not just technical competence with metadata) in light of this opinion on metadata and the national trend.

Acting Competently to Preserve Confidentiality

Indiana Rule 1.6, Comments 16 & 17

[16] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Ohio Rule 1.6 (and Model Rule 1.6) and Comments 18 & 19

Rule 1.6(c) – Confidentiality of Information: A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Rule 1.6 – Comment 18 & 19: Acting Competently to Preserve Confidentiality

[18] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule.

[19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

Similarly, many other states have taken the same approach in their comments, as the ABA and Ohio. Take Maine, New Hampshire and Oklahoma as an example:

Maine Rule 1.6
Acting Competently to Preserve Confidentiality – Comments 16 & 17

Acting Competently to Preserve Confidentiality

[16] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. Consistent with Section 66 of the Restatement, a lawyer who takes action or decides not to take action allowed under this Rule is not, solely by reason of such action or inaction, subject to professional discipline, liable for damages to the lawyer's client or any third persons, or barred from recovery against a client or third persons. The legal effect of the lawyer's choice, however, is beyond the scope of the Model Rules of Professional Conduct.

[17] When transmitting a communication that includes confidences or secrets of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Missouri Rule 4-1.6
Acting Competently to Preserve Confidentiality - Comments 15 & 16

[15] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 4-1.1, 4-5.1, and 4-5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 4-5.3, Comments [3]-[4].

[16] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

New Hampshire Rule 1.6
Acting Competently to Preserve Confidentiality - Comments 18 & 19

[18] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

[19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these rules.

Oklahoma Rule 1.6
Acting Reasonably to Preserve Confidentiality – Comments 16 & 17

[16] Paragraph (c) requires a lawyer to act reasonably to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1, and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern date privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3] -[4].

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

Louisiana Rule 1.6 – Comments 18 and 19

[18] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

[19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

Mississippi Rule 1.6 + Comments

Mississippi requires reasonableness and competency, but they don't provide as much guidance in their comments as other states:

> **Acting Competently to Preserve Confidentiality.** A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See rules 1.1, 5.1 and 5.3.
>
> When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this rule.

Cloud Computing

Cloud computing is an umbrella term that covers several concepts. Within the scope of legal technology, it most often refers to Software-As-A-Service ("SaaS"). There are a ridiculous number of definitions of SaaS, but I think this one sums it up succinctly without using 15 more acronyms requiring definitions:

> "Generally speaking, it's software that's developed and hosted by the SaaS vendor and which the end user customer accesses over the Internet. Unlike traditional packaged applications that users install on their computers or servers, the SaaS vendor owns the software and runs it on computers in its data center. The customer does not own the software but effectively rents it, usually for a monthly fee. SaaS is sometimes also known as hosted software or by its more marketing-friendly cousin, 'on-demand.'"

To be clear, this means that you do not have the software installed on your computer - it is accessible only via a browser on the Internet. Further, your data and/or documents are located on the vendor's servers and not on your computer or server.

This obviously raises ethical concerns because you are entrusting client confidential information with someone other than you and your employees.

An excellent compilation of ethics decisions around the country can be found at the ABA Law Practice Management Section's Legal Technology Resource Center (LTRC).

http://www.americanbar.org/groups/departments_offices/legal_technology_resources.html

Probably the best decision that I have read to date in the U.S. comes from Pennsylvania:

http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/saas.html

Pennsylvania, and nearly every jurisdiction who has addressed the issue employ a standard of reasonableness and typically requires segregation of data, privacy/security of data, ability to keep a local download, and reliability of the vendor. The court stated:

The standard of reasonable care for "cloud computing" may include:

- Backing up data to allow the firm to restore data that has been lost, corrupted, or accidentally deleted;

- Installing a firewall to limit access to the firm's network;

- Limiting information that is provided to others to what is required, needed, or requested;

- Avoiding inadvertent disclosure of information;

- Verifying the identity of individuals to whom the lawyer provides confidential information;

- Refusing to disclose confidential information to unauthorized individuals (including family members and friends) without client permission;

- Protecting electronic records containing confidential data, including backups, by encrypting the confidential data;

- Implementing electronic audit trail procedures to monitor who is accessing the data;

- Creating plans to address security breaches, including the identification of persons to be notified about any known or suspected security breach involving confidential data;

- Ensuring the provider:

    - explicitly agrees that it has no ownership or security interest in the data;

    - has an enforceable obligation to preserve security;

    - will notify the lawyer if requested to produce data to a third party, and provide the lawyer with the ability to respond to the request before the provider produces the requested information;

    - has technology built to withstand a reasonably foreseeable attempt to infiltrate data, including penetration testing;

    - includes in its "Terms of Service" or "Service Level Agreement" an agreement about how confidential client information will be handled;

    - provides the firm with right to audit the provider's security procedures and to obtain copies of any security audits performed;

- will host the firm's data only within a specified geographic area. If by agreement, the data are hosted outside of the United States, the law firm must determine that the hosting jurisdiction has privacy laws, data security laws, and protections against unlawful search and seizure that are as rigorous as those of the United States and Pennsylvania;

- provides a method of retrieving data if the lawyer terminates use of the SaaS product, the SaaS vendor goes out of business, or the service otherwise has a break in continuity; and,

- provides the ability for the law firm to get data "off" of the vendor's or third-party data hosting company's servers for the firm's own use or in-house backup offline

- Investigating the provider's:

  - security measures, policies and recovery methods;

  - system for backing up data;

  - security of data centers and whether the storage is in multiple centers;

  - safeguards against disasters, including different server locations;

  - history, including how long the provider has been in business;

  - funding and stability;

  - policies for data retrieval upon termination of the relationship and any related charges; and,

  - process to comply with data that is subject to a litigation hold.

- Determining whether:

  - data is in non-proprietary format;

  - the Service Level Agreement clearly states that the lawyer owns the data;

  - there is a 3rd party audit of security; and,

  - there is an uptime guarantee and whether failure results in service credits.

- Employees of the firm who use the SaaS must receive training on and are required to abide by all end-user security measures, including, but not limited to, the creation of strong passwords and the regular replacement of passwords.

- Protecting the ability to represent the client reliably by ensuring that a copy of digital data is stored onsite.

- Having an alternate way to connect to the internet, since cloud service is accessed through the internet.

In Oregon, while the model rule language in Comments 18 & 19 has not been explicitly adopted, in Formal Opinion No. 2011-188 (revised 2015) they have adopted "the rule to act reasonably" as it applies to an lawyer's obligation under Rule 1.6 to protect client confidential information. Opinion 2011-188 specifically concludes that a lawyer may contract with a third-party vendor to store and retrieve files online via the Internet (i.e., cloud computing).

In Canada, only the Law Society of British Columbia has directly addressed cloud computing, and the Legal Education Society of Alberta has adopted the same standard. It seems to be a higher standard than the U.S., and many practicing in other areas of Canada that haven't addressed it have felt comfortable following the U.S. rules. The Law Society of BC developed an extensive checklist that is submitted as a separate paper hereto. The checklist encourages potential cloud service users to consider, among other things:

- use of a private cloud, which is designed to offer the same features and benefits of public cloud systems without some of the typical cloud computing concerns such as data control, security, and regulatory compliance;
- encryption of data using a 3rd party encryption product and the compatibility of the 3rd party product with the cloud provider's product and services;
- data security and responsibility for specific aspects of security, including firewall, encryption, password protection and physical security;
- regulatory requirements, including statutory privacy requirements, retention periods indicated in the LSBC Rules, the ability to produce documents with respect to a LSBC investigation in the form and time prescribed, and the retention of custody over client data;
- adequacy of remedies in the event of data breaches, data loss, indemnification obligations, and service availability failures;
- the cloud provider's breach notification obligations;
- termination of the services agreement with the cloud provider, specifically as it relates to issues including cost, service level failures (bandwidth, reliability, etc.), data availability after termination, and transition services;

- technical considerations, including compatibility with existing systems, uptime, redundancies, bandwidth requirements, security measures, and technical support service availability; and
- the track record of the cloud services provider (such as uptime, security, support service level, etc).

The above is neither an exhaustive list of applicable considerations nor a complete summary of the Checklist.

Advantages of Cloud Computing (Saas):

- Up Front Price Advantage: Let's say you want to start using a case management application for your practice. If you were to buy one such as Time Matters, you would have to pay for the software outright along with the annual maintenance contract which is mandatory ($905 for the first license and $525 for each license thereafter). You may have to buy a file server or otherwise upgrade your hardware in order to run the program. For an example cost, a new server plus installation and setup could easily run $5,000 - $8,000. Therefore, buying software may turn out to be quite expensive. In the alternative, you would begin subscribing to something like www.rocketmatter.com in which case you would pay $59.99 for the first user per month and $49.99 per user for the next 5 users per month. You wouldn't have to buy a server and you probably wouldn't have to upgrade any of your existing equipment assuming you already have high speed Internet access.

- Ease of Use

- World-Class Data Security

- New Hardware often NOT Required: If you already have a computer and high speed Internet access, then you probably don't need anything else from a hardware perspective.

- Works in Apple or Windows: Since these applications are browser based, they will usually work with both Apple and Windows computers.

- Updates Included: Most cloud application include all updates which are installed for you.

- Technical Support Included: With most cloud applications, you get "free" technical support included with your monthly subscription fee. Of course, purchased software also provides technical support but it is often an extra fee on top of the original software purchase price.

- Access From Anywhere: As long as you're using a computer with internet access, you can probably use your cloud applications. You wouldn't need a VPN, GotoMyPc, or any other type of additional remote access application to accomplish this.

- Share Applications Among Users Spread Out Geographically: For lawyers with multiple offices or who wish to work from multiple locations, cloud applications provide a lot of flexibility. Of course, there are other ways to gain access to programs besides subscribing to cloud applications, but this feature is obviously built in to cloud apps without buying anything else.

- Redundancy Provided: Since your data is stored on the host company's servers, they almost always provide redundant data storage along with that so that there is little (if any) risk that you would lose your data or access to your application due to a physical hardware failure.

E-Mail Encryption and Other Pitfalls

❶ To Encrypt or Not to Encrypt?

According to most jurisdictions in the United States, a lawyer does not violate the duty to preserve confidences and secrets if an email is sent without encryption technology.

In Canada, the rules do not explicitly say that encryption is not required. Instead, the rules imply a duty to act reasonably to protect client confidences. Lawyers should consider the use of information technologies to communicate with the client in a timely and effective manner appropriate to the abilities and expectations of the client. Lawyers may use email (see Rule 3.1-1(d) and 3.1-2 of the Rules of Professional Conduct).

Lawyers must display the same care and concern for confidential matters regardless of the information technology being used. When communicating confidential information to or about a client, lawyers should employ reasonably appropriate means to minimize the risk of disclosure or interception of data by malicious intruders.

What are the risks that a particular information technology poses for inadvertent disclosure or interception? Lawyers should inform a client of the risks of unauthorized disclosure and interception before using information technologies. Lawyers need to ensure that their clients, too, understand that they need to protect the confidentiality of communications to them. Seeking client consent before using a particular technology for communications may be appropriate.

In Ohio, Ethics Opinion 99-2, issued April 9, 1999, by contrast states that a lawyer does not violate the duty to preserve confidences and secrets if an email is sent without encryption technology citing DR 4-101 of the Ohio Code of Professional Responsibility. A lawyer must use his or her professional judgment in choosing the appropriate method of each attorney-client communication. Most jurisdictions in the U.S. are consistent with Ohio.[1] Also see Formal Opinion No. 99-413 of the American Bar Association

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[1] Excerpt from Ohio Op. 99-2:

The trend among advisory bodies in other states (and the District of Columbia) is that electronic mail without **encryption** is ethically proper under most circumstances.

In the District of Columbia, "[i]n most circumstances, transmission of confidential information by unencrypted electronic mail does not per se violate the confidentiality rules of the legal profession. However, individual circumstances may require greater means of security." District of Columbia Bar, Op. 281 (1998).

In Illinois, "[l]awyers may use electronic mail services, including the Internet, without **encryption** to communicate with clients unless unusual circumstances require enhanced security measures." Illinois State Bar Ass'n, Op. 96-10 (1997).

In New York, the state bar association advised that "lawyers may in ordinary circumstances utilize unencrypted Internet **e-mail** to transmit confidential information without breaching their duties of confidentiality under Canon 4 to their clients, as the technology is in use today. Despite this general conclusion, lawyers must always act reasonably in choosing to use **e-mail** for confidential communications, as with any other means of communication. Thus, in circumstances in which a lawyer is on notice for a specific reason that a particular **e-mail** transmission is at heightened risk of interception, or where the confidential information at issue is of such an extraordinarily sensitive nature that it is reasonable to use only a means of communication that is completely under the lawyer's control, the lawyer must select a more secure means of communication than unencrypted Internet **e-mail**." New York State Bar Ass'n, Op. 709 (1998). The city bar association advised that "[a] law firm need not **encrypt** all **e-mail** communications containing confidential client information, but should advise its clients and prospective clients communicating with the firm by **e-mail** that security of communications over the Internet is not as secure as other forms of communication." Ass'n of the Bar of the City of New York, Formal Op. 1998-2 (1998).

In North Dakota, "Rule 1.6 of the North Dakota Rules of Professional Conduct is not violated by a lawyer who communicates routine matters with clients, and/or other lawyers jointly representing clients, via unencrypted electronic mail (**e-mail**) transmitted over commercial services (such as America Online or MCI Mail) or the Internet unless unusual circumstances require enhanced security measures." State Bar Ass'n of North Dakota, Op. 97-09 (1997).

In Vermont, "[a] lawyer does not violate DR 4-101 by communicating with a client by **e-mail**, including the Internet, without **encryption**." Vermont Bar Ass'n, Op. 97-5.

One state is reticent in its advice regarding unencrypted electronic communication with clients. In Arizona, the state bar responded "Maybe" to the question "Should lawyers communicate with existing clients, via **e-mail**, about confidential matters?" They advised "it is not unethical to communicate with a client via **e-mail** even if the **e-mail** is not **encrypted**" but suggested "it is preferable to protect the attorney/client communications to the extent it is practical." The committee suggested using a password known only to the lawyer or client, using **encryption** software, or at a minimum using a cautionary statement such as "confidential" and "Attorney/Client Privileged" either in the "re" line or beginning the communication. An additional suggestion was to caution clients about transmitting highly sensitive information via **e-mail** if the **e-mail** is not **encrypted** or otherwise secure from unwanted interception. Attorneys were "reminded that **e- mail** records may be discoverable." State Bar of Arizona, Op. 97-04 (1997).

Several states have reconsidered their initial views on the issue. In South Carolina, the bar association first advised that "unless certainty can be obtained regarding the confidentiality of communications via electronic media, that representation of a client, or communication with a client, via electronic media, may violate Rule 1.6, absent an express waiver by the client." South Carolina Bar, Op. 94-27 (1995). Later, the bar advised that "[t]here [now] exists a reasonable expectation of privacy when sending confidential information through electronic mail (whether direct link, commercial service, or Internet). Use of electronic mail will not affect the confidentiality of client communications under South Carolina Rule of Professional Conduct 1.6." South Carolina Bar, Op. 97-08 (1997).

In Iowa, the bar association rescinded Formal Op. 95-30 and replaced it with Formal Op. 96-1 advising that "with sensitive material to be transmitted on **E-mail** counsel must have written acknowledgment by client of the risk of violation of DR 4-101 which acknowledgment includes consent for the communication thereof on the Internet or non-secure Intranet or other forms of proprietary networks, or it must be **encrypted** or protected by password/firewall or other generally accepted equivalent security system." Iowa State Bar Ass'n, Op. 96-1 (1996). See also Iowa State Bar Ass'n Op. 96-33 (1997). Later, the bar

Standing Committee on Ethics and Professional Responsibility, *Protecting the Confidentiality of Unencrypted Email*, dated March 10, 1999.

The opinion contains an important caveat that should not be ignored:

> The conclusions reached in this opinion do not diminish a lawyer's obligation to consider with her client the sensitivity of the communication, the costs of its disclosure, and the relative security of the contemplated media of communication. Particularly strong protection measures are warranted to guard against the disclosure of highly sensitive matters. Those measures might include the avoidance of e-mail, just as they would warrant the avoidance of the telephone, fax and mail.

Is there a problem with this decision that is was issued so long ago? What effect do the newer Model Rules have on this opinion? Despite advances in technology, and the rules in most jurisdictions, the opinion would stand up today.

First, the same opinion is shared in well over a majority of jurisdictions, many of which had the New Model Rules already in place. Comment 17 to Rule 1.6 states:

> [17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. **Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement.** A client may require the lawyer to implement special security measures not required by this rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this rule.

The ABA accepted the same approach in Comment 16 to Model Rule 1.6.

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association amended Opinions 96-1 and 96-33 by advising that "with sensitive material to be transmitted on **e-mail** counsel must have written acknowledgment by client of the risk of violation of DR 4-101 which acknowledgement includes consent for communication thereof on the Internet or non- secure Intranet or other forms of proprietary networks to be protected as agreed between counsel and client." Iowa Bar Ass'n, Op. 97-1 (1997).

Second, email is a very efficient form of communication. Third, the same security issues exist in other forms of communication such as wiretapping phone lines or stealing U.S. mail. Fourth, any interception of email or older forms of communication such as US mail or telephone calls is illegal. Finally, there is support in case law for the proposition that a reasonable expectation of privacy may exist even though a form of communication is capable of being intercepted, citing *State v. Bidnost*, 71 Ohio St. 3d 449, 461 (1994).

Ohio accepted the same approach in Comment 19 to its rule 1.6:

[19] When transmitting a communication that includes information relating to the representation of a client, **the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients**. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. **A client may require the lawyer to implement special security measures not required by this Rule** or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

Duty to Do More? … Some Say Yes

Pennsylvania and New Jersey have adopted the same rule, but added a little more stringency to it. In Pennsylvania, Informal Opinion 97-130, issued September 26, 1997, concluded:

1. A lawyer may use e-mail to communicate with or about a client without encryption;
2. A lawyer should advise a client concerning the risks associated with the use of e-mail and obtain the client's consent either orally or in writing;
3. A lawyer should not use unencrypted e-mail to communicate information concerning the representation, the interception of which would be damaging to the client, absent the client's consent after consultation;
4. A lawyer may, but is not required to, place a notice on client e-mail warning that it is a privileged and confidential communication; and,
5. If the e-mail is about the lawyer or the lawyer's services and is intended to solicit new clients, it is lawyer advertising similar to targeted, direct mail and is subject to the same restrictions under the Rules of Professional Conduct.

While other jurisdictions are not bound by rules 1 through 5, above, I recommend them as best practices to follow.

The New Jersey Advisory Committee on Professional Ethics, in Opinion 701, issued in April 2006, states in a footnote that confidential documents sent over the Internet should be password protected.

In conclusion, in light of evolving technology and rules, it is my recommendation that lawyers (1) should advise clients verbally and in their engagement letter about email, as described in the Pennsylvania opinion, and (2) should have encryption available for use in appropriate circumstances.

❷ Email Encryption Solutions

Office 365 w/hosted Exchange and E3 licensing
www.office.com

Protected Trust
www.protectedtrust.com

Mail It Safe
www.mailitsafe.com

AppRiver
http://www.appriver.com/services/email-encryption/

Send
www.sendinc.com

TrendMicro
http://www.trendmicro.com/us/enterprise/network-web-messaging-security/email-encryption/index.html

❸ Retracting Sent E-Mails

Are there times when you wish that you could UNSEND something? This is actually something that can be done to prevent a known ethical violation where it may not be possible with ordinary U.S. Mail. With U.S. Mail, once the mail is in the post box, good luck getting it back!

I have 2 suggestions in this regard:

- If your firm uses Exchange Server, be sure to tell your system administrator to set a 5 minute delay before the email is actually sent from your server. This may give a user in your office enough time to catch it before it goes out.

- You may want to try out something like www.mailitsafe.com, or similar functioning service, which is an email verification program, but also allows retraction so long as it hasn't been retrieved by the recipient. You can also encrypt emails and attachments, requiring recipients to use passwords to open. The cost is $150 per year.

❹ E-Mail Addressing: AutoComplete can be an AutoDisaster

Outlook and other popular email programs have an ”Auto-Complete” function that saves you the time of having to type out someone’s complete email address if the name already exists in the program’s address book. Once you type the first character in the TO field, Outlook starts guessing the name of the recipient and will display potential names. If to quick and careless, you could accidentally hit ENTER and auto-complete the wrong recipient. While a nifty feature if used correctly, this can get you into trouble if you are careless.

As an example, if you intend to send something to your client “Brian Cluxton”, you could accidentally send something to opposing counsel “Brian Clayton” by typing B-R-I and hitting ENTER too quickly. If you don’t catch it, you could send something really damaging to the wrong person. I don’t think this warrants disabling the feature … just be careful!

Metadata Pitfall

You just hit the SEND button. You start to sweat and suddenly experience a panic attack. You and your associate were revising a contract for a client. Before sending it on to your client, you forgot to accept or reject tracked changes and remove all the hidden text from the word processing document. You also forgot to remove any other "metadata" before sending it. Anyone who receives the file can easily find out the following information:

- All the people who authored any part of the document … including the original author who happens to be a managing partner at a competing law firm
- The hidden text that states the client "is a moron!"
- The suggested changes made by a 1st year associate in your office (half of which were a bit moronic)
- The total time you spent revising the document … 15 minutes (even though you billed the client 8 hours – which is a big ethical problem of its own!)

This story is not fictional. It actually happened. This is just one of many bad messes that you can get yourself into if you are not using technology correctly.

The Bad News … Say goodbye to the glory days when you could simply draft and send a word processing document to opposing counsel or your client.

The Good News … Most technology-created pitfalls are easily avoidable if reasonable steps are taken.

Metadata … Is it really a "Nightmare"?

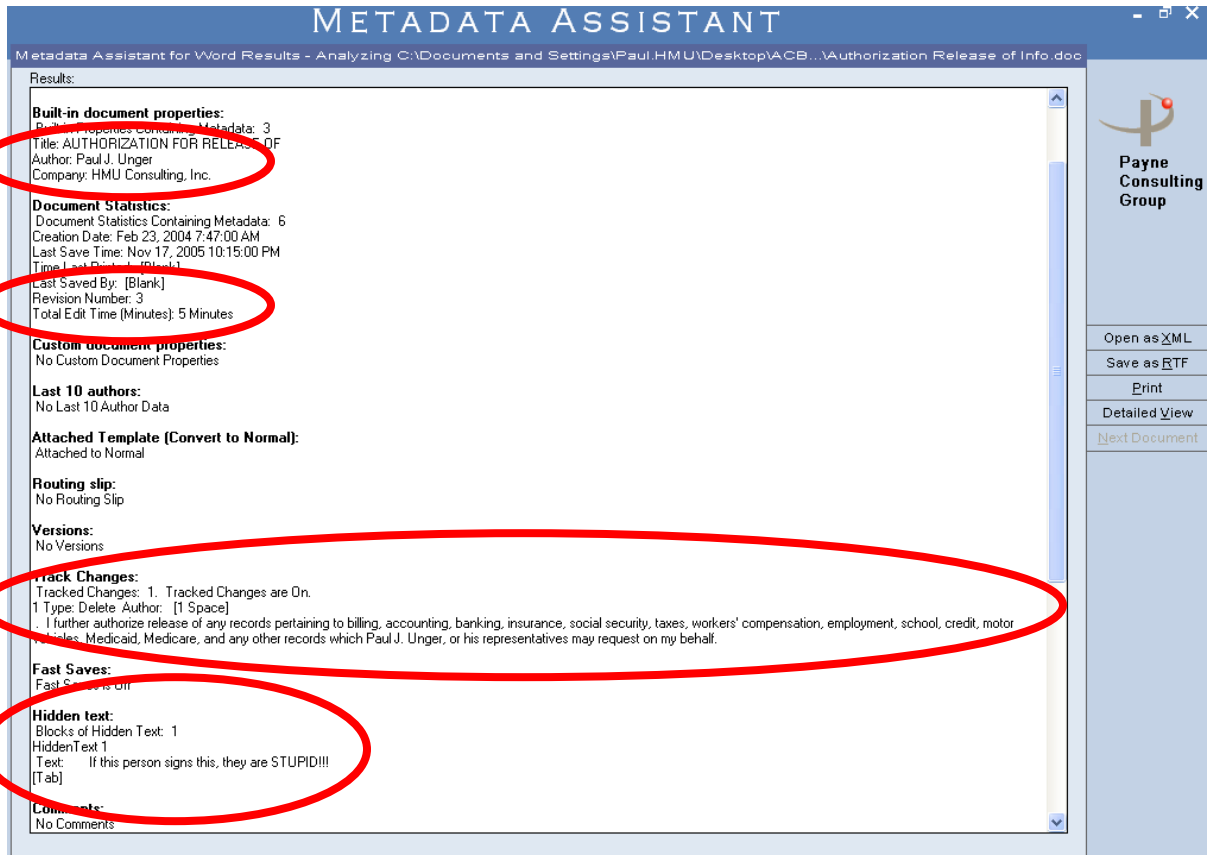
What is Metadata? Literally, metadata means "data about data." In the personal & business computing world, it is the hidden or invisible information contained within computer files. Most notably in the legal technology field, lawyers worry about metadata found in Microsoft Word, PowerPoint, Excel, Corel WordPerfect and Adobe Acrobat files.

The kind of information that can be found under the surface a Word document, for example, might be:

- Last 10 authors
- Firm name
- File locations

- Tracked changes
- Hidden text
- Deleted document comments
- Routing slip information
- Document versions
- Revision time
- Document properties (file size, modification date, etc.)
- Fast saves
- Hyperlinks
- Linked objects

As an example, below is part of a report showing metadata using a widely-used metadata remover called "Metadata Assistant" created Payne Consulting Group.



Why have metadata if it is so bad? Well, quite frankly because it is really useful information and it was never intended to be bad. Microsoft designed its programs to store metadata for a variety of reasons, one of which was for document management before Document Management Systems (DMS) existed.

As a very simple example, if one wanted to find all documents created or modified between December 1, 2005 and December 31, 2005 as a way to verify that you created

timesheets for all your billable time in December, you would perform a search using a Microsoft Find Files or Folders utility or a third-party program like dtSearch that searches … yes … metadata.

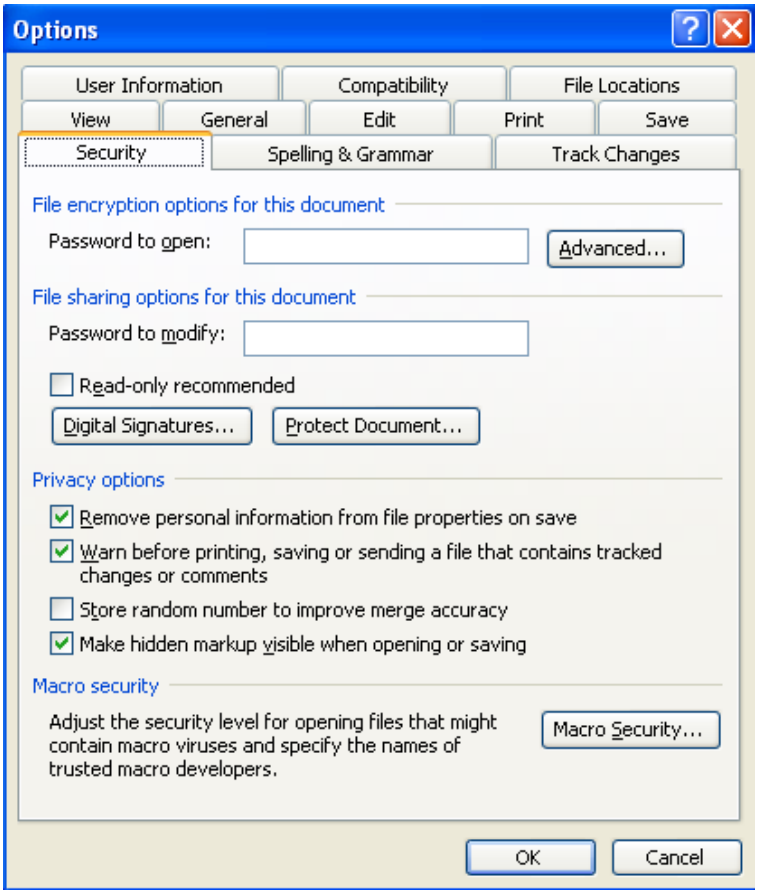
If you exchange electronic word processing files with anyone outside your office and do nothing to remove metadata it can result in a nightmare if the file contains metadata that was intended to be confidential. So, yes, it can indeed be a nightmare as many legal technologists claim. However, if you are not careless, these problems are not a nightmare at all. You just need to know what to do. Below is a list of what you need to do to avoid the word processing so-called "metadata nightmare."

❶ Learn the Security Settings within Microsoft Word

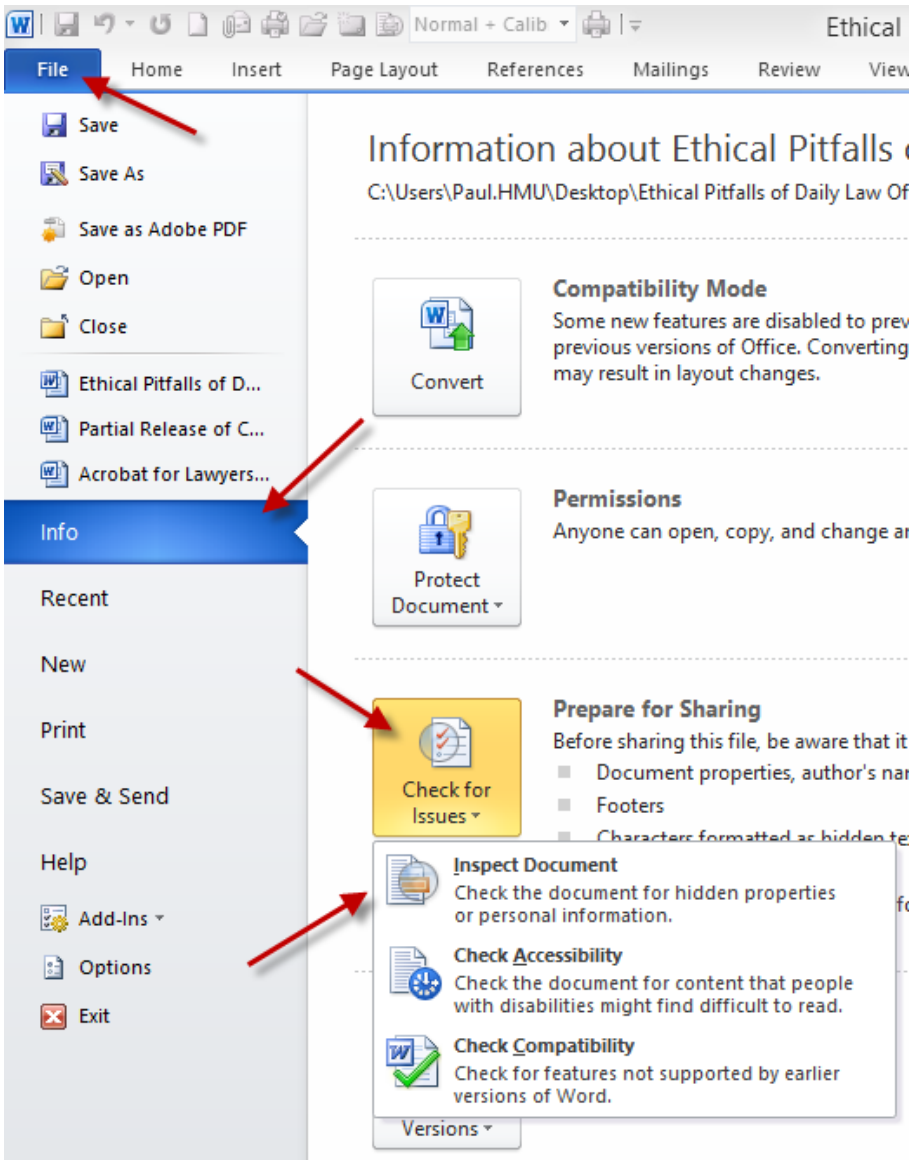
Much of the "dangerous" metadata contained in Microsoft Word documents can be prevented from transmission if certain security features are turned on.

In Word 2003 and earlier, open Word and select **Tools** and then **Options** and select the **Security** tab:

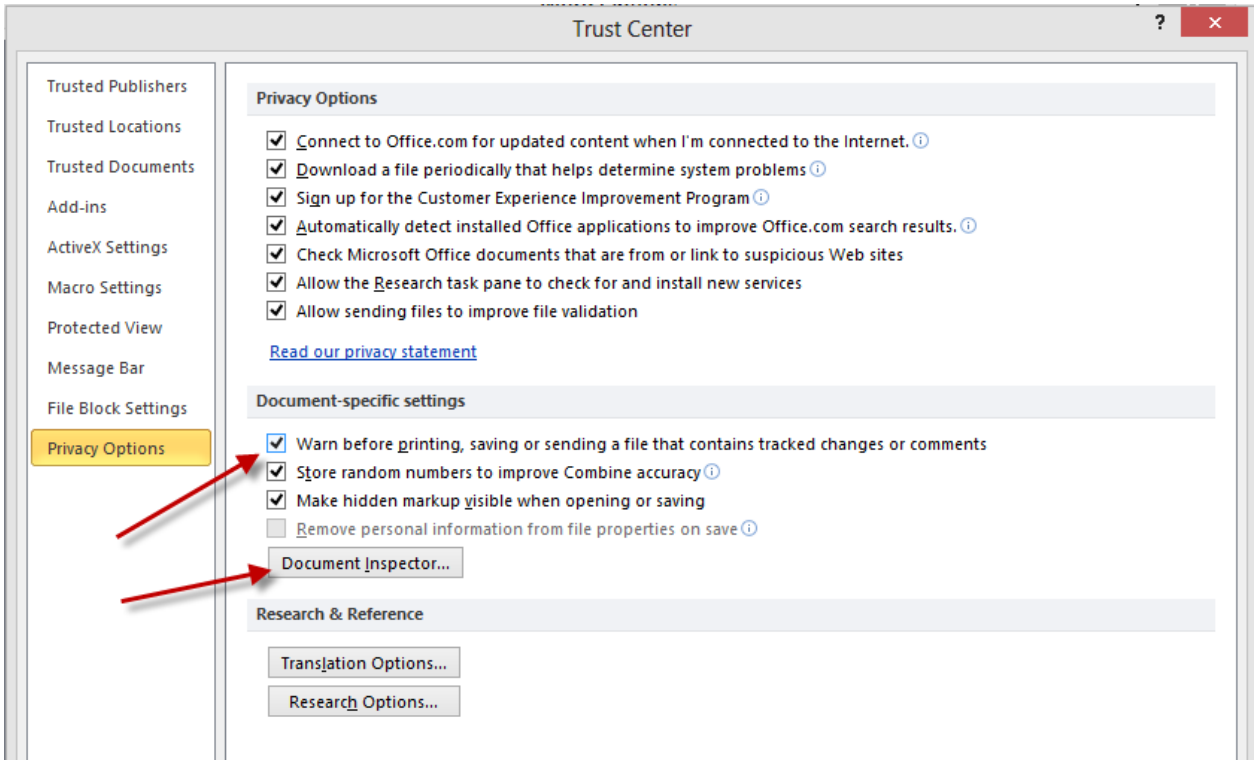
- Check "Remove personal information from file properties on save"
- Check "Warn before printing, saving or sending a file that contains tracked changes or comments"
- Check "Make hidden markup visible when opening or saving"



In Word 2010 and later, you must run the document inspector, which is most easiest found at **File > Info > Check for Issues > Document Inspector.**


Normal + Calib
Ethical
File
Home
Insert
Page Layout
References
Mailings
Review
View
Save
Save As
Save as Adobe PDF
Open
Close
Ethical Pitfalls of D...
Partial Release of C...
Acrobat for Lawyers...
Info
Recent
New
Print
Save & Send
Help
Add-Ins
Options
Exit
Information about Ethical Pitfalls
C:\Users\Paul.HMU\Desktop\Ethical Pitfalls of Daily Law Of
Convert
Compatibility Mode
Some new features are disabled to prev
previous versions of Office. Converting
may result in layout changes.
Protect Document
Permissions
Anyone can open, copy, and change ar
Check for Issues
Prepare for Sharing
Before sharing this file, be aware that it
Document properties, author's nar
Footers
Inspect Document
Check the document for hidden properties or personal information.
Check Accessibility
Check the document for content that people with disabilities might find difficult to read.
Check Compatibility
Check for features not supported by earlier versions of Word.
Versions

You may want to have Word warn you if there are tracked changes comments on save, print or send commands. It is found under **File** and then **Options**, **Trust Center, Trust Center Settings**, and then **Privacy Settings**.



You can also download and install a free add-in from Microsoft - Office 2003/XP Add-in: Remove Hidden Data. CAUTION: This will not remove all metadata. Metadata still exists. The question is whether it is benign or damaging metadata.

❷ Learn About Tracked Changes in Word

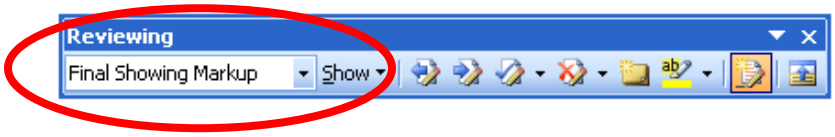
"Track Changes" is a fantastic feature available in Microsoft Word that allows multiple reviewers of a document to literally track changes or compare documents electronically to see what edits have been made to a document. My first suggestion is to start using it if you have the need for that type of feature. My second suggestion is to learn how to use it correctly so those internally tracked changes do not end up in the hands of opposing counsel or even your own client. Here is an example of a paragraph that has tracked changed turned on.

"Track Changes" is a fantastic feature available in Microsoft Word that allows multiple reviewers of a document to literally track changes or compare documents electronically to see what edits have been made to a document. My first suggestion is to start using it if you have the need for that type of feature. My second suggestion is to learn how to use it correctly so those internally tracked changes do not end up in the hands of opposing counsel or even your own client so you don't look like a freaking idiot. ~~Here is an example of a paragraph that has tracked changed turned on.~~

Added Text & Deleted Text

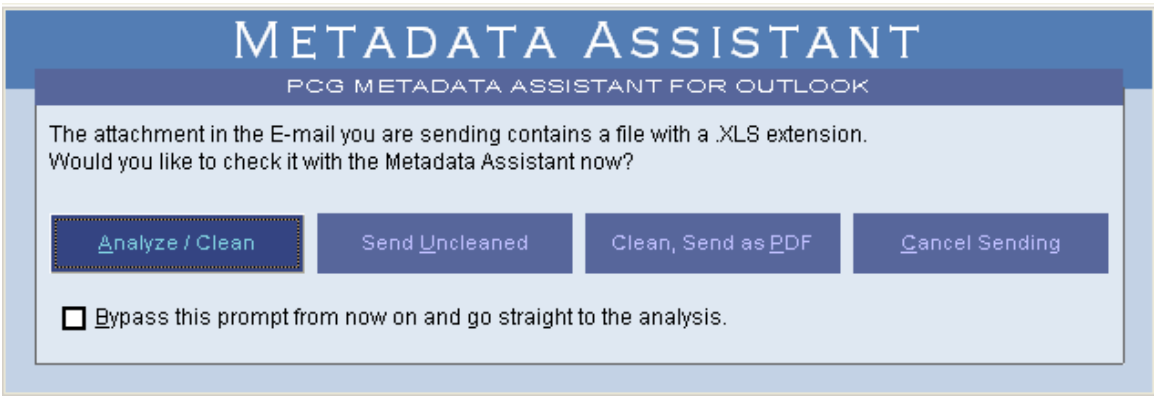
The first big mistake that people make is not accepting or rejecting all changes before sending the document on to opposing counsel for their review. It is imperative that you go through the entire document and accept or reject all the changes made in the document. Changes that were made between versions that are not **accepted** or **rejected** will show up in a metadata analysis. This may expose your thought process or a weakness that you knew about, but the other side didn't think of … at least until now!

The second critical thing that you do is make sure that you can see the tracked changes (the marked up or redlined version). Be sure that you select **Final Showing Markup** in the reviewing toolbar. Otherwise, you may not even realize that there are tracked changes in the document. Also remember in the security settings (discussed above) there is an option that will warn you before printing, saving or sending a document that has tracked changes.



❸ Consider a Third-Party Meta Data Removal Tool

Another option which I generally favor is investing in a metadata removal tool. These are programs that strip the metadata out of electronic documents before you send it to another party. You can either run the cleaner manually on a document OR intercept, evaluate and clean all attached documents when you are emailing it to the outside world. This makes the process much easier and requires no working knowledge of how tracked changes work or security settings within the program. As an example, Donna Payne's Metadata Assistant intercepts attachments with this dialog box when you hit the **Send** key from Outlook's email:



I suggest a metadata remover for those people who actually exchange electronic documents containing potentially harmful metadata. Many lawyers don't do this. If you do not exchange documents, don't spend the money.

Metadata removal tools to consider:

- Metadata Assistant (Payne Consulting Group – www.payneconsulting.com). Cost is $79 per license.
- CleanDocs (www.cleandocs.com)
- Workshare Protect (www.workshare.com). Cost is $29.95 per year.
- iScrub by Esquire Innovations (www.esqinc.com).
- Out-of-Sight by SoftWise (www.softwise.net). Cost is $30 per user.
- ezClean by KKL Software (www.kklsoftware.com). You must buy at least 20 licenses at $20 per license.

❹ Exchange PDF Documents

Although PDF documents do contain some metadata, they do not contain as much. Tracked changes can indeed be passed on from a Word document to PDF, but you would have to do it one of two ways. First, the person converting the document would have to attach the Word file into the PDF in its native format (Acrobat allows you to attach files into a PDF document). While possible, I know of no one who uses that function. So…just don't do it that way. A second way is if you have the tracked changes visible when you convert to PDF. That would create a PDF with the tracked changes blatantly showing. You would have to be blind or extremely careless not to see the tracked changes in the Word document and the resulting PDF. Also, if you have your printing configuration in Word set to print 'tracked changes' along with the document. In this instance, again, you would have to be blind and 100% careless by failing to review the newly created PDF before sending it.

Another benefit sending a PDF is that PDF documents are less editable, especially if you have security turned on. This has less to do with metadata, but it is a nice benefit if you send a PDF to a client, for instance, and tell them to print and sign the attached. If the document is editable, the client could change the text using Adobe Acrobat and then sign it (and not tell you). If the PDF document is secure, the signing party would have to go to greater lengths to make a deceptive change that is not noticeable.

❺ WordPerfect also contains Meta Data

Contrary to popular belief, WordPerfect also contains metadata. Examples of metadata stored in WordPerfect documents include:

- Authors
- Tracked changes
- Comments and hidden text
- Document revision annotations
- Undo/Redo history
- User names, initials and company
- Document summary information
- Header/Footer information
- Hyperlinks

See Minimizing Metadata in WordPerfect 12 Documents, Corel Corporation, copyright 2004.

Like Microsoft, Corel also made available a metadata removal tool which is available on their website. Also check WordPerfect Universe (www.wpuniverse) which offers a metadata removal tool for WordPerfect.

Keeping Information Safe from Disaster, Accidental Loss, Theft, Viruses and Malicious Intruders

ABA Model Rule 1.6 also imposes a duty upon lawyer to keep their technology in safe and working order to protect client information. Similarly, in Canada, Section 3.3 of the Rules of Professional Conduct requires competence and confidentiality.

As an example, section 5.7 of the Law Society of Upper Canada's Technology Practice Management Guidelines states:

5.7 Confidentiality

Lawyers using electronic means of communications shall ensure that they comply with the legal requirements of confidentiality or privilege. (Section 3.3 of the Rules of Professional Conduct).

When using electronic means to communicate in confidence with clients or to transmit confidential messages regarding a client, a lawyer should

- develop and maintain an awareness of how to minimize the risks of disclosure, discovery or interception of such communications
- discuss the inherent security risks associated with each technology with the client and confirm in writing that the client wishes to communicate using that method
- use firewalls and security software to protect at-risk electronic information
- use and advise clients to use encryption software to assist in maintaining confidentiality and privilege
- take appropriate measures to secure confidential information when using cloud-based services
- develop and maintain law office management practices that offer reasonable protection against inadvertent discovery or disclosure of electronically transmitted confidential messages.

ABA Model Rule 1.6(a) states:

> (a) A lawyer shall not reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by division (b) or required by division (c) of this rule.

Comment 16 further states:

> Acting Competently to Preserve Confidentiality [16] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1, and 5.3.

The State Bar of Arizona issued an opinion in response to an inquiry about the steps a law firm must take to safeguard data from hackers and viruses. They stated:

> ER's 1.6 and 1.1 require that an attorney act competently to safeguard client information and confidences. It is not unethical to store such electronic information on computer systems whether or not those same systems are used to connect to the internet. However, to comply with these ethical rules as they relate to the client's electronic files or communications, **an attorney or law firm is obligated to take competent and reasonable steps to as-sure that the client's confidences are not dis-closed to third parties through theft or inadvertence.** In addition, an attorney or law firm is obligated to take reasonable and competent steps to assure that the client's electronic information **is not lost or destroyed.** In order to do that, an attorney must either have the competence to evaluate the nature of the potential threat to the client's electronic files and to evaluate and deploy appropriate computer hardware and software to accomplish that end, or if the attorney lacks or cannot reasonably obtain that competence, to retain an expert consultant who does have such competence. (Emphasis added.)

State Bar of Arizona, Opinion No 05-04, July, 2005.

The ABA Standing Committee on Ethics and Professional Responsibility has stated something similarly. In Opinion 95-398, they concluded "[a] lawyer who gives a computer maintenance company access to information in client files must make reasonable efforts to ensure that the company has in place, or will establish, reasonable procedures to protect the confidentiality of the client information."

In 2006, Nevada spoke to a similar issue relating to offsite storage of data and reached a consistent conclusion. They stated that a lawyer may store confidential information electronically with a third party to the same extent and subject to the same standards as storing confidential paper in a third party warehouse. In doing so, the lawyer must act" competently and reasonably to ensure the confidentiality of the information. Opinion 33 (February 9, 2006), Nevada Standing Commission on Ethics and Professional Responsibility.

David Reis, a partner with Thorp, Reed & Armstrong, LLP in Pittsburgh, PA, and a colleague legal technologist suggests the following basic steps:

1. Keep your operating systems patched.

2. Install and use anti-virus and spyware protection on all computers (and keep them all current with updates).

3. Use Care with Email attachments and Embedded Links.

4. Make backups of important files and folders.

5. Use strong passwords or other authentication (combine numbers and characters).

6. Use care when downloading and installing programs.

7. Install and use a hardware firewall.

8. Install and use a file encryption program.

Additionally, I recommend:

1. Apply the above principles to laptops and PCs that are used at home for business purposes.

2. Have a secondary backup system (consider an online backup service like Iron Mountain, MozyPro or Carbonite).

3. Encrypt laptops and external hard drives or flash drives where you store or transfer client information.

4. Use Adobe Acrobat Pro (or similar competing products like Kofax PowerPDF Advanced, pdfDocs, etc.) to redact important client information (social security numbers, billing information, etc.) contained in documents that you may have to file with the court electronically.

Disposing of Old Computer Equipment

You just got all new workstations for your staff. What do you do with the old workstations? What about all the confidential information contained on the hard drives? If you think that you deleted the information, think again! You may be violating Model Rule 1.6, HIPAA and opening yourself up to liability.

According to a study performed at the Massachusetts Institute of Technology (MIT), two graduate students scavenged through the data inadvertently left on 158 used disk drives. They found more than 5,000 credit card numbers, detailed personal and corporate financial records, numerous medical records, gigabytes of personal email and pornography. The disk drives were purchased for less than $1,000 from eBay and other sources of used computer hardware. Only 12 were properly sanitized (http://web.mit.edu/newsoffice/2003/diskdrives.html) .

❶ Avoiding the Ethical Pitfall – What is Required?

A lawyer must act reasonably to preserve confidences and secrets of his/her client. The rules in the U.S. and Canada impose the same duty. ABA Rule 1.6 (and old rule DR 4-101) imposes a duty to preserve confidences and secrets. In all likelihood, disposing of employee workstations was not contemplated when DR 4-101 was adopted by the Supreme Court of Ohio on October 5, 1970 and likewise in other jurisdiction following suit; nevertheless, the rule applies. The New Rule as written, establishes a broad duty to preserve confidences and secrets that applies to all methods of communication. The duty clearly extends to disposing of client information and communication.

What does this mean in practical terms? Reasonableness, in my opinion, requires one of the following:

(A) Retain the hard drive(s) of the computer(s) for safe keeping; or
(B) Hire a company to erase and reformat the hard drives[2]; or
(C) Hire a company that uses a special data erasing program.

[2] Erasing and reformatting hard drives will not completely protect the data. A skilled computer technician or forensic expert can likely recover some (not all) data from that hard drive using specialized software. This process is time-consuming and expensive.

❷ Use a Computer/Electronics Recycling Service

Seek out a reputable computer disposal vendor in your area. In Canada and U.S., and depending on your location, Global E Waste Solutions (www.globalewaste.net) offers these services, as well as Iron Mountain (www.ironmountain.com). Both companies are reputable vendors who are committed to proper data destruction and not filling up landfills with electronics.

In the U.S., PCDisposal, IT AMG Disposal Services, and Retire-IT offer these services nationwide. They will pick up your units (or have them shipped), properly delete data, and provide a certified report.

PCDisposal.com
Toll Free: 877-244-0250
www.pcdisposal.com

I.T. AMG Disposal Services
Toll Free: 877-625-4872
www.itmag.com

Retire-IT
Toll Free: 888-839-6555
www.retire-it.com

Local Vendors: Similarly, there may be numerous local vendors in your area who provide these services if you prefer to support local businesses. A quick Google search will identify potential candidates.

Get Multiple Quotes: This is a competitive business so it is to your benefit to obtain quotes from more than one vendor!

IMPORTANT: Many computer recycling companies will not sanitize data. Make sure that you specifically request this, or it may not be done.

❸ Do-It-Yourself

You could do the DOD-level data destruction yourself with programs like the ones listed below, OR simply take out your screwdriver and physically remove the hard drive and throw it in a locked file cabinet. Programs that you can buy to erase data yourself are:

- cyberCide Data Destruction (www.cyberscrub.com) offers a product for $29.00.
- Active@ Kill Disk - Hard Drive Eraser (www.killdisk.com/eraser.htm) offers a free version and a professional version for about $30.
- OnTrack DataEraser™ (www.ontrack.com) offers a personal version for $29.

IMPORTANT NOTE: If trying to **sanitize data on a solid state drive (SSD)** (most hard drives after 2013), I recommend that you use Parted Magic (www.partedmagic.com), or rely on an expert to do it for you and provide written certification. The above tools will not work on SSDs.

❹ Don't Forget SmartPhones, Tablets, and Copy Machines!!

Be sure to follow manufacturer's instructions on wiping all data from smartphones and tablets.

Copy machines are the most often forgotten about devices that contain an enormous amount of potentially confidential client information. Copy machines just don't copy anymore. They first take a snapshot image of the document, stores it on a hard drive, and then prints a copy per your instructions. Depending on the size of the hard drive and the volume you scan, your machine can hold days, weeks, months, and potentially years of "copied" documents.

CBS did an excellent story on copy machines that is quite alarming:
http://www.youtube.com/watch?v=iC38D5am7go

Password Management and Two-Factor Authentication

In short, passwords need to be (1) unique; (2) strong; and (3) stored safely. With as many passwords that we maintain, personally and professionally, there are some very inexpensive, but fantastic solutions that can provide you with relief.

❶ Two-Factor Authentication is Critical

Putting in place two-factor (or multi-factor) authentication (also known as 2FA) is more important today than changing passwords or using unique passwords. I still think unique passwords is important, but changing passwords every 30 days has recently been regarded as a waste of time. 2FA is more important because without the second method of authentication (usually a text message notification requiring your intervention, like entering a code, providing a PIN, proving your fingerprint from your smartphone) a cybercriminal will not be able to login to an important account even if they have your password. See this regarding Microsoft finally acknowledging this year that 2FA is critical and changing passwords is not very important anymore: https://www.cnet.com/news/microsoft-admits-expiring-password-rules-are-useless/.

❷ Make Passwords Strong and Unique

Passwords should not be re-used. If your credentials are compromised, they could be sold on the dark web. If you used the same password at another site (i.e. Dropbox, a client portal, your bank, etc.) your information (potential confidential information or documents) is now compromised. Moreover, most cybersecurity experts now advise people to use long phrases that combine letters, numbers and characters. I generally aim for at least 12 characters.

❸ Safely Store your Passwords

If you don't have a password manager, I recommend saving your passwords in an encrypted Word or Excel file (see above how to encrypt Word & Excel files).

❹ Password Management Programs

I strongly recommend investing in a password manager. In fact, I believe in this technology so much, that our company now provides a password manager to every employee in our organization. The good news is that the above 3 objectives can be

achieved with some very inexpensive solutions. Here are some of the common features:

- Automatic password generators for unique passwords that never repeat
- Automatic password generators that create insanely strong & cryptic passwords
- Cloud encrypted storage of passwords
- Access to passwords from all mobile and desktop devices
- Integration with all major browsers
- Works on a Mac or PC
- Apps for iPhone, Android-based phones, iPads, Android tablets
- Safe storage of financial and estate information
- Ability to share with loved ones or individuals at work

Highly Rated Password Managers

1. **Dashlane** (www.Dashlane.com)
2. **LastPass** (www.LastPass.com)
3. **1Password** (www.1password.com)
4. **Roboform** (www.roboform.com)
5. **Keeper** (www.keepersecurity.com)

Section Thirteen

Internet Law / Social Media

Jessica L. Ballard-Barnett
Judicial Law Clerk, The Honorable Melissa S. May, Judge
Indiana Court of Appeals
Indianapolis, Indiana

Seth R. Wilson
Adler Attorneys
Noblesville, Indiana

Section Thirteen

Internet Law / Social Media…… Jessica L. Ballard-Barnett
Seth R. Wilson

Indiana Law Update 2022

Jessica Ballard-Barnett, Indiana Court of Appeals
Seth R. Wilson, Adler Attorneys

#Professional_Responsibility

I. The New York State Bar Association Committee on Professional Ethics issued an opinion[1] on April 8, 2022, regarding a lawyer's duty to protect client information stored on that lawyer's smartphone.
   A. The opinion specifically addresses the situation wherein a smartphone app requests access to the lawyer's contacts, which may include confidential information regarding clients' contacts.
   B. Professional Conduct Rule 1.6 requires a lawyer to "make reasonable efforts to prevent the inadvertent and unauthorized disclosure or use of, or unauthorized access to" the confidential information of a client, former client, or prospective client.
      1. Factors to consider when determining whether any contacts are confidential
         a) Whether the contact information identifies the smartphone owner as an attorney, or more specifically identifies the attorney's area of practice
         b) Whether people included in the contacts are identified as clients, as friends, as something else, or as nothing at all
         c) Whether the contact information also includes email addresses, residence addresses, telephone numbers, name of family members or business associations, financial data, or other personal or non-public information that is not generally known
   C. Thus, without a client's consent, a lawyer cannot opt in to sharing their contacts, which may include confidential client contact information.
   D. May be a best practice to keep a separate smartphone for all business/client information. This smartphone would not have any apps on it.

Deep_Fakes

I. What is a deepfake?[2]

[1] https://nysba.org/app/uploads/2022/04/Opn-1240-with-letterhead.pdf
[2] https://www.theguardian.com/technology/2020/jan/13/what-are-deepfakes-and-how-can-you-spot-them

A. A deepfake is, generally, a video or audio altered in a way as to portray images or audio it does not. Deepfakes use a form of artificial intelligence called deep learning to make images of fake events.
B. Most deepfakes are pornographic, using the mapped faces of celebrities and replacing the faces of porn stars. This technique has become more mainstream, creating entirely fictional photographs from scratch.
C. Audio can be deepfaked as well, using voice skins or voice clones to change the audio of a video

II. Protecting against deepfakes[3]
A. Microsoft is set to boost its existing security protection to help identify deepfake videos and images through a partnership with Truepic, a company which provides photo and video verification services.
B. Truepic brings together several high-integrity data fields for every file, analyzes them for traces of manipulation, then protects them with cryptographic hashing. The data is then sealed, and a chain of custody helps verify the authenticity of the image. This process instantly flags if a video or photo has been manipulated.
C. Truepic already has a library of "trusted visual documentation" which is used by Equifax, Ford, and Transunion.

III. Why do I care?
A. Indiana Rules of Professional Conduct 1.1 - Competence
1. Comment 6
a) To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with the technology relevant to the lawyer's practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

#Social_Media

I. Facebook
A. Facebook Sunglasses[4]
1. Facebook teamed up with Ray-Ban to create "Stories shades" which is accessible through a secondary Facebook app called "Facebook View."
2. The sunglasses operate like a Bluetooth - the user can take calls and listen to music. They also have a camera, which the user can use to take pictures and then use a voice command to post the

[3] https://www.msn.com/en-us/news/technology/microsoft-wants-to-try-and-kill-off-deepfakes-for-good/ar-AAOtbSq
[4] https://www.sfgate.com/culture-columns/article/Facebook-Ray-Ban-sunglasses-Drew-Magary-16497129.php

picture to Facebook. The photo is also stored on Facebook View, from where the user can download the picture at another time.

3. Ethical concerns include inappropriate pictures or pictures taken without the consent of the subject as well as the ability to use the sunglasses to surveil a location for criminal purposes.
4. Amazon also sells similar glasses, and Apple is set to introduce AR Glasses sometime soon.

B. Facebook Outage[5]

1. On October 4, 2021, Facebook seemed to disappear from the internet, causing outages in most of the world.
2. How did it happen?
    a) The Border Gateway Protocol ("BGP") exchanges routing information between Autonomous Systems ("AS") such as Facebook. These AS make up networks, and the internet is a series of networks within network. BGP allows other networks to know a site like Facebook exists and allows it to connect with other networks. Without BGP, the internet wouldn't work.
    b) Each AS has an Autonomous System Number ("ASN"). Each ASN needs to announce its prefix routes to the internet using BGP; otherwise networks would not be able to attach to it.
    c) At the beginning of the Facebook outage, Facebook's Domain Name System ("DNS") stopped announcing routes to the BGP. This meant other networks could no longer find Facebook, so it was essentially "unplugged" from the internet.
    d) With Facebook unavailable, users flocked to other social media sites such as Twitter and Signal.
3. It is important to know that the internet is a very complex and interdependent system of millions of systems and protocols working together.

II. Instagram Kids[6]

A. In September 2021, Instagram decided to put a "pause" on its plan to develop a version of the app for children under age 13

1. The company felt a need to develop a version for children under 13 because younger children were already misrepresenting their age to gain access to the site.

B. The decision was prompted by criticism from policymakers and social scientists concerned with the effect of social media on a child's mental health.

[5] https://blog.cloudflare.com/october-2021-facebook-outage/
[6] https://www.wrtv.com/news/national/instagram-putting-a-pause-on-a-version-of-its-app-for-kids-under-13

1. Opponents noted that, “[u]se of social media can be detrimental to the health and well-being of children, who are not equipped to navigate the challenges of having a social media account”
2. Studies show that children who use social media experience an “increase in mental distress, self-injurious behavior and suicidality among youth.”
3. Wall Street Journal reported Facebook’s internal data indicating the app made body image issues worse for one in three girls.

#Apple

I. Claim against Spyware[7]

A. In November 2021, Apple filed a claim against NSO Group, an Israeli firm that sells software to government agencies and law enforcement that enables those agencies to hack iPhones.

1. The claim was filed after a report from Amnesty International indicating recent-model iPhones belonging to journalists and human rights lawyers had been infected with Pegasus, an NSO Group malware.

a) The malware was loaded by a single click from a malicious text message

b) Pegasus users can remotely surveil the iPhone user’s activities, collect emails, text messages, and browsing history as well as access the device’s microphone and camera.

c) NSO also created Apple ID accounts to disseminate the malware, violating iCloud’s terms of service.

B. The claim requested a permanent injunction banning NSO Group from using Apple software, services, or devices. Additionally, Apple has asked for over $75,000 in damages.

C. The U.S. Commerce Department blacklisted NSO Group earlier in November 2021, and Meta is pursuing a similar lawsuit, alleging NSO Group helped hack users of WhatsApp.

D. NSO stated, in response to the lawsuit, “Thousands of lives were saved around the world thanks to NSO Group’s technologies used by its customers. Pedophiles and terrorists can freely operate in technological safe-havens, and we provide governments the lawful tools to fight it. NSO Group will continue to advocate for the truth.”

[7] https://www.cnbc.com/2021/11/23/apple-sues-nso-group-company-known-for-hacking-iphones-on-behalf-of-governments.html#:~:text=Apple%20is%20suing%20NSO%20Group,infected%20with%20NSO%20Group%20malware

II. Legacy Contact[8]
    A. Allows the user to pass on the user's iPhone and iCloud data to another person upon the user's death.
        1. Your legacy contact will need an access key in the form of an OR code and certification of the date.
        2. Up to five legacy contacts can be added; and they can be removed or edited at any time.
        3. The legacy contact gets all or nothing - the user can not indicate limitations based on legacy contact.
        4. Access Legacy Contact through Settings, Profile or Apple ID, and Password & Security

III. AirTag Stalking
    A. From last year…
        1. General Information[9]
            a) Coin-sized device that can be attached to anything and tracked using Apple's "Find My" service.
            b) When activated, the AirTag sends out a signal, received by other Apple devices, assisting the signal to reach the owner's Apple device
            c) Must be close enough to another Apple device to work
        2. Security Concerns[10]
            a) Many expressed concerns about unwanted personal tracking
            b) Apple attempted to address that by incorporating warnings from the device and on Apple devices, which solves some of the problem
            c) However, those warnings stop after three days and do not broadcast to Android devices.
    B. There have been multiple instances of AirTags being used to "stalk" people or personal property, however, are AirTags contributing to the problem of stalking or merely making us more aware of it because of the unique stalking countermeasures built into the device?[11]
        1. The opinion that AirTags have caused more stalking is a psychological phenomenon called the Frequency Illusion - the awareness that people are doing something creates the illusion that it happens more frequently than before.

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[8] https://consideringapple.com/the-iphone-feature-to-turn-on-before-you-die-legacy-contact-set-up-use/16468/; also https://techiai.com/the-iphone-feature-to-turn-on-before-you-die/

[9] https://www.apple.com/airtag/

[10] https://www.washingtonpost.com/technology/2021/05/05/apple-airtags-stalking/

[11] https://www.macstories.net/linked/are-airtags-causing-stalking-or-making-us-more-aware-of-it/

2. Thus, the incidents of stalking involving AirTags is actually bringing to the forefront the issue of stalking generally and may prompt additional law enforcement and legislative action to protect stalking victims.

C. On February 10, 2022, Apple issued a statement on the use of Apple's AirTag and unwanted tracking.[12]
   1. Apple indicated it was actively working with law enforcement to determine those AirTags used to stalk or track someone, as each AirTag has a unique serial number and paired AirTags are associated with a specific Apple ID. Apple also edited its policies regarding cooperation with law enforcement to create fewer barriers.
   2. Apple updates to address tracking issues
      a) Privacy warnings during AirTag setup indicating AirTags are to be used to track the user's belongings and that using an AirTag to track someone
      b) AirTags will not be displayed as "Unknown Accessory Detected"
      c) Updated support documentation including additional explanations of which "Find My" accessories may trigger an unwanted tracking alert. Also included are resources to individuals who feel their safety is at risk, such a National Network to End Domestic Violence and the National Center for Victims of Crime.

IV. Efforts to Detect Child Sexual Abuse Materials ("CSAM")[13]

A. Apple iOS 15.2 will include two features designed to detect CSAM
   1. The update will scan a user's photos before uploading them to iCloud, using AI to match user images containing child pornography and missing children against government-accredited watchlists. If the offending material is located, it is flagged and sent to a human reviewer. If the human reviewer confirms the image is inappropriate, it will be sent to the National Center for Missing and Exploited Children.
   2. The update will also allow parents to enable Apple's AI on their children's iPhones to warn when nude or sexually explicit imagery is sent or received via iMessage.
      a) When a message containing an image designated by the AI to be sexually explicit is sent or received by a person identified as a minor, the user will receive a prompt

[12] https://www.apple.com/newsroom/2022/02/an-update-on-airtag-and-unwanted-tracking/

[13] https://www.forbes.com/sites/zakdoffman/2021/11/13/apples-billion-iphone-users-shock-imessage-update-after-security-warnings/?sh=d15f44b4b2a9&fbclid=IwAR31pqpqavopOqTTRQ3LuSWhrd6xth4RV99wjxFXiX-Wu47bspdprDi1djs; and see https://www.comparitech.com/blog/information-security/apple-csam/

indicating to the user that the image is present, and the user must then choose to send or receive the photo, or not to. If the user does not accept the picture, nothing else happens. If the user accepts the picture, the parent account is notified as configured in the Family Sharing plan.

B. Concerns about the updates
    1. Privacy
    2. Use of technology to detect other types of images or information
    3. CSAM database is unauditable.
    4. The user's device will not notify the user that an image of suspected child pornography has been found on their phone.
    5. False positives or over censorship

#Eskenazi_data_breach

I. In August 2021, Eskenazi Hospital fell victim to a ransomware attack[14]
    A. Ransomware[15] is…
        1. Form of malware that encrypts a victim's data, requiring the victim to pay a "ransom" to regain control of their data.
            a) Payment is normally in the form of cryptocurrency
        2. Often delivered via phishing scam - someone within the organization opens an attachment to an email masquerading as a file they should trust.
        3. Also leakware or doxware attacks, where an attacker threatens to publicize sensitive data allegedly on victim's hard drive unless a ransom is paid.
        4. Targets are often organizations who need immediate access to their data - governmental agencies, hospitals, banks.
        5. To prevent ransomware
            a) Keep operating system updated to ensure the organization has fewer vulnerabilities to exploit.
            b) Don't install software unless you know what it does
            c) Do not give administrative privileges to all employees
            d) Consider antivirus or whitelisting software
            e) Back up files
    B. Eskenazi Hospital paid $55,000 to get its data back

[14] https://www.wthr.com/article/news/local/eskenazi-cyberattack-personal-data-leaked-dark-web/
[15] https://www.csoonline.com/article/3236183/what-is-ransomware-how-it-works-and-how-to-remove-it.html

C. Before the data was returned, the cyber attackers stole medical, financial, and demographic information from current and former patients, including those who have since died, and posted it on the dark web
    1. The posted information may include name, date of birth, age, address, telephone number, email addresses, medical record number, patient account number, diagnosis, clinical information, physician name, insurance information, prescriptions, dates of service, driver's license number, passport number, face photos, social security number, and credit card information.
    2. Per Indiana law, affected parties were sent notice of the breach and directed to review information reported by the credit reporting bureaus to detect any suspicious activity.

#Amazon_Astro

I. In late September 2021, Amazon[16] announced the release of Amazon Astro, a home robot that links with other Amazon products (Alexa, Ring, Echo) in the home to provide additional security and information to the user through the use of artificial intelligence, computer vision, and advanced sensor technology. The device is available by invite only.

II. Early reviewers[17] note Astro is cute, but may not yet be worth the money with a hefty price tag of $1,000 for early adopters and $1,450 once Astro is available to the general public.
    A. Setup is easy, as is the case with most Amazon devices
    B. Astro was unable to map the floor plan of the CNET smart home because the floors were too shiny and natural light from the windows interfered with the cameras.
    C. Astro is effective as a security device, allowing the user to see a live stream of any area in their house, and alerts occupants that they will be on the live stream.
    D. Astro is also effective as an item delivery device, provided you load and unload Astro with the items the user would like delivered
    E. Astro also is interactive and provides a pet-like experience
    F. Reviewers had privacy concerns, despite Amazon's insistence Astro would delete certain information upon a user's request. Amazon indicated in its news release that Astro would respect any boundaries set by the user, such as the command to stay out of private areas. Additionally, as with any home device, concerns about hacking persist.

[16] https://www.aboutamazon.com/news/devices/meet-astro-a-home-robot-unlike-any-other
[17] https://www.cnet.com/home/smart-home/amazon-astro-review/

#Genetic_privacy_law

I. On January 1, 2022, new laws in California went into effect to protect residents' data privacy, specifically their rights to the privacy of their genetic data.
   A. Why were these laws passed?[18]
      1. After the Golden State Killer and the perpetrators of other cold cases were identified based on the use of a home genetic testing company, many expressed ethical and privacy concerns regarding the use of the genetic data for questionable purposes.
   B. Under these laws, "genetic data" is…
      1. Any data, regardless of format, that results from the analysis of a biological sample of an individual, or from another source enabling equivalent information to be obtained, and concerns genetic material.
         a) Genetic material is…
            (1) DNA
            (2) RNA
            (3) Genes
            (4) Chromosomes
            (5) Alleles
            (6) Genomes
            (7) Alterations of these materials
   C. AB 825
      1. Expands the definition of "personal information" to include genetic data
         a) Relevant laws are the Information Practices Act of 1977, California's Data Security Law, and California's Data Breach Notification Law
      2. Exemptions
         a) Publicly available information
         b) Encrypted information
   D. SB 41
      1. Generic Information Privacy Act
         a) Requires companies engaging in direct to consumer genetic testing, i.e., 23andMe, to provide California with information about the collection, use, and maintenance, and disclosure of their genetic data
            (1) Genetic testing is…
               (a) Any laboratory tests of a biological sample from a consumer for the purpose of determining information concerning genetic material contained within the biological sample, or any information extrapolated, derived, or inferred therefrom

[18] https://www.afslaw.com/perspectives/alerts/golden-state-killer-genetic-data-and-now-gipa-californias-genetic-information

(2) These companies must obtain the consumer's express consent to collect, use or disclose an individual's genetic data. The consent must include
    (a) The use of the material collected, including the use beyond uses associated with the primary purpose of the genetic testing;
    (b) Storage processes;
    (c) Who has access to the data;
    (d) How genetic data may be shared;
    (e) The specific purposes for which the data will be collected, used, and disclosed
    (f) Any transfer of the data
    (g) Marketing directed at the consumer based on the consumer's genetic data
(3) Companies must honor a California resident's request to revoke their consent
(4) Companies must also provide notice of their privacy policy and research disclosure

b) Exemptions
(1) Healthcare providers governed by the California Confidentiality of Medical Information Act (CMIA)
(2) Covered entities or business associates governed by HIPAA
(3) Medical information covered by CMIA or HIPAA
(4) Scientific research of educational activities conducted by certain educational institutions
(5) California Newborn Screening Program
(6) Tests conducted exclusively for individual diagnosis
(7) Legal collection of genetic material used or maintained by an employer
(8) Publicly available information
(9) Deidentified data

#Write_every_text_like_it_may_be_read_aloud

I. On February 1, 2022, Brian Flores, as Class Representative, filed a class action[19] complaint against the NFL and all associated teams after Bill Belichick texted Flores three days before Flores' interview with the New York Giants that Brian Daboll had already been selected for the job.

[19] https://www.wigdorlaw.com/wp-content/uploads/2022/02/Complaint-against-National-Football-League-et-al-Filed.pdf

A. Had Belichick not made the text blunder, Flores would not have known Daboll had already been selected and that his upcoming interview was merely a formality.

II. The Class Action Complaint alleges while racial barriers within the NFL have eroded over the years, the "NFL remains rife with racism, particularly when it comes to the hiring and retention of Black Head Coaches, Coordinators and General Managers.

III. The Rooney Rule, enacted over twenty years ago, required NFL teams to interview at least one Black person in connection with any Head Coach vacancy. The Rule has since expanded to include General Manager and other head office positions. The Rule further expanded to require two Black candidates to be considered and at least one to be interviewed in person.

IV. Flores, who is Black, was considered for the Head Coach position with the New York Giants after being fired as the Miami Dolphins' head coach despite leading the team to two back to back winning seasons.

A. Before Flores' interview with the Giants, New England Patriots coach Bill Belichick texted Flores to congratulate him on his new position as Head Coach of the Giants

1. Belichick realized he meant to text Brian Daboll, who had already been selected for the position, despite Flores not having been interviewed as required by the Rooney Rule.

B. Based on this interaction and another similar interaction with the Denver Broncos, Flores alleged the Rooney Rule is a sham and the NFL continues to set up racial barriers to front office employment.

#Crypto_voting (or, #The_Power_of_Crypto)

I. The Ethereum Name Service (ENS) is a service by while users can purchase ETH, a form of cryptocurrency, to become a part of a Decentralized Autonomous Organization (DAO), which ENS describes as "a safe way to collaborate with internet strangers." The ETH essentially becomes a governance token with the DAO.[20]

II. Early this year, Brantly Millegan, a "steward" of the ENS DAO, came under fire for his 2016 tweet, "Homosexual acts are evil. Transgenderism doesn't exist. Abortion is murder. Contraception is perversion. So is masturbation and porn."

A. ENS members lambasted Millegan for his comments and continued stance on those issues. Twitter suspended his account.

B. The ENS DAO saw an opportunity

1. Groups centered around diversity and inclusion rallied ENS DAO members to remove Millegan from his steward role by deregulating their governance tokens away from him. Millegan

[20] https://www.platformer.news/p/the-man-who-got-fired-by-his-dao

was essentially fired from the DAO and ENS founder and lead developer Nick Johnson indicated Millegan's contract with a related organization had been terminated.

2. The DAO gave members power over the direction of ENS, though it is unclear whether the same concerted action on Twitter or Discord, and not the deregulation of tokens (which ultimately resulted in the decline of the value of those tokens), would have had the same result.

#Lock_down_your_phone

I. Your smartphone holds a plethora of sensitive personal information. This could be devastating to the user if this information were to fall into the wrong hands. The FTC[21] provides a number of ways to protect your smartphone from attacks:

   A. Lock your phone
      1. Use at least a 6-digit passcode
      2. Also can unlock phone with face, retina scan, or fingerprint

   B. Update your software
      1. Updates to your phone's operating system often include critical security patches.
      2. Set your phone to update automatically.
      3. Remember to update apps as well.

   C. Back up your data
      1. Regularly back up your data on your phone to the cloud or a personal computer
         a) If you lose your phone, you can still access your personal information.
      2. You can set your phone to do this at automatic increments - every day, etc.

   D. Get help finding a lost phone
      1. Turn on your "find my location" or similar feature
      2. Will help you find your phone if you lose it.
      3. You can also lock it or erase it if someone takes the phone.

[21] https://consumer.ftc.gov/articles/how-protect-your-phone-hackers

Section Fourteen

THE U.S. SUPREME COURT – 2021-2022 TERM

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Section Fourteen

The U.S. Supreme Court – 2021-2022 Term.....Kenneth J. Falk

I. Introduction

The most recent term of the Supreme Court was momentous, both because of the Court's holdings in a number of cases and perhaps also because of the effect that some of those holding have had on the perception of the Court by the public—a perception that may linger for quite some time.

Of course, the Court will be hearing and deciding cases in the 2022-2023 term with a new Justice, Justice Ketanji Brown Jackson, who replaces the retired-Justice Breyer. What effect, if any, her appointment will have on the Court's jurisprudence will have to be seen over time.

II. Abortion – *Dobbs v, Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022)

In *Dobbs* the Court (6-3) overruled *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992). These cases had held that the "liberty" guaranteed by the Fourteenth Amendment included a fundamental right of a woman to obtain an abortion prior to viability. While *Roe* had adopted the trimester framework to regulate when an abortion could occur and under what circumstances, *Casey* had adopted a standard that allowed states to regulate abortion to safeguard a woman's health and to advance an interest in fetal life, provided the regulations did not amount to an "undue burden."

Mississippi adopted a statute that absolutely prohibited abortions after 15 weeks' gestation (well in advance of viability) except in cases of medical emergency or severe fetal abnormality. The law was clearly unconstitutional under both *Roe* and *Casey* and it was therefore struck down by both the district court and the court of appeals. The question on the petition for certiorari was whether all pre-viability prohibitions on abortions were unconstitutional.

Justice Alito wrote the decision for the five-justice majority. He held that the Constitution does not confer any right to abortion, overruling *Roe* and *Casey.* Justice Alito examined history and found that that the right to an abortion was not rooted in the country's history and that abortion was illegal in the 1800s in many states. He also found that abortion should not be deemed to be part of other rights recognized as part of "liberty," as abortion destroys an "unborn human being." The decision stresses that it applies only to abortion, not to other rights, such as the right to purchase contraception and the right to same-sex-marriage.

Justice Alito addressed reasons why *stare decisis* does not demand that *Roe* and *Casey* not be overruled, reviewing factors that the Court utilizes when addressing whether to overrule precedent: the earlier decisions are "egregiously wrong," the reasoning of the earlier cases was misguided and wrong, the holdings of *Roe* and *Casey* have proven to be unworkable, and overruling the two cases will not upend reliance interests.

In *Casey* the Court had cautioned that overruling *Roe* might have been perceived by the public as a political decision. The Court in *Dobbs* acknowledged this, but this was an "extraneous concern" not to be considered by the Court.

Inasmuch as there is no federal constitutional right to abortion, the Mississippi statute must be assessed only under rational-basis scrutiny. This is very deferential to the state and Mississippi's asserted interest in protecting the life of the unborn is sufficient to provide a rational basis.

Although there is no longer a federal constitutional right to abortion, the Court noted that states and its citizens may decide on abortion rights.

Justice Thomas concurred. He argued that all of the Court's substantive due process cases, finding fundamental rights in "liberty," should be reconsidered. This includes the right of married persons to obtain contraception (*Griswold v. Connecticut*., 381 U.S. 479 (1965)), the right to engage in private consensual acts (*Lawrence v, Texas*, 539 U.S. 558 (2003)), and the right to same-sex marriage (*Obergefell v. Hodges*, 576 U.S. 644 (2015)). By contrast, Justice Kavanaugh, in his concurrence, stressed that the *Dobbs* decision will not affect these other precedents.

The Chief Justice concurred. He noted that the only question that was originally before the Court was whether all pre-viability abortion prohibitions are unconstitutional. He argued that this was the only question that should be answered, and he agreed that

the answer is in the negative. He lamented that the majority went further and argued for judicial restraint and contended that a narrower decision would be "less unsettling."

Justices Breyer, Sotomayor, and Kagan dissented in a joint dissent. They argued that at its core this decision was a curtailment of the rights of women and diminished their status as free and equal citizens. It criticized the majority's reliance on history, noting that it was odd to look to a time when women had no rights to give current meaning to "liberty." And, in any event, noted the dissent, at common law abortion was not prohibited prior to "quickening," the point when the fetus moves in the womb.

But the issue is not history, argues the dissent. The notion of "liberty" in the Fourteenth Amendment is not limited to what existed at the time of the passage of the Amendment in 1868. And based on this, numerous cases have recognized that a state's ability to assert control over a person's body and personal decisionmaking is limited. And, despite the Court's protestations to the country, the dissent argues that there is nothing to limit overruling all these other precedents.

The dissent accuses the majority of abandoning *stare decisis*, as there is nothing to justify overruling the precedent here. Again, citing standards used by the Court in determining to overrule precedent, the dissent argues that there is nothing unworkable about the undue burden standard; there have been no major legal or factual changes undermining *Roe* and *Casey*; and, perhaps most importantly, those decisions have created

overwhelming reliance and overruling the decisions will cause profound, stunning, and horrendous consequences for women and will undermine the legitimacy of the Court.

III. First Amendment – Religion Issues

1. In *Kennedy v. Bremerton School Dist.*, 142 S. Ct. 2407 (2022), a high school football coach had, at the conclusion of each game, offered a prayer at midfield. He also had led prayers in the locker room, although he stopped these when ordered to do so. Although he originally prayed on his own on the field, he was soon joined by other players so that on some occasions he was joined by most of the team and member of the opposing team. Eventually he was ordered to stop. He continued to pray, by himself, at the 50-yard line, after games. At the time that he prayed, after the games. he was not engaged in activities related to his employment. He was not rehired and brought suit claiming that his First Amendment rights had been violated.

The Court (6-3), by Justice Gorsuch, held that Mr. Kennedy's free exercise and free speech rights were violated. Free exercise was violated because this burdened his sincere religious practices pursuant to a policy that is not neutral or generally applicable. It is clear that he was not rehired for praying quietly after being told not to. The school punished Mr. Kennedy for engaging in religious conduct, even though it allowed other on-duty employees to engage in personal secular conduct.

The Court also concluded that Mr. Kennedy's free speech rights were violated. He was not speaking as an employee and therefore, under existing law, the school corporation has to prove that its interests as an employed outweighs the employee's private speech.

Whether viewed as a free exercise or free speech issue, the school district cannot satisfy its burden and the school district's actions were unconstitutional. The Court rejected the argument that the school's actions were essential to avoid an Establishment Clause violation, noting that the traditional test in *Lemon v. Kurtzman*, 403 U.S. 602 (1972) and its endorsement "offshoot" has been abandoned. The Establishment Clause must be interpreted in light of historical practices and understanding. The Court acknowledged that coercion is still a concern in Establishment Clause analysis, but there was no coercion present in the record.

The dissent, by Justice Sotomayor, argued that allowing Mr. Kennedy to pray was a clear Establishment Clause violation.

> Properly understood, this case is not about the limits on an individual's ability to engage in private prayer at work. This case is about whether a school district is required to allow one of its employees to incorporate a public, communicative display of the employee's personal religious beliefs into a school event, where that display is recognizable as part of a longstanding practice of the employee ministering religion to students as the public watched. A school district is not required to permit such conduct; in fact, the Establishment Clause prohibits it from doing so.

142 S. Ct. at 2441 (Sotomayor, J., dissenting).

2. *Carson v. Makin*, 142 S. Ct. 1987 (2022)

Not all school districts in Maine have public high schools. Parents in districts without high schools may designate high schools for their children to attend, and the school district uses public funds to assist with the costs of tuition. However, Maine has limited tuition assistance to nonsectarian schools. The Court concluded (6-3) that this violated the Free Exercise Clause of parents.

The Chief Justice wrote for the Court. The Court, continuing a trend from recent cases, held that although a state does not have to subsidize education in this way, if it extends the benefit of tuition assistance, it may not deny aid solely because it is religious, unless strict scrutiny is met. It is not met here and therefore Free Exercise is violated. The Court stressed that the Establishment Clause is not implicated here because this is a neutral benefit program where religious organizations receive funds as a result of private choice.

The dissent (Justice Breyer) argued that the majority fails to recognize that there is a "play in the joints" between the Free Exercise and the Establishment Clauses, that give states some degree of legislative leeway.

IV. Other religion issues

Ramirez v. Collier, 142 S. Ct. 1264 (2022), is not a constitutional case, but it is an interesting case that highlights religion issues. The plaintiff was set to be executed by Texas and argued he that had the right to have his pastor lay hands on him and pray over

him during the actual execution. Texas denied this, stating that spiritual advisors could not touch persons in the execution chamber.

The prisoner sued claiming a violation of both the First Amendment and the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc, *et seq*. The prisoner sought a stay of execution in the Supreme Court, asking that the execution be stayed while he pursued his Free Exercise and RLUIPA claims, although he only briefed the RLUIPA claim in the Supreme Court. RLUIPA is more protective of prisoner's religious rights than the First Amendment and provides that if religious exercise is substantially burdened, it must be justified by the government by demonstrating a narrowly tailored compelling governmental interest.

The Court (8-1), by Chief Justice Roberts, held that the stay of execution should enter as the prisoner is likely to succeed on his RLUIPA claim and that a stay should be granted. Justice Thomas dissented.

V. First Amendment – Free Speech

1. *Shurtleff v. Boston*, 142 S. Ct. 1583 (2022)

This was a unanimous decision written by Justice Breyer. Boston had a policy that allowed private groups to use one of three flag poles in front of city hall to display their flags during the times that events were taking place on the plaza in front of city hall that were sponsored by the groups. Most of the flags were those of other countries, but there

were flags associated with particular groups or causes. A Christian organization holding a ceremony on the plaza asked to post a Christian flag and this was refused.

Although the plaintiffs argued that this violated their Free Speech rights, lower courts held that this was government speech to which the First Amendment applied. The Supreme Court disagreed, finding that this was not government speech as Boston did not control the content and meaning of the private flags. Because the flag-raising program was not government speech, Boston's exclusion of the Christian flag was excluding private speech because of its religious viewpoint, which is a Free Speech violation.

2. *Houston Community College System v. Wilson*, 142 S. Ct. 1253 (2022)

This was also a unanimous decision. A member of the board of trustees of a community college claimed that his First Amendment rights were violated when he was publicly censured for filing multiple lawsuits against the board and for criticizing other board members. The Supreme Court, by Justice Gorsuch, held that the public censure of the board member, which did not in any way impact his ability to serve as a board member, was not the type of materially adverse action that can give rise to a claim of retaliation in violation of the First Amendment.

VI. Second Amendment – *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022)

New York law makes it a crime to possess a firearm without a license. A person who wants to carry a firearm outside of the home can obtain a license if they can prove

that proper cause exists to do so by establishing a special need for self-protection distinguishable from that of the general community.

In this case the Court (6-3), by Justice Thomas, held that that the analysis demanded by the Second Amendment's right to bear arms requires courts to assess whether modern firearm regulations are consistent with the Second Amendment's text and historical understanding. The plain text and history of the Second Amendment encompasses that ability to carry handguns for self-defense. New York cannot demonstrate that its "proper cause" requirement is consistent with the United States' historical tradition of firearm regulation. Although historical evidence indicates that reasonable regulations on guns have been present throughout America's history, there is little support for historical regulations preventing law-abiding citizens with ordinary self-defense needs from carrying arms in public. The right to bear arms in public for self-defense is not a second-class right that is subject to different rules than other guarantees in the Bill of Rights. The New York law is therefore unconstitutional.

Justice Breyer dissented, joined by Justices Kagan and Sotomayor.

> In 2020, 45,222 Americans were killed by firearms. . . . Since the start of this year (2022), there have been 277 reported mass shootings—an average of more than one per day. . .
>
> Many States have tried to address some of the dangers of gun violence just described by passing laws that limit, in various ways, who may purchase, carry, or use firearms of different kinds. The Court today severely burdens States' efforts to do so. It invokes the Second Amendment to strike down a New York law regulating the public carriage of concealed handguns. In my view, that decision rests upon several serious mistakes.

> First, the Court decides this case on the basis of the pleadings, without the benefit of discovery or an evidentiary record. As a result, it may well rest its decision on a mistaken understanding of how New York's law operates in practice. Second, the Court wrongly limits its analysis to focus nearly exclusively on history. It refuses to consider the government interests that justify a challenged gun regulation, regardless of how compelling those interests may be. The Constitution contains no such limitation, and neither do our precedents. Third, the Court itself demonstrates the practical problems with its history-only approach. In applying that approach to New York's law, the Court fails to correctly identify and analyze the relevant historical facts. Only by ignoring an abundance of historical evidence supporting regulations restricting the public carriage of firearms can the Court conclude that New York's law is not "consistent with the Nation's historical tradition of firearm regulation." See *ante,* at 2130.
>
> In my view, when courts interpret the Second Amendment, it is constitutionally proper, indeed often necessary, for them to consider the serious dangers and consequences of gun violence that lead States to regulate firearms.

142 S. Ct. at 2163-64 (Breyer, J., dissenting).

VII. Environmental Issues – *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587 (2022)

This was a challenge to the EPA's Affordable Clean Energy Rule that was promulgated under the Clean Air Act. The question was whether the rule went further than allowed by the Act in regulating emissions. The Biden administration suggested that it was seeking an alternative plan and that the case was moot.

The Chief Justice wrote for the Court (6-3). The decision first concludes that the case was not moot as it was not absolutely clear that the allegedly wrongful behavior

would not be repeated. The Court then concluded that the EPA had gone too far as it did not have Congressional authority to limit emissions at existing plants by requiring that the plants switch to cleaner energy sources, although it could regulate by requiring emissions reductions technologies as it had done in the past.

It is not enough that an agency can point to a colorable statutory textual basis for its regulatory action. When a "major question" is involved

> both separation of powers principles and a practical understanding of legislative intent make us "reluctant to read into ambiguous statutory text" the delegation claimed to be lurking there. . . To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to "clear congressional authorization" for the power it claims.

Id. at 2609. This case presents a "major question" given the breadth of the attempted regulation.

Justice Kagan, with Justices Breyer and Sotomayor dissented, arguing that Congress gave the EPA this regulatory authority. The case just requires normal statutory construction, not use of a "major questions doctrine."

> The subject matter of the regulation here makes the Court's intervention all the more troubling. Whatever else this Court may know about, it does not have a clue about how to address climate change. And let's say the obvious: The stakes here are high. Yet the Court today prevents congressionally authorized agency action to curb power plants' carbon dioxide emissions. The Court appoints itself—instead of Congress or the expert agency—the decision-maker on climate policy. I cannot think of many things more frightening.

142 S. Ct. at 2644 (Kagan, J., dissenting).

VIII. Immigration – *Biden v. Texas*, 142 S. Ct. 2528 (2022)

The issue in this case concerned the ability of the U.S. Department of Homeland Security to issue a memorandum to terminate the Trump-era immigration policy that forced asylum seekers to await approval in Mexico. Lower courts had held that the termination decision violated the Immigration and Nationality Act ("INA") and was arbitrary and capricious in violation of the Administrative Procedures Act ("APA"). In response Homeland Security issued a new memorandum ending the policy. Lower courts again ordered that the prior policy had to remain in place.

Writing for a 5-4 court, the Chief Justice (with Justices Breyer, Sotomayor, Kagan, and Kavanaugh) held that terminating the program did not violate the INA and that the second memorandum issued by the Secretary was final agency action.

IX. COVID issues

1. *National Federation of Independent Business v. Department of Labor*, 142 S. Ct. 661 (2022)

This was a challenge to an emergency temporary standard issued by the Department of Labor requiring employers with more than 100 employees to enforce a mandate that employees either have a COVID-19 vaccination or take a weekly test and wear a mask. A stay was issued by a district court, but was dissolved by a court of appeals. In a 6-3 *per curiam* decision, the Supreme Court ruled that the petitioners were

likely to succeed on their claim that the emergency temporary standard exceeded the authority of the Secretary of the Department of Labor. The Occupational Safety and Health Administration Act ("OSHA") does not plainly authorize the Secretary's regulation. Justice Breyer, dissenting with Justices Sotomayor and Kagan, argued that this regulation was well within the powers given to the Secretary by the OSHA statute.

2. *Biden v. Missouri*, 142 S. Ct. 647 (2022)

The Centers for Medicare and Medicaid Services (CMS) promulgated an interim final rule that required that staff of healthcare facilities participating in Medicare and Medicaid to obtain vaccines. A preliminary injunction was granted against the rule by two district courts. The Supreme Court in a 5-4 *per curiam* decision found that the Government was entitled to a stay of the preliminary injunctions. The Court found that the rule was within the authority of the agency and that the interim rule was neither arbitrary or capricious. Justices Thomas, Alito, Gorsuch and Barrett dissented.

X. Miscellaneous cases

1. *United States v. Zubaydah*, 142 S. Ct. 959 (2022) – The plaintiff alleged that the had been tortured in Poland by CIA contractors following the attacks of September 11, 2001. His allegations resulted in an ongoing investigation in Poland against Polish nationals who had been involved in alleged torture that he had allegedly suffered in Poland. Plaintiff filed an application for the contractors' deposition testimony and for documents.

The Government argued that even confirming that a detention site was operated in Poland would threaten national security. The Court (7-2), by Justice Breyer, held that given that the Government established that there was a reasonable danger to harm to national security that the state secrets privilege was applicable to block even information that there was a site in Poland.

Justice Gorsuch dissented, with Justice Sotomayor.

> There comes a point where we should not be ignorant as judges of what we know to be true as citizens. . . . This case takes us well past that point. Zubaydah seeks information about his torture at the hands of the CIA. The events in question took place two decades ago. They have long been declassified. Official reports have been published, books written, and movies made about them. Still, the government seeks to have this suit dismissed on the ground it implicates a state secret—and today the Court acquiesces in that request. Ending this suit may shield the government from some further modest measure of embarrassment. But respectfully, we should not pretend it will safeguard any secret.

142 S. Ct. at 986 (Gorsuch, J. , dissenting).

2. *Trump v. Thompson*, 142 S. Ct. 680 (2022) – This was not a merits decision, but a *per curiam* denial of an application by former-President Trump to obtain a stay of a decision by the D.C. Circuit that he was not able to block the release of records maintained by the National Archive and Records Administration that had been demanded by the Select Committee investigating the January 6, 2021 attack on the Capitol. The former President had claimed executive privilege, even though President Biden had waived any privilege in the requested information. The former President had asked for an immediate stay because he characterized the Court of Appeals as holding that he did not have any

privilege as a former President. However, the Supreme Court noted that the Court of Appeals had held that even if former-President Trump was the current chief executive, the executive-privilege claim would be denied. There were therefore no grounds to grant the stay request pending review. Justice Thomas dissented and would grant the request.

3. *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022) – In *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), the Court had held that due to past treaties, much of eastern Oklahoma remained "Indian country," meaning that the state of Oklahoma could not legally try a member of the Creek nation for crimes in state court where the crimes had taken place in that area. In *Castro-Huerta*, the Court, by a 5-4 decision by Justice Kavanaugh, held that the state and federal government may prosecute crimes committed by non-Native Americans against Native Americans in the area established as "Indiana country." Justice Gorsuch, who wrote *McGirt*, dissented with Justices Breyer, Sotomayor and Kagan.

> After the Cherokee's exile to what became Oklahoma, the federal government promised the Tribe that it would remain forever free from interference by state authorities. Only the Tribe or the federal government could punish crimes by or against tribal members on tribal lands. At various points in its history, Oklahoma has chafed at this limitation. Now, the State seeks to claim for itself the power to try crimes by non-Indians against tribal members within the Cherokee Reservation. Where our predecessors refused to participate in one State's unlawful power grab at the expense of the Cherokee, today's Court accedes to another's.

142 Ct. at 2505 (Gorsuch, J., dissenting).

XI. Coming attractions in the 2022-2023 Term (the questions presented are quoted directly from the petitions for certiorari or the Court's articulation of the question(s) presented). Review has been granted in all these cases.

a. *Merrill v. Milligan*, No. 21-1086

Issue(s): Whether the State of Alabama's 2021 Redistricting plan for its seven seats in the United States House of Representatives violated Section 2 of the Voting Rights Act, 52 U.S.C. § 10101.21.

b. *Andy Warhol Foundation for the Visual Arts v. Goldsmith*, No. 21-869

Issue(s): Whether a work of art is "transformative" when it conveys a different meaning or message from its source material (as the Supreme Court, U.S. Court of Appeals for the 9th Circuit, and other courts of appeals have held), or whether a court is forbidden from considering the meaning of the accused work where it "recognizably deriv[es] from" its source material (as the U.S. Court of Appeals for the 2nd Circuit has held).

c. *Students for Fair Admissions v. President & Fellows of Harvard College,* No. 20-1199

Issue(s): 1. Should this Court overrule *Grutter v. Bollinger*, 539 U.S. 306 (2003), and hold that institutions of higher education cannot use race as a factor in admissions?

2. Title VI of the Civil Rights Act bans race-based admissions that, if done by a public university, would violate the Equal Protection Clause. *Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003). Is Harvard violating Title VI by penalizing Asian-American applicants, engaging in racial balancing, overemphasizing race, and rejecting workable race-neutral alternatives?

d. *Students for Fair Admissions v. University of North Carolina,* No. 21-707

Issue(s): 1. Should this Court overrule *Grutter v. Bollinger*, 539 U.S. 306 (2003), and hold that institutions of higher education cannot use race as a factor in admissions?

2. Can a university reject a race-neutral alternative because it would change the composition of the student body, without proving that the alternative would

cause a dramatic sacrifice in academic quality or the educational benefits of overall student-body diversity?

e. *Health and Hospital Corp. of Marion County, Indiana v. Talevski*, No. 21-806

Issue(s): 1. Whether, in light of compelling historical evidence to the contrary, the Supreme Court should reexamine its holding that Spending Clause legislation gives rise to privately enforceable rights under 42 U.S.C. § 1983;

2. Whether, assuming spending clause statutes ever give rise to private rights enforceable via Section 1983, the FNHRA's (Federal Nursing Home Amendments Act of 1987) transfer and medication rules do so.

f. *303 Creative LLC v. Elenis*, No. 21-476

Issue(s): Whether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment.

g. *Moore v. Harper*, No. 21-1271

Issue(s): Whether a state's judicial branch may nullify the regulations governing the "Manner of holding Elections for Senators and Representatives ... prescribed ... by the Legislature thereof," U.S. Const. art 1, § 4, cl. 1, and replace them with regulations of the state courts' own devising, based on vague state constitutional provisions purportedly vesting the state judiciary with power to prescribe whatever rules it deems appropriate to ensure a "fair" or "free" election.

Section Fifteen

2022 CRIMINAL
CASE LAW UPDATE

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Section Fifteen

2022 Criminal Case Law Update.....Kathie A. Perry
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Getting to know IPDC is a must for any Indiana attorney who chooses to represent clients accused of crime. While its mission is to support public defenders and those in the trenches of indigent defense, the IPDC has resources available to all criminal defense lawyers. Visit IPDC's website at https://www.in.gov/ipdc/ for more information.

DISCLAIMER

All information provided is subject to constant and ongoing change. It should therefore only be used as a starting point for further research, investigation and study.

I. SEARCH AND SEIZURE

A. Warrantless Stops & Seizures

Toppo v. State, (6/14/2021) 171 N.E.3d 153 (Ind. Ct. App.), **A driver's tires crossing center line even briefly is traffic violation for which police may initiate a traffic stop**

Police saw Defendant's car cross the center line briefly such that the tires were in the opposite lane of travel. On appeal, Defendant argued that the car's tires briefly touching the center line did not violate Ind. Code 9-21-8-2(a), which states "a vehicle shall be driven upon the right half of the roadway." Court of Appeals finds that the officer's testimony that Defendant's car's tires "crossed" the yellow dividing line, however briefly, was an infraction under the statute and if an officer observes an individual drive his vehicle left of center for any amount of time, that officer has observed the individual commit a traffic violation and the officer has probable cause to conduct a traffic stop of that vehicle.

Hill v. State, (6/9/2021) 169 N.E.3d 1150 (Ind. Ct. App.) **Consensual encounter transformed into investigatory stop upheld under Fourth Amendment**

Defendant was a passenger in a car stopped at a gas station when police approached on foot looking for a recent person who used counterfeit currency at a CVS. Police did not display a weapon and did not request to see Defendant's driver's license. Court of Appeals found that this part of interaction was a consensual encounter. However, the officer was then informed that Defendant fit the description of the suspect, which turned the encounter into an investigatory stop. The officer's suspicion was more than a hunch and was supported by credible witness observations as relayed to dispatch. During the investigatory stop, Defendant provided false information as to his identity, which created probable cause for the police to believe that the crime of identity deception had been committed. Because police had probable cause to arrest Defendant and could order him to exit the vehicle and conduct a warrantless search of his person and car, there was no Fourth Amendment violation. Held, convictions for possession of methamphetamine, counterfeiting, and identity deception affirmed.

Wilson v. State, (8/24/2021) 173 N.E.3d 1063 (Ind. Ct. App.) **Defendant lacked requisite privacy interest in vehicle and did not have standing to challenge its search**

During a traffic stop, Defendant provided the officer with a driver's license and a car rental agreement for the vehicle that matched the name on the license. However, officers determined the license was not his and Defendant was arrested for false informing. Officers contacted the car rental company and the representative granted permission to search the vehicle, which uncovered a variety of illegal drugs. The trial court denied Defendant's motion to suppress and he pursued an interlocutory appeal. The Court of Appeals noted that Byrd v. United States, 138 S. Ct. 1518 (2018), "merely stands for

the proposition that a defendant's status as the unauthorized driver of a rental car does not defeat his claim to standing" but that such a defendant must still show that he was someone in otherwise lawful possession and control. Here, Defendant did not present any evidence at the suppression hearing that he was an authorized driver on the rental agreement or that he had the renter's permission to use the car, only that there was nothing indicating he didn't have permission or that it was stolen. Relying on Campos v. State, 885 N.E.2d 590 (2008), the Court concluded Defendant did not meet his burden to show he lawfully possessed the vehicle when it was searched and therefore lacked the requisite privacy interest in the vehicle that would confer standing to challenge the search. Held, denial of motion to suppress affirmed.

B. Warrantless Searches/Arrests

Combs v. State, (6/3/2021), 168 N.E.3d 652 (Ind.) **Lawful warrantless seizure and search of arrestee's vehicle in driveway under plain view and inventory search exceptions**

Police did not violate Defendant's Fourth Amendment rights when they conducted a warrantless seizure and inventory search of his van following an accident. After driving his van into an electrical box to avoid hitting another vehicle, Defendant took photos of the damage to the van, rummaged around under the driver's seat and then left the scene. A police officer who arrived shortly after followed a fluid trail that eventually led to Defendant's home at a nearby neighborhood, where he had parked the damaged van. Defendant, whom the officer suspected was under the influence of medication or drugs, then failed two field sobriety tests and s agreed to submit to a chemical test and being handcuffed for transport. Before Defendant was taken to the hospital, he told officers they could look under the seat of his van but not open the black bag they had found. But the officers searched the van in Defendant's driveway without a warrant after calling for the vehicle to be towed, finding three different controlled substances. Court of Appeals found that the warrantless search of Defendant's van was impermissible under the open view and plain view doctrines, as well as the Fourth Amendment. On transfer, the Indiana Supreme Court disagreed, holding that police properly seized and inventoried the van as an instrumentality of Defendant's class-B misdemeanor leaving the scene of an accident. At the time of seizure, officer reasonably believed the van would be useful in prosecuting Defendant and its incriminating character was immediately apparent. Additionally, once seized, police lawfully impounded the van for towing and conducted an inventory search at the scene pursuant to police department's "thorough and reasonable" written tow policy. Held, transfer granted, Court of Appeals opinion at 150 N.E.3d 266 vacated, judgment affirmed; Slaughter, J., concurring in result, would hold that Defendant waived his Fourth Amendment claim on appeal for lack of cogent reasoning. Goff, J., dissenting because the State failed to show that officers needed the van itself to solve the OWI or leaving accident scene investigation and evidence obtained during the inventory search should have been excluded as fruit of the poisonous tree. Dissent believes the Court's decision "will unnecessarily extend the government's reach into our private lives."

I.G. v. State, (9/10/2021) 177 N.E.3d 75 (Ind. Ct. App.) **Unlawful arrest and search of passenger based on smell of marijuana where no drugs found**

Odor of burnt and raw marijuana, by itself, was not enough to establish probable cause to arrest juvenile Defendant for possessing marijuana. Police officers pulled over a vehicle with three people inside, including Defendant. After smelling burnt and raw marijuana, police ran the occupants IDs and discovered the driver had a warrant for his arrest for a traffic offense. When asked to exit the vehicle, all three occupants were "calm," "[a]bsolutely cooperative," and did not make any furtive movements or give the officer "any cause or concern" for his safety. Regardless, a pat down of Defendant was conducted for officer "safety," revealing a handgun and extra magazine. Following Thomas v. State, 81 N.E.3d 621, 624 (Ind. 2017), which held that a canine alert, by itself, was not enough to establish probable cause to arrest, Court found that the search here was not a valid search incident to arrest, and the trial court erred in admitting the handgun into evidence. Unlike Maryland v. Pringle, 540 U.S. 366 (2003), where money and cocaine were found in a car before the front-seat passenger was arrested, here no evidence was admitted that marijuana was found. In a footnote, Court acknowledged Bunnell v. State, 21S-CR-139, slip op. at 4 (Ind. Sept. 2, 2021), which held that a police officer's detection of the scent of raw marijuana can supply probable cause for a search warrant if the detection is based on the officer's training and experience. The issue here, however, is whether police had probable cause to arrest Defendant for possession of marijuana based on the odor of raw and burnt marijuana in a car with three occupants. And no evidence was presented that the odor of marijuana was strong or came from Defendant's person. Held, delinquency adjudication reversed.

Posso v. State, (11/30/2022) 180 N.E.3d 326 (Ind. Ct. App.) **Inadequate Pirtle advisement required suppression of evidence seized as result of warrantless searches**

In interlocutory appeal following a murder charge, the Court of Appeals held Defendant was not adequately advised of his right to the presence and advice of counsel before he consented to the searches of his motel room, van, and cell phone. Pirtle v. State, 263 Ind. 16, 323 N.E.2d 634 (1975), held that a person in police custody is entitled to the presence and advice of counsel prior to consenting to a search and that the right, if waived, must be explicitly waived. This right applies only to the "weightiest intrusions" such as the search of the hotel room and van in this case. As a matter of first impression, the court also concluded that the search of a cell phone is a weighty intrusion under Pirtle. Defendant was in custody when presented with the search form when first, he was sitting in the corner of a hospital examination room guarded by officers after surrendering his van keys and license, and later when he was placed in a locked room at the sheriff's office. The Pirtle advisement was inadequate, however. The consent form Defendant signed stated YOU HAVE THE RIGHT TO CONSULT WITH AN ATTORNEY PRIOR TO GIVING CONSENT TO ANY SUCH SEARCH. The detective did not read the consent form aloud or otherwise advise of the right to consult with an attorney before giving consent to search. This was so even after Defendant advised he did not understand what the consent form was for. Video evidence also established Defendant did not read either form before signing. The court found the State's argument that not reading the form was his choice unavailing. Pirtle specifically places the burden on the State to show that the defendant's waiver of the right to counsel was explicit. Because the State failed to carry that burden here, denial of motion to suppress evidence seized from the motel room,

van, and cell phone was reversed. In a footnote, the Court noted Defendant made a compelling claim the consents were not voluntary because the detective told him he had to do the searches to help him understand what happened and that he would obtain a warrant regardless of consent.

C. Warrantless Home Entries & Searches

Lange v. California, (6/23/2021) 141 S. Ct. 2011 (2021) (SCOTUS) **Pursuit of a fleeing misdemeanor suspect does not always or categorically qualify as an exigent circumstance justifying a warrantless entry into a home**

One exception to general requirement that officers get a warrant before entering a home without permission is when "the exigencies of the situation" create a compelling law enforcement need. The Court held that the pursuit of a fleeing misdemeanor suspect does not always—or more legally put, categorically—qualify as an exigent circumstance. The defendant was listening to loud music with his windows down and repeatedly honking his horn. An officer began to tail him, and soon afterward turned on his overhead lights to signal that Lange should pull over. By that time, though, Lange was only about a hundred feet (some four-seconds drive) from his home. Rather than stopping, Lange continued to his driveway and entered his attached garage. The officer followed Lange in and began questioning him. Because the officer did not enter to prevent imminent harms of violence, destruction of evidence, or escape of the home--and had time to get a warrant--entry into the home was unreasonable.

Ramirez v. State, (9/23/2021) 174 N.E.3d 181 (Ind.) **Seizure of home-security footage under exigent circumstances exception**

In murder, neglect and LWOP prosecution, trial court did not abuse its discretion in admitting into evidence video footage obtained from a home-security-system recorder detectives seized while executing a warrant to "photograph and/or videotape" Defendant's parents' home. Believing the recorder contained "potentially fleeting evidence" that was "clearly critical" to the investigation, a detective secured it while he applied for a search warrant to prevent its contents from being tampered with or destroyed. The footage showed Defendant in the driveway, striking the children. The Indiana Supreme Court concluded that the exigent-circumstances exception justified the warrantless seizure of the recorder under the Fourth Amendment, and that under the Indiana Constitution, the seizure was likewise reasonable under the totality of the circumstances. The detective's belief that the recorder's contents were in danger of being imminently destroyed was objectively reasonable. When the recorder was seized, law enforcement officers were still establishing a timeline of events leading up to child's death and had reason to believe Defendant brought victim to his parents' house the night before she died. Even assuming the recorder had been improperly seized, admitting the footage was harmless beyond a reasonable doubt considering independent, overwhelming evidence of Defendant's guilt.

State v. Fox, (4/6/2022) N.E.3d (Ind. Ct. App.) **Suppression improper where Defendant waived search and seizure rights in home detention contract**

Relying on Micheau v. State, 893 N.E.2d 1053 (Ind. Ct. App. 2008), Defendant argued that the involvement of Marion County Community Corrections in the warrantless search of his hotel room was a subterfuge for law enforcement, the search required probable cause and a warrant, and that because both probable cause and a warrant were lacking, the search of his hotel room violated the Fourth Amendment, voiding the probable cause supporting the search warrant. He further argued it violated the Indiana Constitution. The State responded that, as a condition of his home detention, Defendant had unambiguously waived his rights against search and seizure under both the federal and state Constitutions. The trial court granted the motion to suppress, *citing* Micheau but making no findings regarding the search and seizure provision in Defendant's home detention contract. The Court of Appeals found that Micheau did not involve any waiver executed by the defendant of his constitutional protections against searches and seizures as part of parole. In State v. Ellis, 167 N.E.3d 285 (Ind. 2021), the Supreme Court held a home detention contract with "broad language" stating that a defendant "waives all rights against search and seizure" unambiguously informs a defendant that he is waiving all his rights, including the right against search and seizure absent reasonable suspicion. Here, Defendant executed a home detention contract that contained a waiver provision which, if anything, was more detailed in what rights he was waiving than the contract involved in Ellis. The Court concluded the trial court improperly ignored Defendant's waiver of his Fourth Amendment and Article 1, Section 11 rights and relied upon distinguishable precedent. The suppression ruling was reversed as being contrary to law.

Corbett v. State, (11/10/2021) 179 N.E.3d 475 (Ind. Ct. App.) **Constitutional challenge to "knock and talk" and trash search rejected**

Police collected DNA from the scene of a murder where the victim had been stabbed to death and his wife was severely injured. Seven years later, police sent the DNA to a genealogy company for testing and received Defendant's name as a possible lead. Police then conducted a "knock and talk" followed by a trash search of Defendant's home where items were taken for DNA analysis. After more testing of items from the trash pull, police obtained a search warrant for Defendant's DNA, which matched DNA at the crime scene. Defendant, who was sixteen at the time of the offense, was convicted of murder and attempted murder and sentenced to 115 years in prison. On appeal, Defendant argued the knock and talk was an unconstitutional search, as was the trash pull, and the remaining evidence in support of the application for the search warrant for his DNA was uncorroborated hearsay and the warrant was therefore unsupported by probable cause. On the knock and talk issue, the Court of Appeals found the detective did not violate Defendant's rights under the Fourth Amendment, as the officer intended to speak to the occupants and determine who lived at the home. See Florida v. Jardines, 569 U.S. 1 (2013). Police actions surrounding the trash pull were not unreasonable under the totality of circumstances, thus the trash pull did not violate Article 1, Section 11 of the Indiana Constitution.

D. Search Warrants

Bunnell v. State, (9/2/2021) 172 N.E.3d 1231 (Ind.) **Officers' assertion they detected smell of raw marijuana based on "training and experience" presents substantial basis for probable cause to support search warrant**

Law enforcement officers who affirm that they detect the odor of raw marijuana based on their training and experience may establish probable cause without providing further details on their qualifications to recognize said odor. Here, officers conducting a welfare check climbed an external staircase to a third door into the home and detected the smell of raw marijuana. Their application for a search warrant affirmed that one deputy "observed through [his] training and experience the smell of raw marijuana emitting from the door" and that the other advised "through his training and experience he smelled marijuana as well," but did not detail what that training or experience was. The Supreme Court held that a trained officer seeking a search warrant on that basis "need not further detail their qualifications to recognize this odor beyond their basic 'training and experience'." A warrant-issuing judicial officer can reasonably infer that a law enforcement officer is qualified to recognize the odor of marijuana if that officer attests, without elaboration, that they possess the requisite training and experience to detect the smell. Noting that this holding is in tension with some prior Court of Appeals decisions, the Court disapproved them to the extent they conflict. Justice Goff concurred in result and Justice Massa wrote a separate concurring opinion to caution and advise law enforcement to include the "six magic words" in their warrant applications of "based on my training and experience" so that they avoid the risk of suppression.

Phillips v. State, (8/13/2021), 174 N.E.3d 635 (Ind. Ct. App.) **Probable cause for search warrant based solely on informant's statement**

Informant's statements against penal interest beyond that for which she was arrested were sufficient to establish probable cause for a search warrant for Defendant's home. Defendant argued that the only basis for issuance of the warrant was a drug addict's unreliable statements, which failed to establish the necessary probable cause for the warrant. After police arrested informant on an outstanding warrant at Defendant's home, she told the officers that Defendant had been using and dealing methamphetamine as well. Although the affidavit was not clear on whether informant's allegation of Defendant's drug dealing was based on direct observation or speculation, Court concluded that the remainder of the allegations in the affidavit support the judge's determination that informant's hearsay statements were reliable enough to support both a finding of probable cause and issuance of the search warrant for Defendant's home. Although the better course would have been for the officer to reveal informant's statement about her recent drug use, Court found that Defendant failed to establish that the officer omitted any material facts in the affidavit that would have left probable cause in doubt.

Lundquist v. State, (12/30/2021) 179 N.E.3d 1051 (Ind. Ct. App.) **Search warrant -- particularized description of place to be searched despite incorrect address**

A search warrant does not violate the State or Federal constitutions if the property to be search is adequately described and includes sufficient particularity even if the address listed is in the warrant incorrect. Here, police obtained a search warrant for Defendant's home that was on property which adjoined his mother's property where she also had a house. The search warrant listed the address for the mother's home but the physical description of Defendant's home. Defendant moved to suppress the evidence obtained in the search of his home because the search warrant listed his mother's address and not his address. On interlocutory appeal from a denial of a motion to suppress, the Court of Appeals affirmed the trial court's denial of the suppression motion under both the State and Federal Constitutions. Under a Fourth Amendment analysis, the Court found no constitutional violation because the warrant adequately and accurately described the physical characteristics of the property to be searched. Under an Indiana constitutional analysis, there was sufficient particularity of the description of the property to be searched to withstand a constitutional challenge.

II. CONFESSIONS/COMPELLED TESTIMONY

State v. Diego, (6/9/2021) 169 N.E.3d 113 (Ind.) **No Miranda warnings required before voluntary, noncustodial interview at police station**

Police may not interrogate a person in custody without proper Miranda warnings or else the State risks having those custodial statements suppressed in a criminal trial. However, not every station house interview implicates Miranda. Miranda warnings are only required when a person is in custody; when a person's' freedom of movement is curtailed to a level associated with formal arrest and when he or she is under the same inherently coercive pressures in the police station as those at issue in Miranda v. Arizona. Here, a uniformed officer went to Defendant's home to ask him to come to the police station for an interview. Defendant had limited English speaking proficiency, so the officer spoke to Defendant's girlfriend who spoke English. Through the girlfriend, Defendant was told to go to the police station to speak to an officer. A few days later Defendant and his girlfriend went to the police station and were buzzed through a door and into a detective's office. Defendant was not read his Miranda warnings before being asked questions for 45 minutes by a uniformed police officer. After the interview, Defendant and his girlfriend left the police station. Defendant was later charged with three counts of child molest and filed a motion to suppress his statement to police. The trial court found the statements were inadmissible because they were made pre-Miranda. The Court of Appeals affirmed the trial court. On transfer, the Indiana Supreme Court reversed, finding Defendant was not in custody such that Miranda warnings were necessary. The majority concluded that the totality of objective circumstances surrounding the interrogation would make a reasonable person feel free to end the questioning and leave. As such, Defendant's freedom of movement was not curtailed to the degree associated with formal arrest. In reaching its decision, the Court distinguished State v. E.R.,123 N.E.3d 675 (Ind.), where

statements were suppressed involving the same detective. Because the interview took place in the detective's personal office, not an interview room, the approximately forty-five minute interview — while certainly lengthy — was not particularly hostile; it was exploratory and conversational rather than accusatory. Defendant and his girlfriend left the station unaided, which gives rise to a reasonable inference that Defendant was not cabined into a remote place in the police station. "True, the couple was told they 'needed' to come to the police station, [the detective] did carry his gun, [Defendant] was outnumbered in the interview room, and the couple had to move through several barriers. But given the casual atmosphere, exploratory and conversational line of questioning, and relatively unimpeded pathway to the room, the totality of these objective circumstances does not represent a curtailment akin to formal arrest." Goff, J., dissenting, arguing that a Miranda warning would be necessary when "a limited-English-speaking suspect, having been summoned to a police station by a fully uniformed officer, endures a prolonged and accusatory interrogation by an armed detective in a visually combined office with no clear path to the office door and with no knowledge of his ability to freely exit the secured station house entrance … ." One important factor distinguished this case from E.R., bolstering the trial court's conclusion that police conducted a custodial interrogation: Defendant's limited-English proficiency."… (U)pon electing to interrogate such a suspect, a prudent officer, in my opinion, should consider whether the suspect's language barrier might reasonably bear on the suspect's understanding of his freedom of action... If so, a Miranda warning would greatly assist a judge tasked with ruling on the admissibility of any statements made during the interview."

Murray v. State, (2/11/2022) 182 N.E.3d 270 (Ind. Ct. App.) **Compelling Defendant to show his teeth to jury did not violate Fifth Amendment**

At a trial for dealing methamphetamine, the State entered a video of a controlled buy into evidence, which showed the person who entered the informant's car wore sunglasses, a hat, and a hood. He also had crooked teeth. Near the end of its case-in-chief, the State asked the trial court to direct Defendant (who was wearing a mask under COVID restrictions) to show the jury his uncovered face and his teeth to show that he had the same distinctive set of teeth as the person in the video. Defendant objected on the basis that being compelled to do so would constitute a violation of his Fifth Amendment right against self-incrimination. The trial court initially ruled Defendant would have to take off his face mask and face the jury, but not show his teeth. Then, after learning he was wearing a "homemade" retainer in his mouth, the State renewed its motion and the court ruled he would be required to take the appliance out and smile for the jury. The Court of Appeals held that the trial court did not violate Defendant's Fifth Amendment protection against compulsory self-incrimination when it required him to show his teeth to the jury. Unlike compelling the defendant to unlock a smartphone in Seo v. State, the act of showing teeth did not convey information that the State does not already know. "While smiles can convey messages in the ordinary course of life, any such emotional context is removed when the subject smiles because he is directed to do so." Even assuming error in requiring Defendant to show his teeth, the Court would find it harmless beyond a reasonable doubt in light of the other evidence against Defendant.

Kerner v. State, (10/22/2021) 178 N.E.3d 1215 (Ind. Ct. App.) **Disclosure of Defendant's cell phone pass code did not violate Fifth Amendment**

In murder, attempted robbery and arson prosecution, trial court did not err in denying a motion to suppress evidence obtained from Defendant's cell phone. Unlike the defendant in Seo v. State, who consistently refused to provide her pass code to law enforcement, Defendant here voluntarily provided the pass code. He also made no Fifth Amendment objection to doing so until 19 months later on the sixth day of trial. The Court of Appeals concluded that because Defendant voluntarily gave his pass code to law enforcement instead of timely asserting his Fifth Amendment privilege, his disclosure was not a compelled incrimination.

Doroszko v. State, (3/29/2022) 185 N.E.3d 879 (Ind. Ct. App.) **Involuntary confession claim rejected**

In murder prosecution, Defendant challenged the admission of his confession on grounds that police lied to him at his home by telling him they believed he was a victim, which negated the voluntariness of his confession. The record showed that when a police commander arrived at Defendant's home, he told Defendant that he believed him to be a victim in the shooting incident. He then asked Defendant about the location of the gun, and the defendant said he did not know where it was. At that point, officers transported him to the metro homicide unit and placed him in an interview room. Under the totality of the circumstances, the Court of Appeals could not say that the police commander's statement rendered Defendant's confession at the metro homicide unit several hours later involuntary.

III. PRETRIAL PROCEEDINGS

A. Charging Information/Amendments

Cabrera v. State, (10/18/2021) 178 N.E.3d 344 (Ind. Ct. App.) **No fundamental error in State's charging information**

The defendant, convicted of four counts of child molesting, argued that the charging information failed to state with sufficient particularity the facts that formed the basis of the criminal charges. Specifically, he claimed that, based on the dates alleged in the charging informations, he was unfairly made to defend against actions that occurred over 50 months. Defendant did not move to dismiss, so the Court of Appeals reviewed his claim of fundamental error. Finding no fundamental error, the Court noted the exact date of the offense in a child molest case is only important in limited circumstances. And here, the respective date ranges covering each offense spanned no more than one year. The victim's recall of each of Defendant's offenses was relative to her grade in school. The State crafted each time frame to correspond with the victim's progression through each grade in school, which is as definite as the State could have framed them. The Court concluded that Defendant's "repeated

reference to a fifty-month time period is inapt, and under these facts and circumstances the State's allegation of separate time frames spanning less than one year did not deprive him of a fair trial."

B. Bail/Initial Hearing

DeWees v. State, (2/3/2022) 180 N.E.3d 261 (Ind. Ct. App.) **Denial of bail modification affirmed**

Trial court did not abuse its discretion in refusing to reduce bond or grant conditional release to an 18-year-old Defendant who drove three men to an armed home invasion resulting in the exchange of gunfire and injury to one of the accomplices. Defendant was charged with Level 2 felony aiding, inducing or causing burglary with a deadly weapon. Using the Indiana Risk Assessment System's (IRAS's) Pretrial Assessment Tool, court services assessed Defendant for pretrial release and rated her at a moderate risk of rearrest and failure to appear at future court hearings. The trial court subsequently denied her motion for reducing her $50,000 cash only bond. Acknowledging Defendant's strong family ties and lack of criminal record, the trial court was swayed by the "extremely serious" nature of the crime and burglary victim's testimony that he lived in fear since the break-in. However, the Court of Appeals reversed and ordered Defendant to be released to pretrial electronic home detention with GPS monitoring. On transfer, the Indiana Supreme Court affirmed the trial court's ruling, finding the State met its burden of showing Defendant posed a substantial flight risk and danger to others, including the victim of the home invasion. Before reaching its decision, the Court examined Indiana's bail reform efforts, concluding Criminal Rule 26 and the Legislature's codification of that rule enhance, rather than restrict, the trial court's discretion when determining bail and "strike the proper balance between preserving a defendant's pretrial liberty interests and ensuring public safety." Indiana Code § 35-33-8-3.8 mandates that a trial court consider the results of the IRAS, but the statute does not compel that the defendant be released or require the trial court to use the IRAS assessment in setting bail. Indeed, the Legislature encouraged trial courts to incorporate other information that is relevant in the bail determination. The Court also admonished the Court of Appeals for reversing the trial court and issuing a ruling that required her to be released immediately. Even while an individual's liberty is at stake in a bail decision and deviating from Appellate Rule 65(E) may be justified, the Court urged "prudence and restraint" when deviating from the rule. But the Supreme Court's opinion did not affect Defendant's conditional release. Instead, if either party wanted to modify her release, then the trial court would have to conduct a hearing consistent with the Supreme Court's opinion in this case. Held, transfer granted, Court of Appeals opinion at 163 N.E.3d 357 vacated, judgment affirmed.

Beachey v. State, (9/28/2021) 177 N.E.3d 850 (Ind. Ct. App.) **Trial court must consider Indiana pretrial risk assessment in determining bond amount**

The trial court abused its discretion in denying Defendant's motion to reduce bail because it failed to order and consider the results of a pretrial risk assessment report as mandated by Indiana Criminal Rule 26 and IC 35-33-8-3.8. In light of the trial court's failure to adhere to the pre-risk assessment

requirement, the Court of Appeals did not address Defendant's constitutional argument that the $520,000 surety bond was excessive. The trial court's order denying modification of bond was vacated and remanded for proceedings consistent with the opinion.

C. Speedy Trial

Williams v. State, (5/4/2022) N.E.3d (Ind. Ct. App.) **Defendant not prejudiced by 35-year delay in filing of rape and criminal deviate conduct charges**

In 1984, when Defendant was a juvenile, he was charged with participating in several home invasions involving rape, robbery and sexual assault in Gary, Indiana. Defendant was questioned by police about another home invasion in Hobart, Indiana, and he admitted participation with others in the Hobart home invasion. Sexual assault kits from the Hobart home invasion were submitted to the State police lab for analysis. Hair and seminal fluid was found but because there were no suspect standards sent for comparison, the evidence was returned to police in 1987. Defendant was convicted and sentenced to 45 years in the Gary home invasion cases. 31 years later, Hobart police resubmitted the Hobart sexual assault kits and Defendant emerged as a match through CODIS. The State then charged Defendant with two counts of rape and two counts of criminal deviate conduct as class A felonies for the Hobart home invasion. Defendant filed a motion to dismiss the charges, which was denied. On interlocutory appeal, the Court of Appeals affirmed, finding that even though Defendant's alleged accomplice and some of the witnesses from the lab were now deceased, Defendant was unable to show prejudice because he he failed to make a thorough showing the witnesses were unavailable or that he tried unsuccessfully to locate them, and because the charges are based on DNA. Defendant was unable to show that the now deceased or unavailable witnesses likely possessed information that would aid in his defense. Because Defendant was unable to make the threshold showing that he suffered actual or substantial prejudice, the Court did not address whether the State's delay was justified. Defendant argued that when he was tried and convicted of the Gary home invasion and investigated for the Hobart home invasion, it was "tantamount to declaring that justice had been done for his crime spree and no further prosecution was necessary." The Court of Appeals dismissed this argument as as sheer speculation. Held, denial of motion to dismiss affirmed.

Blake v. State, (9/28/2021) 176 N.E.3d 989 (Ind. Ct. App.) **Reasonable to find COVID-19 pandemic constituted an emergency under Criminal Rule 4**

On interlocutory appeal, the Court of Appeals found Defendant waived his argument alleging a speedy trial violation because, in his motion for discharge, Defendant had maintained the COVID-19 pandemic did not constitute an emergency under Criminal Rule 4. The Court held Defendant was not entitled to discharge under Crim. R. 4(B)(1). On November 20, 2020, the trial court continued Defendant's jury trial, noting the current conditions within Morgan County concerning Covid-19 infections and the positivity rate coupled with the case's complexity. The trial court's finding that an emergency existed was reasonable in light of the circumstances relating to the Covid-19 pandemic that existed at the time.

McCarthy v. State, (9/1/2021) 176 N.E.3d 562 (Ind. Ct. App.) **Speedy trial clock did not begin to run while Defendant was held in another county because proceedings had not been started against him**

In June 2017, Defendant robbed a tobacco store in Johnson County and stole a customer's car. He was apprehended by the Greenwood Police Department and transported to a Marion County Hospital for injuries, where he was taken into custody by the Indianapolis Police Department on an active warrant and incarcerated at the Marion County Jail. The following day, Defendant was charged with five felonies in Johnson County, but hs arrest warrant was not served until Dec. 14, 2018. After two continuances requested by Defendant and withdrawal of defense counsel due to a breakdown in the attorney-client relationship, a trial date was set for September 22, 2020. Defendant filed a motion for discharge, which trial court denied, and an interlocutory appeal ensued. Relying on State ex rel Kohlmeyer, 261 Ind. 244, 301 N.E.2d 518 (1973), the Court of Appeals held that for Criminal Rule 4(C) purposes, the speedy trial clock did not start ticking until Defendant was transferred to Johnson County in December, 2018. The Court distinguished Rust v. State, 792 N.E.2d 616 (Ind. Ct. App. 2003), which involved a defendant charged in two counties. Unlike in Rust, Johnson County had not commenced proceedings against Defendant while he was incarcerated in Marion County, so the one-year Crim. R. 4(C) clock for Johnson County had not been running during this time. Applying the factors set out in Barker v. Wingo, 407 U.S. 514 (1972), the Court also rejected Defendant's constitutional speedy trial challenge. Although the initial 18-month delay between Defendant's charging and initial hearing weighed slightly against the State, the overall factors in the delays weighed more against the Defendant than the State.

D. Continuance

Ramirez v. State, (4/27/2022) 186 N.E.3d 89 (Ind. Ct. App.) **Denial of continuance denied a fair trial**

In child molesting prosecution, trial court erroneously denied Defendant's motion for a continuance to review new evidence submitted one day before trial. After delving "into the facts of the case" with the complaining witness (C.W.) and her mother for the first time, the prosecutor sent defense counsel an email detailing the discussions that included several new allegations. Defense counsel, within four hours of receiving the new information, filed a motion requesting in part that the court grant a continuance because the new allegations materially changed his theory of defense and counsel needed time to complete additional discovery. The trial court denied the motion as untimely, and during trial, Defendant twice renewed his request for a continuance with no success. The Indiana Supreme Court found an abuse of discretion because the trial court failed to engage "in the appropriate balancing of interests when it denied the (continuance) request, and [Defendant] made specific showings as to why additional time was necessary and how it would have benefitted the defense." The Court further noted that there was no evidence that a continuance would have adversely impacted the State's interests or burdened the court. As in Vaughn v. State, 590 N.E.2d 134, 135–36 (Ind. 1992) and Flowers v. State, 654 N.E.2d 1124, 1125 (Ind. 1995), Defendant established prejudice from the trial court's denial of his motion for continuance. "Simply put, it is unrealistic to expect the defense, within a few hours, to

investigate the new allegations, evaluate the evidence, adapt trial strategy, and complete final preparations." Held, transfer granted, Court of Appeals' memorandum opinion vacated, conviction reversed and remanded for new trial.

E. Venue/Jurisdiction

Bunch v. State, (4/6/2022) N.E.3d (Ind. Ct. App.) **Trial court was proper venue to hear defendant's petition to restore gun rights**

Both federal and Indiana law provide that an individual who has been convicted of a crime of domestic violence may not possess a firearm. But federal law further indicates that an individual's federal rights may be restored if the individual's rights are restored in the applicable jurisdiction, in this case, Indiana. The Indiana General Assembly has created an avenue by which such an individual may petition to have their right to possess a firearm restored. Bunch alleged that he lost his right to possess a firearm after he pled guilty to and was convicted of Class B misdemeanor battery for acts committed against his then-wife. Bunch subsequently petitioned the trial court to restore his right to possess a firearm. The trial court denied the petition, finding that if Bunch's gun privileges had been revoked, the revocation was not the result of Indiana Code section 35-47-4-7, but rather the result of federal law and, as such, Bunch must seek relief in the federal courts. The Court of Appeals disagreed. Based on the plain language of the statute, the Court concluded that the proper venue for Bunch's request was the trial court regardless of whether his federal or state right to possess a firearm (or both) was revoked and that Bunch's conviction qualified as a crime of domestic violence. I.C. 35-47-4-7 therefore applied and Bunch appropriately relied on I.C. 35-47-4-7(b) in his attempt to have his right to possess a firearm restored. The Court rejected the State's alternative argument that, even if the trial court was the correct venue, denial of the petition was still the right result. "Because the trial court made no findings on whether restoration of Bunch's right to possess a firearm was proper pursuant to the factors listed in I.C. 35-47-4-7(b), we cannot merely agree with the State on this assertion. Rather, we must remand the matter to the trial court for further proceedings, during which the trial court may consider the merits of Bunch's petition." Held, judgment and remanded.

F. Discovery

Ramirez v. State, (4/27/2022) 186 N.E.3d 89 (Ind. Ct. App.) **Improper local discovery rule**

In child molesting prosecution, trial court erred in denying Defendant's request for a copy of forensic interview of complaining witness (C.W.). The prosecutor relied on Allen County Local Criminal Rule 13, which requires defense counsel to apply to the trial court "to obtain copies of audio or videotape" and "state in specific terms the necessity for such copies." The Court found the local rule void "because it imposes requirements not found in our trial rules for obtaining otherwise discoverable evidence." The trial court erred in relying on the impermissible local rule and issuing an improper protective order for the video. However, these erroneous discovery rulings did not require reversal because Defendant had over seven months to view the videos at the prosecutor's office. The Court could not say that Defendant's inability to receive a physical copy of the video was "inconsistent with substantial justice," thus reversal was not required on that issue. Held, transfer granted, Court of

Appeals' memorandum opinion vacated, conviction reversed and remanded for new trial based on trial court's denial of Defendant's motion for continuance (see above).

State v. Jones, (6/22/2021) 169 N.E3d 397 (Ind.) **An informant's identity is inherently revealed at a face-to-face interview and the informer's privilege applies**

A confidential informant (CI) provided police with information they used to determine Defendant was a suspect in offenses stemming from a home invasion. When Defendant and his codefendants attempted to learn the CI's identity, the State refused to disclose it, stating the witness was used only to develop potential suspects and would not testify at trial. After failed attempts to conduct an interview in a way that would conceal the CI's identity, the trial court ordered the State to produce the CI for a face-to-face interview with the condition defense counsel not ask questions that may disclose the CI's identity. The Indiana Supreme Court found that physical appearance disclosed by a face-to-face interview inherently reveals a CI's identity and thus triggers application of the confidential informer's privilege. Once the State has met the threshold requirement to show the confidential informer's privilege applies, the burden shifts to the defendant to demonstrate that disclosure of identity is relevant and helpful to the defense or that it's necessary for a fair trial. If the defense meets that burden, it has shown an exception is warranted. The State then gets the opportunity to dispute whether disclosure is necessary to the defense or show that disclosure would threaten its ability to recruit or use Cis in the future. The trial court should balance the respective interests to determine whether the general rule of nondisclosure has been overcome. Held, transfer granted, Court of Appeals opinion at 155 N.E.3d 1287 vacated, reversed and remanded to the trial court to engage in the necessary balancing inquiry to determine whether an exception to nondisclosure was warranted.

Church v. State, (6/28/2021) 173 N.E.3d 302 (Ind. Ct. App.) **Statute restricting D's ability to take child depositions in sex cases conflicts with Indiana Trial Rules and is invalid**

Ind. Code 35-40-5-11.5 requires "extraordinary circumstances" or prosecutorial consent to depose an alleged child victim under sixteen years of age. Here, trial court abused its discretion in denying Defendant's petition to depose the alleged child victim because the procedural statute impermissibly conflicts with the Indiana Trial Rules governing the conduct of depositions. Following Sawyer v. State, No. 20A-CR-1446 (Ind. Ct. App. May 19, 2021), Court found that trial court erroneously resolved the conflict in favor of the newly-enacted statute and reversed the trial court's order denying Defendant's petition for depositions.

See also: State v. Riggs, 175 N.E.3d 300 (Ind. Ct. App. 2021) (child deposition statute unenforceable; any substantive provisions of the statute do not exempt the procedural provisions of the statute from general rule that trial rules control); Pate v. State, 176 N.EW.2d 228 (Ind. Ct. App. 8/9/2021) (statute impermissibly conflicts with Trial Rules 26 and 30. The Trial Rules govern and the Statute is a nullity).

Minges v. State, (1/1/2022) 180 N.E.3d 391 (Ind. Ct. App.) **Supreme Court urged to reconsider precedent regarding police reports as the prosecutor's work product**

The trial court denied Defendant's motion to compel discovery of a complete and accurate copy of a police report detailing the events that led to his charges. Pursuant to Keaton v. Circuit Court of Rush County, 475 N.E.2d 1146 (Ind. 1985), police reports constitute the work product of the prosecuting attorney and trial courts lack authority to order production of police reports alleging criminal conduct when the prosecutor timely asserts the work product privilege. The Court of Appeals, while bound by the Supreme Court precedent, agreed with Defendant that Keaton's holding and analysis are problematic in a number of respects and addressed those concerns "solely for the purpose of urging reconsideration of the particular issue." Specifically, the Court first criticized the bases for the holding, burden and the risk of misleading cross-examination, as not generally the considerations for a work product analysis. Work product analysis usually turns on whether the document was prepared in anticipation of litigation at the direction of counsel while the concerns regarding burden and the risk of misleading cross are analyzed under Trial Rule 26(B)(1) and Evidence Rule 403, respectively. The Court next noted that it's problematic to categorically treat police officers as agents of the prosecutor and that Keaton gives the State advantages provided to no other party under the work product doctrine. Finally, the Court noted that Keaton's concerns about burdening the State and misleading cross do not warrant shielding all police reports given the fact prosecutors all over the State routinely produce them in discovery. Despite those concerns, the Court noted it was bound by the precedent in Keaton, and held the trial court did not abuse its discretion in denying the discovery request. Judge Bailey wrote separately to concur.

State v. Lyons, (5/11/2022) ___N.E.3d___(Ind. Ct. App.) **Exclusion of evidence as sanction for "serious discovery violation" by State upheld on appeal**

The Court of Appeals affirmed the trial court's exclusion of incriminating evidence against Defendant in a child molest case due to "serious discovery violation" by the State. In the middle of a stipulated polygraph of Defendant, police determined he was not a suitable candidate for an evidentiary polygraph due to his mental health issues. They changed it to a non-stipulatory, investigatory polygraph, which is inadmissible in court. But the officer conducting the polygraph forgot to change the stipulated notation to non-stipulated on his handwritten notes. In a post-polygraph interview, Defendant made incriminating statements. Despite being told not to, a detective delivered the stipulation to the Lawrence County prosecutor. In a motion to suppress hearing challenging the advisement of the right to counsel advisement on the stipulation, neither the detective nor the officer who performed the polygraph testified that the polygraph had been changed to non-stipulated. After the prosecutor's late disclosure of the non-stipulated polygraph just days before the jury trial was set to begin, the trial court granted a motion to exclude any and all evidence in reference to the polygraph, including the post-polygraph interview. The Court of Appeals found no abuse of discretion in the decision to impose that sanction for a violation of *Brady v. Maryland* and *Kyles v. Whitley*, and a material breach of Trial Rule 37(B)(2). "We are unconvinced by the State's argument that the discovery violation resulted in no significant prejudice to Lyons's defense because the argument fails to acknowledge the broader

implications that pretrial discovery violations may have on a case. It is easy to imagine a scenario in which Lyons entered into a plea agreement with the State before ever finding out that the polygraph results would not have been admissible in a trial." Held: affirmed and remanded.

Pimentel v. State, (2/18/2022) 181 N.E.3d 474 (Ind. Ct. App.) **Dismissal not warranted for State's failure to preserve syringe**

When the State fails to preserve materially exculpatory evidence, a due process violation occurs regardless of whether the State acted in bad faith. Here, the Court of Appeals found no due process violation from State's destruction of the syringe Defendant was charged with unlawfully possessing, because the syringe was not materially exculpatory evidence. Defendant presented no evidence that an examination of the syringe would have revealed there was no needle attached to it. The Court noted that although the police officer "should have photographed the syringe while it was uncapped so that the needle would have been visible, the officer's failure to do so does not render the syringe materially exculpatory." The syringe fell in the category of potentially useful evidence, which required Defendant to demonstrate bad faith on the part of the State in destroying the evidence. But the record showed the police department disposed of the syringe pursuant to its policy. Therefore, the trial court did not err in denying the defendant's motion to dismiss the charge.

Bennett v. State, (8/23/2021) 175 N.E.3d 331 (Ind. Ct. App.) **Due process claim from destruction of evidence rejected**

Defendant called 911 after fatally shooting girlfriend with a muzzleloader and then shooting himself in the face with a different firearm. He was convicted of murder and sentenced to 65 years in prison. At trial, Defendant argued he was denied Due Process as a result of the State's destruction of exculpatory evidence from cleaning the muzzle loader in the course of performing tests on it, thereby removing the corrosion and residue that could have shown the gun was unsafe and prone to misfire. This would imply Defendant did not have the requisite intent to commit murder when he shot his girlfriend. The Court of Appeals disagreed, finding Defendant failed to show that examining the gun before it was cleaned could have provided evidence that Defendant did not act knowingly or intentionally when he pulled the trigger and Defendant also failed to show the State acted in bad faith by cleaning the gun. Held, judgment affirmed.

G. Motions to Dismiss

State v. Johnson, (2/23/2022) 183 N.E.3d 1118) (Ind. Ct. App.) **Double jeopardy did not bar state prosecution for attempted murder and related charges following acquittal on federal kidnapping charge stemming from same event**

A prior conviction or acquittal in another jurisdiction bars a subsequent Indiana state prosecution for the "same conduct." I.C. 35-41-4-5. Indiana statutory double jeopardy analysis centers on comparing the conduct alleged in the charging instruments. Here, Defendant was charged in State Court with attempted murder, two counts of kidnapping, aggravated battery, battery by means of a deadly weapon, battery resulting in serious bodily injury and intimidation. A month later, Defendant was indicted in Federal court on a single federal kidnapping charge stemming from the same event. The State moved to dismiss the charges due to the federal charge having been filed, and the trial court granted the motion. Defendant was later acquitted of the kidnapping in federal court. The State then refiled an information charging Defendant with the offenses it had charged earlier but absent the two kidnapping charges. Defendant filed a motion to dismiss, arguing that pursuant to Indiana's double jeopardy statute, his acquittal on the federal kidnapping charge barred his prosecution on the refiled charges. The trial court agreed and granted the motion, but the Court of Appeals reversed and remanded for trial, finding "scant Indiana caselaw applying (Indiana Code) section 35-41-4-5," but found that Indiana statutory double jeopardy analysis centers on comparing the conduct alleged in the charging instruments. Here, the federal kidnapping allegation and the State's charges were not based on the "same conduct" for purposes of Indiana Code section 35-41-4-5.

Brown v. State, (6/24/2021) 172 N.E.3d 1273 (Ind. Ct. App.) **Administrative sanctions by DOC do not preclude subsequent prosecution for the same actions**

As an inmate at a DOC facility, Defendant allegedly fought with and scratched a correctional officer. The DOC held a hearing and Defendant was found in violation of the conduct code and sanctioned with significant discipline including the demotion of one credit class, loss of credit time, and 360 days in solitary confinement. The State charged Defendant with battery against a public safety officer based on the same incident and the trial court denied his motion to dismiss based on principles of double jeopardy. The Court of Appeals found deprivation of credit time is not so punitive either in purpose or effect that it constitutes a criminal penalty that would subject a person to double jeopardy. Further, the court followed Williams v. State, 493 N.E.2d 431 (Ind. 1986), to hold that prosecution after administrative punishment by changes in the conditions of incarceration, such as placement in segregated housing, does not constitute double jeopardy. Held, affirmed.

State v. Smith, (12/7/2021) 179 N.E.3d 516 (Ind. Ct. App.) **Trial court misapplied the law in dismissing burglary and kidnapping charges**

Defendant filed a motion to dismiss burglary, kidnapping, and criminal confinement charges because of insufficient evidence. At a hearing on the motion, the alleged victim denied that the defendant (her ex-boyfriend) had broken into her home or removed her against her as the charging information alleged. The defendant argued that the trial court had factfinding discretion because it was able to observe the demeanor of the sole alleged victim, and that the Information should be dismissed in the interests of judicial economy. The trial court dismissed the charges and the State appealed. The Court held of Appeals that while trial courts have some discretion to determine factual issues when considering a motion to dismiss, that discretion does not extend to usurping the function of the jury. The Court also pointed out that there was other evidence of criminality based on the officer's observations of the scene, the alleged victim's conflicting accounts of how she came to be three hours from her home, and a text message she sent her aunt shortly after the event accusing the defendant of domestic violence. The case was remanded with instructions to reinstate the charges.

IV. TRIAL

A. Right to Counsel

Marshall v. State, (1/7/2022) 180 N.E.3d 411 (Ind. Ct. App.) **Invalid waiver of counsel & due process violation resulting from failure to provide discovery to incarcerated defendant**

In criminal trespass prosecution, Defendant's waiver of his right to counsel was not knowing, voluntary, and intelligent, and his inability to get his case file while in jail violated his right to fundamental fairness and due process of law. After rescinding his request for a public defender at a pretrial conference, Defendant informed the trial court that he had not received any of the court filings or documents related to his case. The prosecutor and trial court assured Defendant that he would receive access to discovery in the jail. And when Defendant indicated that he wished to proceed pro se, the trial court did not inform him of any of the dangers and disadvantages of self-representation. At trial, Defendant again stated that he had not received any witness statements, affidavits or information the court had instructed the prosecutor to provide to him. The trial court stated that “by choosing to represent yourself and being in custody it made it difficult for you having access to that” but "that’s a choice that you have made." In Griffin v. State, 59 N.E.3d 947 (Ind. 2016), the Indiana Supreme Court noted, “[i]t is quite possible that the State could violate a pro se prisoner’s due process rights by providing discovery solely in a format it knows the prisoner has no means of accessing. We hope never to see such a case.” The Court of Appeals noted that the fundamental fairness requirement of the 14th Amendment "involves meaningful access to the courts, including through discovery, and through a knowing, voluntary, and intelligent waiver of the right to counsel at all significant phases of criminal proceedings, including trial and sentencing.” Defendant was denied due process in this case, and the Court reversed his conviction. The Court also noted that "while the pressure on trial courts to manage

cases is immense," the requirement of Judicial Conduct Rule 2.8(B) to be “patient, dignified, and courteous to litigants" is not optional, nor does it conflict with the duty imposed in Rule 2.5 "to dispose promptly of the business of the court. Judges can be efficient and businesslike while being patient and deliberate.” See Comment [1] to Ind. Code of Jud. Conduct, Rule 2.8.

B. Right to Public Trial; Jury Trial

Lappin v. State, (6/14/2021) 171 N.E.3d 702 (Ind. Ct. Ind.) **Limiting public seating in courtroom and audio streaming of voir dire due to Covid-19 restrictions did not violate right to public trial**

Defendant was tried by jury, October 1, 2020, during the Covid-19 pandemic. Live stream of voir dire was audio only to the lobby of where the trial was being held due to covid-19 restrictions and where the public could hear the audio. Court of Appeals found no violation of Defendant's right to public trial and that trial court struck the right balance between Defendant's right to public trial and privacy of venire. Also, no violation in limiting number of spectators to four, due to pandemic-related restrictions. Applying the four part test set out in Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 2215 (1984), the Court held that Defendant was not denied his right to a public trial and the trial court did incorporate reasonable alternatives.

Carmouche v. State (5/17/2022) N.E.3d (Ind. Ct. App.) **Battery conviction reversed where Defendant never advised of his jury right**

After a bench trial, Defendant was convicted of class A misdemeanor battery stemming from a jailhouse incident wherein he was alleged to have kicked a door against the knee of the jail's mail clerk. The Court of Appeals reversed his conviction after finding his jury trial waiver was invalid because Defendant was never advised of his jury trial right or how to assert it. The Court also found insufficient evidence to support battery (see below) and reversed and discharged Defendant.

C. Right to be present/Trial *in absentia*

Wells v. State, (9/22/2021) 176 N.E.3d 977 (Ind. Ct. App.) **Excluding Defendant from trial and trying him *in absentia* for testing positive for THC resulted in fundamental error**

Exclusion from trial for failing a drug test is improper. In such instances, a trial court should apply, and exhaust, lesser contempt penalties, before imposing the extreme sanction of the deprivation of fundamental rights. After Defendant appeared in court for trial and exhibited worrisome behavior, trial court had him tested for drugs and he tested positive for THC. The trial court continued his case and imposed pre-trial release conditions including twice weekly drug testing and ordered "no weed smoking until you get tried." At the rescheduled trial, Defendant again tested positive for THC and the trial court excluded him from trial and tried him in absentia. Court of Appeals finds the exclusion from trial violated

Defendant's right to be present under the Sixth Amendment rights and Article one section 13 of the Indiana constitution because there was no record that Defendant engaged in disruptive and contumacious conduct or interfered with the trial court's conduct on the date in question. The trial court failed to apply and exhaust lesser contempt remedies and foreclosed Defendant from assisting in his defense and hearing the evidence against him. Held, conviction reversed.

Warren v. State, (2/28/2022) 182 N.E.3d 925 (Ind. Ct. App.) **New sentencing hearing ordered after trial court wrongly denied Defendant's request to be physically present**

A trial court may conduct a sentencing hearing at which the defendant appears by video, but only after obtaining a written waiver of his right to be present and the consent of the prosecution. Here, on December 29, 2020, Defendant filed a request to be physically present in the courtroom for his sentencing hearing on multiple convictions related to dealing and possessing methamphetamine. The trial court denied Defendant's request four days later without making findings. Instead, it merely stamped "DENIED" on the defendant's motion and then proceeded to hold a remote sentencing hearing. The Court of Appeals agreed with Defendant's argument that the trial court failed to comply with Administrative Rule 14 and the Supreme Court's May 13, 2020, emergency COVID-19 order. Under Administrative Rule 14, a trial court may conduct a sentencing hearing at which the defendant appears by video, but only after obtaining a written waiver of the right to be present and the consent of the prosecution. The Supreme Court's May 2020 COVID-19 order also provided that a trial court could conduct a remote sentencing hearing only where a defendant waived his right to be physically present in the courtroom for the hearing. The Court of Appeals held that the trial court erred in holding the sentencing hearing in which the defendant clearly did not waive his right to be present. In a footnote, the Court rejected the State's argument that Defendant waived the issue by not objecting at the outset of the sentencing hearing, citing the Supreme Court's May 2020 emergency order. The Court found his written motion requesting to be present at sentencing hearing preserved the issue for review.

Partee v. State (3/21/2022) 184 N.E.3d 1225 (Ind. Ct. App.) **No error in failing to advise defendant he could return to courtroom if he behaved**

After being removed for the second time the first day of his trial following Defendant's repeated disruption of the proceedings, the trial court did not advise Defendant (a "sovereign citizen") that he could return if he conducted himself in an appropriate manner. Defense counsel objected to Defendant's removal for the record but said she understood why he was being removed. On appeal, Defendant did not challenge his removal. He argued that the error occurred when the trial court did not advise him, he may reclaim his constitutional right to be present and be afforded the opportunity to return to the courtroom if he promises to behave, citing language from the Supreme Court's decision in Illinois v. Allen, 397 U.S. 337, 338 (1970). The Court of Appeals acknowledged some courts have read the Supreme Court's opinion in Allen as requiring trial courts to advise defendants that they may return to the courtroom if they promise to behave. But the Court declined to read Allen as creating such a requirement. The Court pointed out that defense counsel did not raise an objection about the failure to

advise at the trial, and Defendant gave no indication that he was willing to conform his behavior consistent with the decorum required in judicial proceedings. "Accordingly, we conclude that the trial court did not commit error, let alone fundamental error, by failing to explicitly advise Partee that he could return to the courtroom if he promised to behave. We instead commend the trial court for its patience with a defendant as difficult as Partee."

D. Voir Dire

Glover v. State, (12/13/2021) 179 N.E.3d 526 (Ind. Ct. App.) **State's mini opening permitted because it did not suggest prejudicial evidence which not introduced at trial.**

In strangulation and domestic battery prosecution, trial court did not abuse its discretion in permitting the State to give a mini opening that explored jurors' understanding of domestic violence. Indiana Jury Rule14(b) expressly permits the State to give a mini opening that is a brief statement of the facts and issues to be determined by the jury and in this case the State did not suggest the existence of prejudicial evidence not introduced at trial. Court also found not error in trial court's failure to grant a mistrial after the complaining witness (C.W.) while testifying mentioned that Defendant had been in prison. Defendant failed to show the jury failed to follow the trial court's admonishment to disregard the testimony. Finally, there was no prosecutorial misconduct when during opening statement the State informed the jury that C.W. paid for Defendant's attorney, as these comments did not place Defendant in a position of grave peril and there was no fundamental error. Held, conviction affirmed.
NOTE: Justice David dissented from the denial of transfer to give guidance on how to regulate mini opening statements during voir dire. See Glover, 181 N.E.3d 982 (Ind. 3/9/2022).

United States v. Tsarnaev (3/4/2022) 142 S. Ct. 1024 (U.S. Supreme Court) **Voir dire - no error in court declining to ask about the content and extent of each juror's media consumption regarding crimes**

In capital case, District Court did not abuse its discretion by declining to ask about the content and extent of each juror's media consumption regarding the Boston Marathon bombings. Jury selection falls "particularly within the province of the trial judge," Skilling v. United States, 561 U. S. 358, 386, whose broad discretion in this area includes deciding what questions to ask prospective jurors, see Mu'Min v. Virginia, 500 U. S. 415, 427. Here, the District Court did not abuse that discretion when, recognizing the significant pretrial publicity concerning the bombings, the court refused to allow the question at issue because it wrongly emphasized what a juror knew before coming to court, rather than potential bias. That decision was reasonable and well within the court's discretion. Court also found no abuse of discretion in excluding from the sentencing proceedings evidence that Defendant's accomplice brother was allegedly involved in a triple murder two years before the bombing. Defendant offered this evidence to support his mitigation defense that his brother was the ringleader of the bombing. Although the Federal Death Penalty Act provides that, at the sentencing phase of a capital trial, "information may be presented as to any matter relevant to the sentence, including any mitigating or aggravating factor," (18 U. S. C. §3593(c)), the district court may exclude information "if its probative value is outweighed by

the danger of creating unfair prejudice, confusing the issues, or misleading the jury." Such evidentiary decisions are reviewed for abuse of discretion. The proffered evidence here did not allow the jury to confirm or assess Defendant's brother's alleged role in the unsolved murders. Thus, the District Court did not abuse its discretion when it reasonably excluded the evidence for its lack of probative value and potential to confuse the jury. Held, First Circuit Court of Appeals' opinion vacated, judgment affirmed. Breyer, J., joined in part by Sotomayor and Kagan, JJ., dissenting, agreed with 1st Circuit that district court should have allowed Defendant to introduce evidence about his brother's role in 2011 triple murders which was "critically important" to his defense, noting that one of the main issues at sentencing was whether Defendant's brother was more responsiblef for the bombings than Defendant.

Doroszko v. State, (3/29/2022) 185 N.E.3d 879 (Ind. Ct. App.) **Trial court's refusal to let Defendant or his attorney directly question prospective jurors was harmless error**

Defendant went to trial on the charge of murder and a firearm enhancement. Under the trial court's policy, the parties could not question the jury directly during voir dire. Defendant filed a motion objecting to the trial court's procedure as contrary to Trial Rule 47(D) and the right to a fair and impartial trial. Trial court denied Defendant's request to "personally, directly and verbally" question jurors. He submitted sixty potential voir dire questions for the court to consider. During voir dire, the trial court asked many questions of the jurors, including questions about self-defense. Defendant renewed his objection to the procedure for jury selection once the jury was impaneled. The Court of Appeals held the trial court's refusal to allow the defendant or his attorney directly question prospective jurors was an error under Logan v. State, 729 N.E.2d 125 (Ind. 2000) and Trial Rule 47(D). But it concluded the error was harmless under Logan because Defendant did not indicate what questions he would have asked had he been allowed to directly question the prospective jurors, did not show that the court's procedure adversely affected his ability to exercise his peremptory challenges, and he did not allege that any specific juror should have been removed but was not. In a footnote, the Court disagreed with another panel's decision in Peppers v. State, 152 N.E.3d 678 (Ind. Ct. App. 2020), which held that no error occurred in the trial court's procedure for conducting voir dire, because it believed Peppers was contrary to the Supreme Court's decision in Logan.

E. Bifurcation

Miller v. State, (11/1/2021) 177 N.E.3d 893 (Ind. Ct. App.), TRANS. GRANTED **Failure to bifurcate SVF charge - fundamental error**

In prosecution for possession of a firearm by a serious violent felon (SVF) and other charges, trial court committed fundamental error in instructing jury that Defendant had a prior robbery conviction and that possession of the firearm was already established because it elevated the two other charges of dealing and possession of a narcotic drug. Court could "think of no reason why a jury should be made aware of the fact of a defendant's prior conviction to support an SVF charge during the phase where the other primary charges are being tried." The preliminary jury instruction should not have been used

because of its prejudicial nature and Defendant's counsel should have moved for bifurcation of the SVF charge. Bifurcation serves the purpose of protecting a defendant's right to the presumption of innocence and ensures a fair trial. Even though the State dismissed the SVF charge after the jury had rendered its verdict, that did not balance the rights Defendant was deprived of during the trial. Believing that "a bright line must be drawn here," Court concluded that "the prejudicial nature of the prior-crimes evidence in the primary charge phase of the trial erodes if not eviscerates the defendant's right to the presumption of innocence. This is so no matter the level of sophistication of the juror tasked with divorcing himself from applying that knowledge to the primary charge." Here, "Defendant not receive a fair trial because of this fundamental error."

F. Closing Argument

Vasquez v. State (7/30/2021) 174 N.E.3d 623 (Ind. Ct. App.) **Prosecutor's improper closing argument did not require reversal -- arguing appellate standard of review for sufficiency claims**

In child molesting prosecution, trial court erred in allowing the prosecutor to argue an appellate standard of review in closing argument. Trial court allowed the prosecutor to construe the evidence in light of legal precedent holding that the uncorroborated testimony of a child victim is sufficient to support a child molesting conviction. Defendant argued the prosecutor's argument created the real risk of confusing the jury into thinking they do not have the ability to question the complaining witnesses' credibility and reject it. Court agreed with Defendant that permitting this argument to continue was improper. The prosecutor's argument repeatedly used the term "uncorroborated," which may confuse or mislead the jury. See Ludy v. State, 784 N.E.2d 459, 461 (Ind. 2003). Moreover, the argument focused the jury away from how the evidence met the elements required for conviction and toward the appellate standard, which Ludy made clear "is irrelevant to a jury's function as fact-finder." While inappropriate, the argument did not create reversible error because the trial court's instructions made clear to the jury that the court's instructions were its best source for controlling law and that counsels' arguments were not evidence. Thus, the prosecutor's improper argument was harmless error.

G. Jury Instructions

Larkin v. State (9/24/2021) 173 N.E.3d 662 (Ind.) **Reference to "handgun" in charging information for voluntary manslaughter gave D fair notice of lesser-included involuntary manslaughter instruction**

Charged with voluntary manslaughter in the death of his wife, Defendant was convicted of involuntary manslaughter as a lesser offense. During a domestic altercation in their home, Defendant's wife was shot twice and died; either of the shots could have been fatal. First, the Court found by simply alleging Defendant killed his wife with a handgun, the charging information alleged that he committed a battery against her. Thus, involuntary manslaughter based on a battery was a factually included lesser offense. The Court found there was a serious evidentiary dispute about the elements that distinguish

voluntary manslaughter from involuntary manslaughter and sufficient evidence to support a conviction of either offense. If the jury believed Defendant's statement he only intended to push his wife with the gun, they could convict him of involuntary manslaughter. The jury could also reasonably infer Defendant killed her while acting in sudden heat because of evidence of a heated verbal and physical confrontation between the two just before the shooting. The Court concluded there was no abuse of discretion in instructing the jury on involuntary manslaughter as a lesser included offense. The Court also held Defendant was given fair notice of the possibility of conviction of the lesser offense by alleging Defendant killed his wife with a handgun because the two charges were both based on the same means, the handgun, with the difference being whether the killing resulted from a pushing or a shooting.

Justice David dissented, believing the involuntary manslaughter instruction was not appropriate. While battery may be included where there is a murder by a handgun, that's not always the case. The "terse" charging information here only alleged the use of a handgun without any mention of a battery or facts that would even indicate one. The State requested the instruction over the defense's objection just minutes before final instructions and closing arguments. This does not give defense counsel adequate time to prepare a defense and the State should not be able, "to seek a lesser included instruction mid trial once it realizes things aren't going well or use a vague charging information to ambush a defendant."

Reyes v. State (5/6/2022) N.E.3d (Ind. Ct. App.) **No presumption that final instructions be given to jury after closing arguments**

The Court of Appeals rejected a defendant's claim that the presumption should be that final instructions are given last and trial courts must provide a reason for giving them before closing arguments. Jury Rule 26(a) gives trial courts the option to give final instructions before or after closing arguments; it creates no presumption. The Indiana Supreme Court could have written a presumption into Jury Rule 26 but did not. Reading final instructions before closing helps the jury better understand counsels' arguments about how the law applies to the facts. Further, there would be no guessing during closing as to what the instructions will be. The downside is that the last thing the jury would hear is the State's rebuttal argument, which might have a greater impact on it because of "recency bias." But as the trial court did here, courts could lessen any impact by addressing housekeeping matters after the State's rebuttal argument. That said, because Jury Rule 26(a) affords trial courts the option to give final instructions before or after closing arguments, a court can do either without abusing its discretion. Held, judgment affirmed.

Mathews v. State (4/21/2022) N.E.3d (Ind. Ct. App.) **No error in giving pattern jury instruction on motive**

In murder prosecution, the trial court did not err in giving the State's proposed Indiana pattern jury instruction on motive, which stated that "[m]otive is what causes a person to act. The State is not required to prove a motive for the crime charged." Defendant argued that this instruction invaded the province of the jury, was incomplete, and that the trial court should have stuck with its own proposed

jury instruction, which read: “Motive is what causes a person to act. Motive is not an element of the crime and therefore does not have to be proven beyond a reasonable doubt. However, presence of motive may tend to establish guilt, and absence of motive may tend to establish innocence. You may therefore give its presence or absence the weight you believe it should have as evidence.” In Cook v. State, 544 N.E.2d 1359 (Ind. 1989), the Court found that the pattern jury instruction on motive was sufficient, and the Defendant's more elaborate instruction, although "even-handed," did not require reversal of the jury’s verdict. "That reasoning applies here.” Although the trial court's original proposed instruction correctly stated the law and there was sufficient evidence to support giving it, the jury received ample information about motive through counsel's arguments and could weigh the evidence accordingly. See Kriner v. State, 699 N.E.2d 659 (Ind. 1998). Court concluded that both the trial court and the State’s instruction would have produced the same verdict.

Ramirez v. State (9/23/2021) 174 N.E.3d 181 (Ind.) **Supplemental jury instruction – no error**

In murder, neglect and LWOP prosecution, trial court did not abuse its discretion in giving supplemental jury instruction over objection in response to a jury question during deliberations. The jury asked whether “intentionally causing harm that leads to death” was the same as “intentionally kills.” The trial court sent the jury a supplemental instruction saying, “The State does not have to prove that a defendant specifically intended to kill another person for that defendant to be guilty of murder. It is enough for the State to show that a defendant knowingly inflicted an injury that resulted in the other person’s death, and at the time he inflicted that injury, the defendant was aware of a high probability that said injury could cause the death of the other person.” The Supreme Court emphasized that the decision to give a supplemental instruction should be made with great caution. But consistent with Ind. Code § 34-36-1-6, an error or legal lacuna — a gap in final instructions — is no longer required for trial courts to supplement final instructions in responding to a jury’s question on a point of law. See Inman v. State, 4 N.E.3d 190 (Ind. 2014). The statute only requires that the jury “seek information concerning a legal issue before it.” Defendant’s challenge to the substance of the instruction also failed, with the Court declining to reverse based on his arguments that the instruction used the word “could” instead of “would” in the definition of “knowingly” and failed to define “intentionally.” Defendant waived his challenge to the process for giving the supplemental instruction — sending it to the jury in writing rather than calling the jury back in and reading it.

Calvert v. State (9/27/2021) 177 N.E.3d 107 (Ind. Ct. App.) **No fundamental error in failing to give unanimity instruction**

The Court of Appeals found no fundamental error in not giving a special unanimity instruction under Baker v. State, 948 N.E.2d 1169 (Ind. 2011). Because the State was permitted to present the jury with alternative ways to find Defendant guilty as to one element, the jury did not have to unanimously decide which crime (battery or criminal recklessness) Defendant assisted in the charge for Level 6 felony assisting a criminal.

Yeary v. State (4/7/2022) N.E.3d (Ind. Ct. App.) **Reversible error found in jury instructions in drug-Induced Homicide case**

In drug-induced homicide prosecution, trial court committed reversible error in refusing to give Defendant's tendered jury instructions, which further defined the element of causation. Simply saying that ingestion of a controlled substance "resulted in the death of a human being who used the controlled substance" does not convey the concept of proximate causation to a lay juror. Likewise, saying, "'cause of death' is that event which initiates a chain of events, however short or protracted, that results in the death of an individual" does not convey to a lay person that some event may break the chain of causation. A lay person could reasonably, but erroneously, interpret these instructions to mean the State was only required to prove the victim's death followed the drug sale because "result" and "follow" are synonyms. Due to the ambiguity regarding precisely what drugs and in what quantities the victim took over the time period leading up to his death, the jury's verdict likely turned on its understanding of the legally required causal connection between the drugs Defendant sold the victim and the victim's death. Therefore, the trial court's instructional error cannot be called harmless.

H. Mistrial

Craft v. State (5/12/2022) ___N.E.3d___ (Ind. Ct. App.) **Defendant need not request jury admonishment before mistrial to preserve prosecutorial misconduct claim**

In a murder trial, Defendant objected four times during the State's closing argument and moved for a mistrial, which the trial court twice denied. The State argued Defendant waived the claim of prosecutorial misconduct by not first requesting an admonishment before seeking a mistrial, citing Ryan v. State, 9 N.E.3d 663 (Ind. 2014), in which the Supreme Court stated, "[t]o preserve a claim of prosecutorial misconduct, the defendant must—at the time the alleged misconduct occurs—request an admonishment to the jury, and if further relief is desired, move for a mistrial." But in Dresser v. State, 454 N.E.2d 406 (Ind. 1983), the Court previously said: "Where it is obvious, from the nature and degree of misconduct, that no admonishment could suffice, the motion for one may be dispensed with." Thus, it is quite plain that an admonishment is not required when it would not be effective. The Court of Appeals did not read Ryan as intending to fundamentally alter that foundation. The Court also saw no rationale for refusing to review a claim of prosecutorial misconduct when defense counsel believes the prosecutor's conduct is so egregious that only mistrial, and not admonishment, is the proper redress. "The defense is not forced to beg for relief it believes to be fruitless." In reviewing the claim on the merits, the Court determined that the prosecutor's statements did not tip the scales towards grave peril. Held: convictions affirmed.

Rochefort v. State (9/29/2021) 177 N.E.3d 113 (Ind. Ct. App.) **Denial of mistrial affirmed**

While serving a sentence at work release, Defendant obtained a pass and was transported to a mental health appointment by work release staff. When his appointment was over, no one from work release came to pick him up. He contacted work release, who instructed him to take a bus back to the

facility, but Defendant had no money and no bus pass. Defendant went to a transit station and got on a train that took him away from the work release facility. He did not return. A warrant was issued for his arrest and more than a year later he was arrested, charged, and convicted of failure to return to lawful detention, a Level 6 felony. At trial, Defendant repeatedly responded directly to the deputy prosecutor and spoke over the judge. At one point the judge told Defendant, in front of the jury, if he did not stop interrupting the judge he would be held in contempt of court and face a $1000.00 fine or six months in jail. Counsel moved for a mistrial, which was denied. The State requested an admonishment to the jury which was given. The Court of Appeals determined the trial court did not abuse its discretion in failing to grant the mistrial and Defendant did not show he was placed in grave peril because he failed to show the trial court exhibited partiality in its comments to Defendant in front of the jury. Even if it had, the trial court issued an admonishment to the jury explaining the reason for the court's comments and instructing the jury not to take its comments into account when determining Defendant's guilt.

V. SENTENCING

A. Sentencing Procedure/Placement

Strack v. State (5/2/2022) N.E.3d (Ind. Ct. App.) **Right to allocution distinct from the right to present evidence at sentencing**

Without a plea agreement, Defendant pleaded guilty to four charges and admitted to being a habitual vehicular substance offender. The State questioned Defendant at his plea hearing to establish a factual basis for the guilty plea. The trial court accepted Defendant's guilty plea and ordered a presentence investigation report. At the sentencing hearing, Defendant was advised if he had anything to say he needed to testify and be cross-examined. Trial counsel called his client to testify, and the State cross-examined him over objection. Defendant also spoke to the court at allocution. Defendant argued the trial court improperly advised him when told if he had anything to say he must testify and that this forced him to testify in violation of his right to allocution. On transfer, the Indiana Supreme Court clarifies before being sentenced for a felony, a criminal defendant is "entitled to subpoena and call witnesses and to present information in his own behalf." A defendant is not required to testify at sentencing, but when a defendant chooses to testify for evidentiary purposes, he or she must be placed under oath and subject to cross examination. "But a statement in allocution is not evidence. Rather it is more in the nature of closing argument where the defendant is given the opportunity to speak for himself or herself" to the trial court before the court pronounces sentence. Through allocution, the defendant may explain his or her views of the facts and circumstances without being "put to the rigors of cross-examination." Here, Defendant was able to exercise both his right to present evidence and his right to allocution and therefore any error was harmless.

Mitchell v. State, (2/28/2022) 184 N.E.3d 705 (Ind. Ct. App.) **Trial court erred in ordering Defendant to serve sentence at DOC**

Defendant pleaded guilty to Level 6 felony methamphetamine possession and Class C misdemeanor possession of paraphernalia. He argued the trial court abused its discretion when it sentenced him to the Department of Correction (DOC) for a Level 6 felony and misdemeanor. The State conceded that the trial court lacked statutory authority to order the sentence served in the DOC under Indiana Code 35-38-3-3. The Court of Appeals remanded with instructions to correct its abstract of judgment and sentencing order so Defendant can be transferred to the county jail. The Court of Appeals rejected Defendant's other argument that the 1.5-year executed sentence was inappropriate in light of the nature of the offense and character of the offender. Defendant failed to take advantage of rehabilitative efforts offered to him and his remorse did not justify reducing the sentence.
Note: In 2022, the Legislature repealed the statutory restriction in IC 35-38-3-3 for committment of level 6 felony offenders to the DOC.

B. Aggravating/Mitigating Circumstances

Terrell v. State (7/23/2021) N.E.3d (Ind. Ct. App.) **Advisory sentence for child molesting not inappropriate despite erroneous failure to find lack of criminal history mitigator**

Following Defendant's guilty plea to Level 4 felony child molesting, the trial court imposed a six-year advisory sentence, with one year suspended. Although the trial court did not specifically recognize the absence of a criminal history to be a mitigating factor in sentencing Defendant, the Court of Appeals elected not to remand for clarification or resentencing. Instead, the Court independently reviewed Defendant's sentence for inappropriateness and concluded that it is not inappropriate under Appellate Rule 7(B).

Davis v. State (7/15/2021) 173 N.E.3d 700 (Ind. Ct. App.) **Trial court did not abuse discretion in sentencing**

Defendant pleaded guilty to one count of attempted overpass mischief, a Level 5 felony, without the benefit of a plea agreement. The trial court sentenced him to a term of five years executed in the Department of Correction. The Court of Appeals held that the trial court did not abuse its discretion by failing to find as mitigating the fact he “called in and reported what he did and then waited nearby to be arrested.” Noting the argument was not raised at the sentencing hearing, the court found that waiver notwithstanding, Defendant did not demonstrate that mitigator was significant.

Strack v. State, (11/29/2021) 178 N.E.3d 1253 (Ind. Ct. App.) **Cumulative sentencing error claim rejected**

Trial court erred in precluding evidence pertaining to the impact Defendant's incarceration would have on his daughter, and also abused its discretion in failing to afford mitigating weight to Defendant's entry of a guilty plea without the benefit of a plea agreement. However, the Court of Appeals declined to remand for resentencing due to the abuse of discretion and alleged cumulative effect of the trial court's errors because the Court of Appeals could not conclude that the trial court would have ordered a different sentence had it properly considered the mitigator and evidence.

Carranza v. State, (2/28/2022) 184 N.E.3d 1742 (Ind. Ct. App.) **Finding of improper aggravators was harmlesss error**

In child molesting prosecution, trial court abused its discretion in considering improper aggravators of lack of remorse and non-acceptance of responsibility. The Court of Appeals agreed with Defendant that finding those aggravators was improper because it was based on Defendant's good faith assertion of innocence. But based on the court's statements at the sentencing hearing, the Court was confident that the trial court would have imposed the same sentence absent the improper aggravators.

Smoots v. State, (7/27/2021) 172 N.E.3d 1279 (Ind. Ct. App.) **Sentencing error claims rejected**

Defendant was convicted of battery resulting in serious bodily injury, criminal confinement, obstruction of justice, attempted obstruction of justice and the habitual offender sentencing enhancement and was sentenced to an aggregate term of 24 years. The Court of Appeals rejected Defendant's arguments that the trial court abused its discretion by failing to identify as a mitigating circumstances the hardship his child would face if he were incarcerated and the fact he had achieved certain educational requirements. Further, the Court found no abuse of discretion in trial court's consideration of the same aggravating evidence in imposing the sentence on the habitual offender count as was identified to support the sentence in the underlying felony. Finally, the 24-year aggregated sentence was not inappropriate when considering the brutal and unprovoked nature of the offenses or Defendant's character as evidenced by his substantial criminal history.

C. Consecutive Sentences

S.B. v. State, (9/17/2021) 175 N.E.3d 1199 (Ind. Ct. App.) **Consecutive sentences for incest upheld**

The statutory bar on consecutive sentences did not apply to Defendant's incest convictions. The sparse evidence of the timeframe for the acts of incest to which Defendant pleaded guilty reasonably supported that the charged offenses did not constitute a single episode of criminal conduct. Absent support in the record for finding a single episode of conduct, the Court could not say the trial court exceeded its statutory authority imposing consecutive sentences beyond the statutory limit in subsection (d)(3) of the consecutive sentencing statute.

D. Court Costs, Fees and Restitution

Neeley v. State, (1/26/2022) 172 N.E.3d 234 (Ind. Ct. App.) **Erroneous assessment of child abuse prevention fee and failure to remit remaining amount of bail deposit after subtracting costs and fees**

Defendant was originally charged with neglect of a dependent as a level 6 felony. Bond was set at $4000.00 and she paid ten percent cash deposit of $400.00. The bond agreement stated that fees and costs would be deducted from her deposit. Defendant failed to appear and a warrant was issued for her arrest with bond set at $5000.00. Defendant was arrested and posted a ten percent deposit of $500.00. Defendant pleaded guilty to newly added charge of failure to comply with compulsory school attendance as a class B misdemeanor and neglect of a dependent charge was dismissed. Court costs and fees were assessed including a $100.00 "child abuse prevention" fee. The CCS indicated Defendant's total costs were $660.00 and that her balance was $0.00. The Court of Appeals held that because Defendant pleaded guilty to failure to comply with compulsory school attendance, the child abuse prevent fee was not authorized by statute. (IC 33-37-5-12(1)(P). Therefore, the total fees should have been $560.00 and Defendant was entitled to remittance of $340.00, the difference of the $560.00 fees subtracted from the $900.00 she had posted as a cash bond deposit.

Nolan v. State (10/27/2021) 177 N.E.3d 881 (Ind. Ct. App.) **Defendant waived right to appeal trial court's restitution order under terms of plea agreement**

Defendant entered into a plea agreement which provided, “All terms [of the sentence] shall be open to the court.” It further provided for waiver of Defendant's "right to appeal any discretionary portion of the sentence entered pursuant to and in accordance with this plea agreement.” Finally, it provided Defendant “hereby waives his right to appeal the sentence so long as the Court sentences him within the terms of the plea agreement.” The court accepted the plea agreement and later ordered Defendant to pay $10,680 restitution to the victim. On appeal, Defendant argued the trial court abused its discretion by not inquiring into his ability to pay restitution and imposing restitution for the victim’s lost wages. But the Court of Appeals declined to address the arguments on the merits. Instead, it held that because Defendant agreed to waive his right to appeal any discretionary portions of his sentence in his plea agreement, he thereby waived his right to appeal the restitution order.

E. Appropriateness Review

Davis v. State (7/15/2021) 173 N.E.3d 700 (Ind. Ct. App.) **What Defendant must demonstrate in bringing a Rule 7(B) claim**

Defendant’s five-year executed sentence in the DOC for Level 5 felony overpass mischief, resulting from guilty plea without benefit of plea agreement, was not inappropriate under Appellate

Rule 7(B). Judge Najam, writing for the majority, noted that Defendant only argued the sentence was inappropriate in light of the nature of the offense and made no argument regarding his character. Noting the split of opinion in how to apply Appellate Rule 7(B), he would hold an appellant must prove the sentence is inappropriate in light of both the nature of the offense and the character of the offender. Nevertheless, with respect to the nature of the offense, he threw a bicycle off an overpass onto an interstate during rush hour and declared his intent to do harm and his lengthy criminal history and behavior while in jail reflect poorly on his character. Concurring in result, Judge Tavitas wrote separately to express her disagreement with the majority's assertion that Appellate Rule 7(B) requires that an appellant make a showing his sentence is inappropriate in light of both his character and the nature of the offense.

Wilmsen v. State (1/31/2022) 181 N.E.3d 469 (Ind. Ct. App.) **190-year aggregate sentence not inappropriate under Appellate Rule 7(B)**

The Court of Appeals rejected an appropriateness challenge to Defendant's 190-year sentence for multiple counts of child molesting, sexual misconduct with a minor, dissemination of matter harmful to minors, finding the nature of the offenses "horrific." Defendant committed the offenses against his girlfriend's daughters for months on a near-daily basis. The victims suffered pain, if not physical injuries. The Court found no compelling evidence of good character when considered in light of the nature of Defendant's crimes. The Court held it was not "a rare and exceptional case" to warrant a sentence reduction, citing Livingston v. State, 113 N.E.3d 611 (Ind. 2018) (per curiam).
See also: S.B. v. State, 175 N.E.3d 1199 (Ind. Ct. App. 9/17/2021) (Court found nothing redeeming about D's character to render her aggregate 24-year sentence for child molesting inappropriate, and found the depravity of the nature of the offense--a mother engaging in various forms of sexual activity with her three-year-old and six-year-old sons, along with her boyfriend--was "unthinkable" and "among the worst of the worst offenders we have encountered."); Corbett v. State, 179 N.E.3d 475 (Ind. Ct. App. 2021) (In light of brutal nature of murder and attempted murder, Court upheld maximum sentence despite D's young age at the time of the crimes, his lack of criminal history, five-year service in the U.S. Navy and his classification as low-risk to reoffend under the Indiana Risk Assessment System).

Wellings v. State (3/22/2022) 184 N.E.3d 1236 (Ind. Ct. App.) **After rejecting Rule 7(B) claim, Court of Appeals declined to exercise authority to increase 12-year sentence**

Defendant was sentenced to an aggregate term of twelve years for his convictions of Level 3 felony attempted rape,, Level 4 felony criminal confinement, Level 5 felony attempted incest, Level 6 felony sexual battery, and Level 6 felony strangulation for offenses he committed against his adult daughter. The Court of Appeals rejected his argument the sentence was inappropriate under Appellate Rule 7(B), agreeing with the trial court's conclusion that the nature of the offense was "simply horrendous" and that Defendant's character included a "troubling" criminal history of a prior child molesting conviction. The Court also noted its authority to review sentences under Appellate Rule 7(B) authorizes it to Increase a sentence, in addition to affirming or reducing it. McCullough v. State, 900 N.E.2d 745, 750 (Ind. 2009); Akard v. State, 937 N.E.2d 811, 814 (Ind. 2010). The Court concluded, "while

the nature of this offense and [Defendant's] character could justify a more severe sentence, we choose to defer to the good judgment of the trial judge who was present and considered all the evidence at the sentencing hearing."

F. Sentence Enhancements/Habitual Offender

Harris v. State (4/21/2022) N.E.3d (Ind. Ct. App.) **No error in prohibiting defendant from testifying about circumstances of prior crimes in habitual offender phase**

The defendant in a habitual-offender proceeding wanted to testify about the circumstances surrounding his convictions in hopes of persuading the jury to reject the habitual charge, but the trial court wouldn't allow it. *Citing* two Indiana Supreme Court cases, Seay v. State, 698 N.E.2d 732 (Ind. 1998), and Hollowell v. State, 753 N.E.2d 612 (Ind. 2001), the defendant argued this violated Article 1, Section 19 of the Indiana Constitution. But the Court of Appeals concluded that after those cases were decided, the legislature amended the habitual-offender statute to provide that the role of the jury in a habitual-offender proceeding is limited to determining whether the defendant has been convicted of the prior felonies. The amendment provided in part: "The role of the jury is to determine whether the defendant has been convicted of the unrelated felonies. The state or defendant may not conduct any additional interrogation or questioning of the jury during the habitual offender part of the trial." I.C. 35-50-2-8(h) (2014). The Court found that this amendment eliminated the broader role recognized in Seay, as well as the discretion inherent in that role. Therefore, the jury is no longer "entitled to make a determination of habitual offender status as a matter of law independent of its factual determinations regarding prior unrelated felonies" under Seay. The Court held that because the jury's only role under the current habitual offender statute is to determine whether the defendant has the requisite prior convictions, the trial court did not err by barring the defendant's testimony about the circumstances surrounding his convictions. Further, the jury's right to determine the law and the facts under Article 1, Section 19 applies during habitual-offender proceedings only because the legislature has provided for a jury role in those proceedings. The legislature could eliminate the jury's role entirely without violating Article 1, Section 19. The Court also noted that trial courts should give instructions and verdict forms that recognize the jury's limited role as provided in the current statute: determining whether the defendant has the requisite prior convictions.

Guthery v. State (12/22/2021) 180 N.E.3d 339 (Ind. Ct. App.) **Same prior conviction may be used to find conviction non-suspendible and as predicate offense for an habitual offender enhancement**

Trial court did not abuse its discretion in finding defendant's sentence for dealing in methamphetamine to be non-suspendable under the minimum for a Level 2 felony and for enhancing that sentence for being an habitual offender based in part on the same predicate felony. The felony suspendability statute, Ind. Code § 35-50-2-2.2(a) and (b), is not a progressive penalty statute, as it does not expand the sentencing range for an offense; rather, it limits the discretion of the trial court to order a sentence to be suspended, all within the existing sentencing range for the offense. Therefore, the

felony suspendability statute is not a sentencing enhancement statute to which double-enhancement analysis applies.

Afanador v. State (1/28/2022) 181 N.E.3d 462 (Ind. Ct. App.) **Double enhancement claim rejected where predicate offenses supporting progressive penalty and habitual offender finding were entered on same day but were not part of same res gestae**

Trial court did not err in using Defendant's auto theft conviction to enhance his offense to a Level 5 felony under a progressive-penalty statute and his Class C felony handgun conviction to enhance his sentence pursuant to Indiana's general habitual offender statute. Judgment of conviction for the two predicate offenses were entered on the same day but were not part of the same res gestae, as they occurred five years apart, involved different victims, and were assigned separate cause numbers. Previously, Defendant had been convicted of Class C felony forgery in 2002, Class C felony carrying a handgun without a license in 2012 and Level 6 felony automobile theft in 2017. Although the criminal act underlying the handgun offense occurred in 2012, five years before the criminal act underlying the auto theft offense in 2017, the trial court entered the convictions and sentences for both offenses on the same day in 2019. Following Defendant's Level 6 felony auto theft conviction in 2021, the trial court used his 2019 auto theft conviction to elevate the offense to a Level 5 felony. The trial court also found Defendant to be a habitual offender based on his 2002 forgery conviction and 2012 handgun offense.

On appeal, Defendant argued that because his handgun and auto theft convictions could not both be used to support a sentence enhancement under the general habitual offender statute, the use of both convictions to support simultaneous sentence enhancements resulted in an impermissible double enhancement of his sentence. The Court of Appeals held that the plain language of Indiana's general habitual offender statute [IC 35-50-2-8(f)] prohibited the State from using Defendant's predicate handgun and auto theft convictions that had been entered on the same day to support an enhancement under that statute. However, the State was not prohibited from using the two offenses to support separate enhancements under different recidivist offender statutes because the two crimes were not part of the same res gestae. See Dye v. State, 984 N.E.2d 635 (Ind. 2013). And IC 35-50-2-8(f) expressly states its definition of "unrelated" is intended for "purposes of this section"— the general habitual offender statute — "'only," rather than to all double enhancements. Defendant's predicate 2002 forgery conviction was "unrelated" to both the handgun and auto theft predicates. Therefore, the trial court did not err in using Defendant's predicate auto theft conviction to enhance his offense under the progressive-penalty statute and also relying upon his predicate handgun conviction (along with the forgery conviction) to enhance his sentence pursuant to Indiana's general habitual offender statute. Held, judgment affirmed.

Wooden v. United States (3/8/2022) 142 S. Ct. 1063 (U.S. Supreme Court) **Burglarizing 10 units in single storage facility constitute only one conviction for purposes of enhancement under Armed Career Criminal Act**

The Armed Career Criminal Act (ACCA) mandates a minimum 15-year minimum penalty for offenders in possession of a gun who have at least three prior convictions for specified felonies

“committed on occasions different from one another.” 18 U.S.C. 924(e). Here, the Court threw out the ACCA enhancement for Defendant who was designated a "career criminal" based on his burglary convictions for breaking into a single mini-storage facility and stealing items from ten separate storage units. Defendant did not commit his crimes on different "occasions" but rather rose from a single criminal episode, thus he should not have been subject to the mandatory-minimum enhancement because the burglaries count as only one prior conviction under the ACCA. Defendant's "one-after-another-after-another burglary...occurred on one 'occasion," under a natural construction of that term and consistent with the reason it became part of the ACCA." The government's contrary view could make someone a career offender in the space of a minute. Whether criminal activities occurred on one occasion or different occasions may depend on several circumstances, including timing, location, and the character and relationship of the offenses. Congress’s amendment of ACCA to add the single occasion requirement was based on its belief that a person who robbed a restaurant and did nothing else, is not a career offender. Wooden’s burglary of a single storage facility does not suggest the “special danger” posed by an “armed career criminal.” Gorsuch, J., joined in part by Sotomayor, J., concurring to express his view that the rule of lenity should come into play when courts struggle to decide whether crimes were committed as part of a single “occasion.” Kavanaugh, J., concurring to caution against resorting to the rule of lenity except in cases where a statute is "grievously ambiguous."

Borden v. U.S. (6/10/2021) 141 S. Ct. 1817 (U.S.) **Crime involving recklessness does not count as a “violent felony” that will trigger ACCA’s sentencing enhancement**

A criminal offense with a *mens rea* of recklessness does not qualify as a “violent felony” under the Armed Career Criminal Act (ACCA). The ACCA mandates a 15-year minimum sentence for offenders found guilty of illegally possessing a gun if they have three or more prior convictions for a "violent felony." A "violent felony" is defined to include a number of specifically enumerated offenses, as well as any offense that "has an element the use, attempted use, or threatened use of physical force against the person of another." Here, Defendant argued that the enhancement under ACCA did not apply because one of the three prior offenses that the government relied on was a conviction under Tennessee law for reckless aggravated assault, which can result from a less culpable legal standard than purposefully or knowingly causing injury. Court held that the phrase "against the person of another" when modifying a volitional act like the "use of force" in ACCA's definition necessarily encompasses only purposeful or knowing crimes, not reckless ones. Thomas, J., concurring; Kavanaugh, J., joined by Roberts, C.J., Alito and Barrett, JJ., dissenting, accused majority of adopting a tortured reading of phrase "against the person of another" to limit the reach of the statute. "The Court's decision overrides Congress's judgment about the danger posed by recidivist violent felons who unlawfully possess firearms and threaten future violence."

G. Credit Time

Temme v. State, (6/21/2021) 169 N.E.3d 857 (Ind.) **Defendants not at fault for early release earn credit for time erroneously at liberty as if still incarcerated**

The DOC erroneously awarded Defendant 450 days of jail credit. As a result, he served only a portion of his felony sentences and was released from custody 450 days earlier than he should have been. When the State realized the error, it petitioned for Defendant's return to custody to serve the time owed on his felony sentence. The Indiana Supreme Court found that the credit time statute (Ind. Code chapter 35-50-6) only concerns credit time while an inmate is imprisoned or confined. The Court held that as long as the defendant bears no active responsibility in his early release, he or she is entitled to credit while erroneously at liberty as if still incarcerated. However, the defendant's projected release date serves as a firm backstop. When it discovers an error, the State must petition a trial court to recommit the defendant to resume his or her sentence if, after calculating credit time, any sentence remains to be served. Held, transfer granted, Court of Appeals' opinion at 158 N.E.3d 423 vacated, reversed and remanded to the trial court to calculate any credit time owed with Defendant to be recommitted to the appropriate authority if any time remains to be served.

Niccum v. State, (12/20/2021) 181 N.E.3d 993 (Ind. Ct. App.) **Calculation of good time credit is determined by accrued time**

Defendant was on probation when arrested for another offense. He spent three days in jail before being released on his own recognizance. The trial court revoked his probation and ordered him to serve the remainder of his suspended sentence in the Department of Correction but failed to award him credit for the three days he was in jail pending his probation revocation. The State agreed Defendant was entitled to accrued time for the days spent in jail but argued the case should be remanded to the trial court for consideration of whether Defendant was entitled to good time credit, arguing the day he was arrested should not count. *Citing* I.C. 35-50-6-3.1(c), the Court of Appeals held that Defendant had earned three days of accrued time, which entitled him to one day of good time credit.

Paul v. State, (9/21/2021) 177 N.E.3d 472 (Ind. Ct. App.) **Credit time must be allocated to the first sentence in sequence of multiple sentences imposed**

Defendant was incarcerated awaiting resolution of three causes simultaneously. The sentences in each cause were run consecutively. When the trial court calculated good time credit, it used the earning rate associated with the Third Cause. The court then applied that credit time to the Third Cause. Although the approach to credit time did not affect the aggregate length of the sentence, the approach prolonged the time it would take Defendant to satisfy the sentence in the First Cause. The Court of Appels held that Indiana law contemplates a "first in, first out" approach under the circumstances. Therefore, when a person has been simultaneously confined in connection with multiple causes and the

court must impose consecutive sentences across those causes, Indiana law requires the trial court to (1) calculate credit time at the rate associated with the first sentence in the sequence of sentences and (2) allocate the time to that first sentence.

Glover v. State (10/29/2021) 177 N.E.3d 884 (Ind. Ct. App.) **No credit for time spent in pretrial incarceration on charge that was later dismissed**

Trial court properly denied Defendant's request to put his credit time from a previous charge toward his current child molesting sentence. Defendant pleaded guilty to child molesting as a Level 4 felony in exchange for the dismissal of an earlier sexual and domestic battery of a different child. The trial court granted him credit time for the pre-trial confinement on the charge for which he was sentenced. Defendant argued his period of pre-trial confinement for the dismissed charges should also be credited towards his sentence. The Court of Appeals affirmed the trial court's credit time determination, distinguishing Purdue v. State, 51 N.E.3d 432 (Ind. Ct. App. 2016). Because Defendant was not detained on both the dismissed charge and the charge for which was sentenced simultaneously, Court held he could not receive credit for time in jail on the dismissed charges. In response to Defendant's argument that he could never get credit for the time held on the dismissed charges, the Court reasoned that "credit time does not work like store credit where it can be redeemed with the next crime."

H. Double Jeopardy/Double Enhancements

Moore v. State (1/20/2022) 181 N.E.3d 442 (Ind. Ct. App.) **Two convictions for criminal recklessness violated double jeopardy under the new Powell test**

Defendant was convicted of pointing a firearm and two counts of Level 6 felony criminal recklessness for firing two gunshots in quick succession in the presence of the two complaining witnesses (CWs). The Court of Appeals found sufficient evidence for the convictions but that the two criminal recklessness convictions constitute double jeopardy under the new test established by the Indiana Supreme Court in Powell v. State, 151 N.E.3d 256 (Ind. 2020). Applying the two-part Powell test to the facts here, the Court concluded the criminal recklessness statute includes both conduct-based language and result-based language such that the statute is ambiguous as to the unit of prosecution and the analysis must proceed to the second step of the test. The second step requires the Court to "determine whether the facts--as presented in the charging instrument and as adduced at trial--indicate a single offense or whether they indicate distinguishable offenses." Powell, 151 N.E.3d at 264. Noting that the two gunshots were fired in the same general direction and without a meaningful break in time, the lack of any evidence that one shot was meant for one victim and the second for the other, or any evidence one person was placed at greater risk by one shot or the other, the Court found Defendant's actions do not support multiple criminal recklessness convictions. Instead, the two shots were fired in quick succession with the unified purpose of scaring the CWs out of her house. The Court held the two convictions constitute double jeopardy and one of them must be reversed.

Vanderveer v. State (1/26/2022) 182 N.E.3d 893 (Ind. Ct. App.) **Convictions for both using false information to obtain a handgun and making a false statement on a criminal history information form violate double jeopardy**

After pawning a handgun given to her by her grandfather, Defendant was arrested and charged with a felony. She appeared in court and was advised of the charges against her and the possible penalties. While her felony charge was pending against her she went to redeem the handgun from the pawn shop. To redeem the handgun she was required to complete an ATF form 4473 wherein she would certify that her answers were true, correct and complete. One of the questions on form 4473 asked, "Are you under indictment or information in any court for a felony or any crime for which the judge could imprison you for more than one year?" Defendant answered no. The pawn shop submitted Form 4473 for review, Defendant's request to obtain the handgun was denied and she was subsequently charged with Level 5 felony using false information to obtain a handgun and Level 6 making a false statement on a criminal history information. A jury found Defendant guilty of both counts and she was sentenced on both counts to be served concurrently. On appeal, Defendant alleged her conviction and sentence on both counts violated double jeopardy and the State conceded that under the framework set out in Wadle v. State, 151 N.E.3d 227 (Ind. 2020), neither statute defining the Level 6 felony or the Level 5 felony permit multiple punishments and that the convictions were established by proof of the same material elements, therefore the Level 6 felony should be vacated on double jeopardy grounds. Court also rejected Defendant's sufficiency challenge to her convictions, in which she argued she did not have the intent to commit the Level 6 felony because she did not understand the meaning of the word "indictment." The Court chose not to reweigh the evidence and impinge upon the jury's decision, thus it affirmed the conviction.
See also: Phillips v. State, 174 N.E.3d 635 (Ind. Ct. App. 2021) (as charged and tried, D's Level 3 felony possession of methamphetamine conviction was a factually included offense of his dealing conviction and that his offenses constituted a single transaction under Wadle).

Carranza v. State (2/28/2022) 184 N.E.3d 712 (Ind. Ct. App.) **Two child molesting convictions did not violate double jeopardy**

Defendant was convicted of violating two subsections of the Child Molesting statute. Because both of his convictions fall under the Child Molesting Statute, he asked the court to apply the Powell "single statute" test to his double jeopardy claim. But the Court followed another panel of the Court of Appeals, which recently held that the Wadle "multiple statutes" test applied when two child molesting convictions fell under "separate statutory provisions, each defining a separate crime" in Koziski v. State, 172 N.E.3d 338, 342 (Ind. Ct. App. 2021), *trans. denied*. Applying Wadle, the Court held that no double jeopardy violation occurred because neither offense was included in the other.
See also: Koziski v. State, 172 N.E.3d 338 (Ind. Ct. App. 2021) (D's two acts of licking C.W.'s vagina and puting his finger inside her, done within 5 to 10 minutes, resulted in two Level 1 felony child molesting convictions; under Wadle analysis,Ct. found no double jeopardy violation even though two counts were charged under different parts of the same statute; neither offense is included in the other).

Garth v. State (1/31/2022) 182 N.E.3d 905 (Ind. Ct. App.) **Conspiracy and murder convictions did not violate double jeopardy**

Entry of both murder and conspiracy to commit murder convictions did not violate double jeopardy under the Wadle test. The legislature intended to permit multiple punishments under I.C. 35-41-5-3, which prohibits convictions for conspiracy and attempt of the same crime but "notably" does not prohibit convictions for both a crime and conspiracy to commit the same crime.

I. Sentence Modification

Terry v. U.S. (6/14/2021) 539 U.S.___ **Defendant ineligible for sentence reduction for his 2008 federal crack cocaine conviction**

An offender convicted of a crack cocaine offense is eligible for a sentence reduction under the Fair Sentencing Act (which addressed the crack:powder disparity) and the First Step Act (which made the Fair Sentencing Act retroactive) only if that prior conviction triggered a mandatory minimum sentence. Offenders such as Terry, whose offense did not trigger a mandatory minimum, do not qualify.

Newman v. State (10/29/2021) 177 N.E.3d 888 (Ind. Ct. App.) **No racial disparity in denial of sentence modification**

Trial court did not abuse its discretion in denying a black defendant's petition to modify a 30-year sentence for Class A felony dealing in cocaine. In late 2020, at Defendant's request, the DOC filed a progress report with the trial court. The report indicated that he had completed MRT and Project Echo, DOC programs meant to address his attitude and employability, among other things. The progress report also indicated Defendant was enrolled in PLUS Character 2.0, was a mentor in the prison's SNAP program, had been employed while incarcerated, and had not received any conduct violations during his commitment. Defendant filed a petition to modify his sentence, attaching the report and letters from community members attesting his good character. The State objected to modification, and the trial court denied the petition without a hearing. The Court of Appeals affirmed, noting that a trial court may still decline to modify a defendant's sentence even with plentiful evidence of rehabilitation efforts. And because the trial court was not considering a modification, it was not required to hold a hearing on Defendant's petition. The Court rejected Defendant's argument that racial disparity existed in denying his motion to modify. Defendant pointed out that the drug dealer, who is white and the original target of the sting operation that ensnared Defendant, was granted a sentence modification and released from prison to probation after serving fewer than three years of his 35-year sentence for dealing cocaine. The Court held the argument was "improperly raised" for the first time in a motion to reconsider and unsupported because the record on appeal did not indicate the white dealer's race. The Court further rejected the existence of racial disparity, reasoning that—unlike Defendant—the white dealer had pleaded guilty under an agreement which contemplated the possibility of modification and Defendant was not necessarily less culpable for his role in the controlled buy.

VI. PROBATION/COMMUNITY CORRECTIONS REVOCATION

Puckett v. State (2/3/2022) 183 N.E.3d 335 (Ind. Ct. App.) **Community Corrections director may act through other court services officers to seek revocation**

One month after Defendant began serving his sentence through home detention, a community corrections service officer petitioned the trial court to revoke his home detention placement, alleging a failed drug test. Defendant filed a motion to dismiss, arguing that Indiana Code 35-38-2.6-5 allows only the community corrections director to petition for a revocation, not another community corrections employee like a court services officer. The trial court denied Defendant's motion to dismiss, finding the officer was an agent of the director. The Court of Appeals found the statute informs community corrections directors and prosecutors, respectively, what their options are for addressing placement violations. The statute does not "purport to limit the authority of community corrections directors and prosecutors to act through others. The trial court's unchallenged finding here was that the community corrections service officer who filed the petition was acting on behalf of the director." The Court further declined to apply the Rule of Lenity, citing authority that the rule applies only when ambiguity remains after consulting traditional canons of statutory construction and noting its conclusion that the statute at issue had no such ambiguity. The trial court did not err in denying the motion to dismiss. The Court further found no abuse of discretion in the trial court's sanction.

Gaddis v. State (11/2/2021) 177 N.E.3d 1227 (Ind. Ct. App.) **Consideration of probationer's mental state is not required in all probation revocation hearings**

In Patterson v. State, 659 N.E.2d 220 (Ind. Ct. App. 1995), the Court held that "[a]t a minimum, the probationer's mental state must be considered in the dispositional determination of a probation revocation proceeding." Here, Defendant argued that the trial court abused its discretion in revoking his entire term of probation without adequately considering his mental health issues, including his substance abuse. Court clarified Patterson does not apply to all revocation proceedings. Instead, consideration of a probationer's mental health is only required where: (1) the State alleges the probationer has violated probation by committing a new crime and (2) the probationer's mental health issues affect the probationer's degree of culpability concerning that new crime. Because Defendant did not connect his new crime to his poor mental health, the trial court was not required to consider his mental health during the revocation proceeding.

Bedtelyon v. State (3/4/2022) 184 N.E.3d 1216 (Ind. Ct. App.) **Sexually suggestive anime cartoons did not meet statutory definition of obscene matter**

Under the terms of his probation after a conviction for sexual misconduct with a minor, Defendant was prohibited from "accessing, viewing, or using internet websites and computer applications that depict obscene matter as defined by IC 35-49-2-1." After his probation officer learned

he viewed several anime videos on YouTube with titles like, "My Mother and Sister Pretend to Be Expecting My Babies After I Lost My Memory," she watched the videos and determined they were obscene. Relying only on the testimony of other people who watched the videos, the trial court found Defendant violated the probation term against viewing obscene matter and revoked his previously suspended sentence. The Court of Appeals reversed because the testimony merely proved the videos were suggestive but did not prove they constituted "obscene matter" under the statutory definition. Overall, the evidence suggested the videos might have erotic themes, are erotic in tone, and describe erotic feelings. But the State did not present evidence that "sexual conduct" as defined by statute was depicted or described, rather than merely implied. The Court found the State's arguments otherwise were "conclusory." It also found the State's reliance on a prior case, Fordyce v. State, was misplaced. Fordyce involved an obscene book in which there was a description of incestuous sexual conduct. But here, the Court could not infer from such a "slim record" that sexual conduct occurred in the videos. Held, judgment reversed and remanded.

Phipps v. State (10/7/2021) 177 N.E.3d 123 (Ind. Ct. App.) **Insufficient evidence defendant violated two probation conditions**

After molesting his brother, Defendant was forbidden from having contact with his victim's family. The intertwining of his and his brother's family trees led Defendant to be confused as to which limbs were forbidden to him. After helping his uncle move, Defendant attended a goodbye dinner with his uncle's family, including minors who sat at a different table. Construing these acts as a violation of his probation, the trial court revoked Defendant's probation and returned him to prison for 10 years. The Court held that the probation condition prohibiting contact with the victim's "family" was overly broad and vague in the context of the case, given one of the victims was Defendant's brother. The Court also held that evidence was insufficient to find Defendant violated the condition prohibiting contact with minors. The word "contact" did not clearly apply to Defendant's behavior as alleged because he did not touch or communicate with children at the family dinner.

Dobrowolski v. State (4/14/2022) N.E.3d (Ind. Ct. App.) **After admitting probation violation, probationer could not challenge waiver of counsel in belated appeal**

The trial court allowed Defendant to admit to a probation violation without being represented by counsel. After revoking Defendant's probation, the trial court appointed a public defender to represent her to request a belated notice of appeal. The trial court then granted Defendant's motion under Post-Conviction Rule 2 to file a belated appeal. The Court of Appeals determined that Defendant was not an "eligible defendant" for a belated appeal under Post-Conviction Rule 2 because a probationer may not challenge on direct appeal a finding she violated the conditions of probation after admitting a violation. Instead, to challenge the validity of her waiver of counsel, Defendant must file a petition for postconviction relief under Post-Conviction Rule 1. Held, appeal dismissed without prejudice.
See also: Kirkland v. State, 176 N.E.3d 986 (Ind. Ct. App. 9/27/2021) (admission to probation violation is issue properly raised in PCR proceeding, not direct appeal).

VII. SUBSTANTIVE OFFENSES

A. Offenses against the Person

Young v. State (5/11/2022) ___N.E.3d___ (Ind. Ct. App.) **A rare reversal of murder and attempted murder convictions on sufficiency grounds**

Defendant did not dispute he was at the gas station at the same time as the shooting victims. His sole argument on appeal was that the State failed to prove beyond a reasonable doubt that he returned to the gas station and did the shooting. The State's entire case consisted of the following: Defendant's DNA was on a cigarette found in the alley two days after the shooting in the same general area where the person in the alley footage discarded a lit object, Defendant was at the gas station minutes before the shooting, he searched the internet a week or two after the shooting about how to clean and disassemble a weapon that could have been used in the shooting, but no one could say was definitely the kind of weapon used in the shooting, and Defendant turned off his Google location data the day of and the day after the shooting. This evidence falls short of the "substantial evidence of probative value," circumstantial or not, required to support the verdicts. Held, convictions reversed. Judge Crone dissented, finding that the evidence supporting the jury's verdicts and the reasonable inferences drawn from it were more than sufficient to affirm the convictions.

Grannan v. State (8/13/2021) 174 N.E.3d 232 (Ind. Ct. App.) **Sufficient evidence to support criminal recklessness conviction - shooting at neighbor's house**

To obtain a conviction of Level 5 felony criminal recklessness, the State is required to prove beyond a reasonable doubt that Defendant: (1) recklessly, knowingly, or intentionally (2) created a substantial risk of bodily injury (3) to another (4) by shooting a firearm into an inhabited dwelling or other building where people are likely to gather. See Ind. Code § 35-42-2-2. Here, State presented sufficient evidence to establish that Defendant's act of shooting several bullets into the side of her ex-friend's home in the middle of the night posed a substantial risk of bodily injury, and thus constituted criminal recklessness. In so holding, Court disagreed with Defendant's claim that her conduct did not fall within the purview of the offense of criminal recklessness because her ex-friend's home was not inhabited when she fired the shot. The plain language of the statute also applies to a building "where people are likely to gather," and ex-friend's home fits this definition. Defendant later admitted that she knew her ex-friend had returned home at the time she shot at her house.

Wilson v. State (2/3/2022) 172 N.E.3d 257 (Ind. Ct. App.) **Criminal recklessness - shooting at a gas tank of a truck constitutes area where people are likely to gather**

Shooting a firearm into a place where people are likely to gather makes criminal recklessness a level 5 felony. Here, Defendant shot at the bed of a pickup truck and not the internal passenger compartment. Court of Appeals declined to make a distinction between specific parts of a vehicle, finding evidence sufficient to support Defendant's conviction.

Carmouche v. State (5/17/2022) N.E.3d (Ind. Ct. App.) **Insufficient evidence to support battery conviction**

After a bench trial, Defendant was convicted of battery as a class A misdemeanor stemming from a jailhouse incident wherein he was alleged to have kicked a door against the knee of a jail's mail clerk. The Court of Appeals found insufficient evidence of the battery in light of the video footage that clearly shows the door did not touch the clerk's knee, indisputably contradicting the State's case. Held, reversed and discharged.

Fowler v. State (3-7-2022) N.E.3d (Ind. Ct. App.) **No error in declining to enter judgment on lesser included offense of voluntary manslaughter**

Defendant was charged with battery of two pregnant women and murder of the boyfriend of one of the women after the expectant father died of a gunshot wound. At a bench trial, Defendant was found guilty of murder and level 5 felony battery resulting in bodily injury to a pregnant woman and Class A misdemeanor battery after finding insufficient evidence to support the second Level 5 felony count. At sentencing, Defendant orally moved for the trial court to reconsider its guilty verdict for murder and instead enter judgment of conviction on the lesser-included offense of voluntary manslaughter. But the trial court refused and sentenced him to an aggregate of 45 years for murder. At trial, Defendant argued self-defense. The trial court considered the evidence and found it did not support self-defense. The trial court was not asked to consider voluntary manslaughter and because the defense never hinted at the existence of sudden heat, it deprived the State the opportunity to submit evidence Defendant did not act in sudden heat. The Court of Appeals affirmed the murder conviction, noting that waiting until sentencing to inject sudden heat as a mitigating factor of the killing not only prejudiced the State but also deprived the trial court of the opportunity to consider sudden heat as a factor. Court of Appeals noted that self-defense and voluntary manslaughter are not mutually exclusive, although trial counsel may have made a strategic decision for an all or nothing self-defense argument so as to deprive the State of the opportunity to negate sudden heat.

B. Sex Offenses

Gliva v. State (10/7/2021) 178 N.E.3d 321 (Ind. Ct. App.) **Sexual battery statute requires that victim be "unware" of touching as it occurs and not before it occurs**

The State alleged that Defendant touched victim's buttocks three times while she was shopping at a large retail store. The State's charges alleged the unaware prong of Indiana's sexual battery statute. The unaware prong of the sexual battery statute applies when the victim lacks knowledge or acquaintance of the touching or is unconscious of the touching as the touching is occurring. Unawareness that the touching is going to occur alone does not satisfy the provision. Under the Court of Appeals' construction of the statute, which requires unawareness contemporaneous with the touching,

the Court could not say with confidence that the State met its burden of proving sexual battery beyond a reasonable doubt. Evidence indicated victim was aware of the touching.

Swopshire v. State (9/27/2021) 177 N.E.3d 98 (Ind. Ct. App.) **Statute of limitations - sexual misconduct**

Applying procedural amendment that enlarges the limitations period does not violate Ex Post Facto Clause so long as the statute is passed before the given prosecution is barred. Minton v. State, 802 N.E.2d 929, 933-35 (Ind. Ct. App. 2004). Here, the earliest date alleged in State's sexual misconduct with minor charges against Defendant is March 6, 2009. The five-year limitations period for offenses on that date would have expired in March of 2014. However, effective July 1, 2013, prior to the expiration of the State's ability to charge any of the offenses as alleged here, the Legislature expanded the limitations period to ten years. Accordingly, applying the 2013 amendment to the State's charges as alleged does not violate the federal or state Ex Post Facto clauses, and the State had until March of 2019 under the 2013 amendment to file its charges. But Court agreed with Defendant that even under the ten-year limitations period of the 2013 amendment, some of the dates alleged in four out of five counts had expired prior to the effective date of the 2019 amendment (7/1/19), which extended the limitations period until the date that the alleged victim of the offense reaches age 31. Once the statute of limitations for a crime has expired, the crime cannot be revived by an amendment to the statute of limitations. Stogner v. California, 539 U.S. 607 (2003). Court also rejected Defendant's claim under Privileges and Immunities Clause Article 1, Section 23 of Indiana Constitution, holding that a person who is alleged to have committed an offense on a date that requires the application of one statute of limitations is not similarly situated to a person who is alleged to have committed the same offense but on a different date under a different statute of limitations. Held, remanded with instructions to limit the State's alleged time frames in Counts 1, 2, 3, and 5 to offenses occurring on or after July 1, 2009.

Saavedra v. State (3/23/2022) 186 N.E.3d 134 (Ind. Ct. App.), **Child exploitation - evidence sufficient**

To obtain a conviction for child exploitation, the State must prove beyond a reasonable doubt that Defendant knowingly or intentionally created a digitized image of any performance or incident that included the uncovered genitals of a child less than 18 years of age. Ind. Code § 35-42-4-4(b)(4). Here, Defendant began asking his granddaughter (C.W.), who lived in Guatemala and was then 15 years old, to send him "sexy videos" in exchange for money sent to her family. C.W. complied, sending her grandfather explicit photographs of herself and the requested videos. On appeal of his convictions, Court rejected Defendant's argument that the State failed to establish that he "created" any of the images at issue. Bringing into existence the images of C.W. found on Defendant's cell phone involved more than taking them; Defendant told C.W. to use her telephone to capture the explicit images, explained what he wanted to see, and paid her to take them. Defendant's course of action clearly brought the photographs into being, even if he was not the one actually taking them. Regarding the age element, given their close familial relationship and frequent communication, State presented sufficient evidence from which a reasonable jury could conclude that Defendant was aware of a high degree of probability that C.W. was under age 18. Court also affirmed Defendant's vicarious sexual gratification conviction, finding sufficient evidence to establish that C.W. was under the age of 16 when Defendant

first solicited the videos from her. Held, attempted rape, child exploitation and vicarious sexual gratification convictions affirmed, remanded for clarification that no judgment of conviction for sexual battery was entered and regarding Defendant's sentence.

C. Sex Offender Registry

McClernon v. Wedding (3/9/2022) 1:20-cv-02322-JPH-DML 2022 U.S. Dist. Lexis 41557 (Ind.) **Sex offender registry requirement for any vehicle an offender "operates on a regular basis" void for vagueness as applied to Defendant**

Ind. Code § 11-8-8-8(a)(1), which requires a sex offender to provide information related to "any vehicle the sex or violent offender operates on a regular basis," was unconstitutionally vague as applied to Defendant. The Indiana Court of Appeals' decision was based on an unreasonable determination of the facts, specifically, that Defendant used the truck for five consecutive days. The Court of Appeals relied on those facts in determining whether "a reasonable person would have considered McClernon's failure to register the information for the vehicle he operated to have put him at risk under the statute." In granting habeas relief, federal district court concluded the statute does not provide an objective standard by which to determine whether one's use of a vehicle is "regular." It therefore fails to place a person of ordinary intelligence on notice of the conduct proscribed and opens the door for arbitrary enforcement.

D. Drug Offenses

Yeary v. State (4/7/2022) N.E.3d (Ind. Ct. App.) **Drug-Induced Homicide statute constitutional but reversible error found in jury instructions**

Indiana's Drug Induced Homicide (DIH) statute (Ind. Code § 35-42-1-1.5) does not eliminate the State's burden of proving proximate causation and is therefore constitutional. The plain language of I.C. 35-42-1-1.5(a) requires the State to prove a causal connection between the controlled substance delivered by the defendant and the victim's death. The plain language of subsection (d)(1) only precludes a defendant from raising as a "complete defense" that the person who died made the voluntary choice to use, inject, inhale, absorb, or ingest the drug manufactured or delivered by the defendant. See, e.g., Willis v. State, 888 N.E.2d 177, 182-84 (defenses of parental privilege and self-defense are "complete defense[s]" eliminating culpability for an otherwise criminal act). As applied here, the defense exclusion in subsection (d)(1) merely prevented Defendant from seeking acquittal solely because the victim voluntarily chose to ingest the drug that Defendant sold him. Subsection (d)(1) does not prohibit Defendant from ever arguing the user's voluntary actions broke the chain of causation. Instead, it effectively prohibits the defendant from only arguing that one particular voluntary decision by a user – to ingest the substance – breaks the chain of causation. As with subsection (d)(1),

subsection (d)(2) does not alter the State's constitutional burden of proving causation. The State still must prove that the death resulted from the drug distributed by the defendant. Where multiple drugs are in the defendant's system, such proof may consist of evidence that the drug distributed by the defendant was enough, by itself, to cause the death. It also may consist of evidence that the distributed drug, while not enough to cause the death by itself, foreseeably combined with other substances to cause the death. Because the evidence could permit a reasonable trier of fact to determine the drugs Defendant sold to the victim were the actual and proximate causes of the victim's death, the State may choose to retry Defendant due to reversible error in jury instruction (see above).

Page v. State (8/6/2021) 173 N.E.3d 723 (Ind. Ct. App.) **Expired prescription did not support possession of narcotic drug conviction**

Evidence was insufficient to support Defendant's conviction for possession of a narcotic drug, where she established by a preponderance of the evidence that she possessed a validly issued prescription for the oxycodone found in her vehicle during traffic stop. Defendant obtained prescriptions to address her chronic back pain in 2017 and 2018, but trial court found her guilty after concluding that the prescriptions weren't valid at the time of her 2019 traffic stop. The Indiana Court of Appeals disagreed with trial court's determination that a validly issued prescription becomes invalid for purposes of Ind. Code § 35-48-4-6 upon a person's failure to take the medicine as prescribed. There is nothing in the statute from which to infer that a prescription is no longer valid once the prescribed period of use elapses. "The effect of the trial court's determination is that every person who retains, that is, possesses, a prescription of a controlled substance for any time after the proscribed number of days commits a possession offense. We do not believe the legislature intended such a harsh result." The "valid prescription" requirement is intended to assure the prescription was not obtained by fraud, misrepresentation, or deceit. Schuller v. State, 625 N.E.2d 1243 (Ind. Ct. App. 1993). There was no evidence of such here, nor evidence Defendant obtained the prescriptions from anyone other than a practitioner in the scope of the practitioner's professional practice. Held, Level 6 felony possession of narcotic conviction reversed, possession of marijuana conviction affirmed.

Washington v. State (12/9/2021) 178 N.E.3d 1275 (Ind. Ct. App.) **Trial court abused its discretion when it admitted evidence from Drugs.com to identify pills**

Defendant was charged with Possession of a schedule II controlled substance as a class A misdemeanor after an officer recovered pills from his possession. The State did not conduct chemical tests on the pills to identify them, but instead relied on the officer's testimony he matched the appearance of the pills to an image of hydrocodone he found on a website called Drugs.com and an exhibit which was a printout from that website. The Court of Appeals found that, on this issue of first impression for Indiana's courts, using that website to identify the pills was not necessary and that the State did not show that Drugs.com is a reliable source for drug identification. The Court held that the market reports exception to hearsay under Evidence Rule 803(17) does not apply to allow the admission of evidence from Drugs.com that was used to convict Defendant. The trial court abused its discretion when it admitted the evidence and since the State presented no other evidence to show the pills were a

controlled substance, Defendant's conviction was reversed.
See also: Fedij v. State, 21A-CR-1481 (Ind. Ct. App. 4/11/22) (aside from improperly admitted labels, the State presented no evidence that any of the seized substances had a percent concentration of THC that was more than 0.3%, which would make the item illegal to possess under the statute. At trial, the testimony was that plant material was consistent with both marijuana and hemp. If the State seeks to obtain a conviction under the statute for possession of marijuana, it is the State's burden to prove the proscribed substance in Defendant's possession was in fact an illegal substance. Here, the State failed to do so)., and the Court reversed Defendant's conviction).

Pimentel v. State (2/18/2022) 181 N.E.3d 474 (Ind. Ct. App.) **Constructive possession of fentanyl and syringe**

State presented sufficient evidence to support Defendant's convictions for possessing fentanyl and a syringe. The contraband was found in the front seat of the car where Defendant had been sitting. The car contained his personal belongings and he appeared to be intoxicated. Based on that, the jury could reasonably find Defendant constructively possessed the incriminating items.

E. Offenses against Property

Wilburn v. State (9/20/2021) 177 N.E.3d 805 (Ind. Ct. App.) **Entering an unlocked door of an open business was insufficient evidence of breaking and entering to support burglary conviction**

A conviction for burglary cannot be sustained if an alleged perpetrator enters a business open to the public during business hours, with intent to commit a felony or theft in it, due to a lack of evidence as to breaking. Here, Court found insufficient evidence to sustain Defendant's burglary conviction, because Defendant entered through an unlocked front door of an establishment open for business (two minutes prior to closing), therefore there was not a "breaking" as required by statute.

Fix v. State (5/16/2022) N.E.3d (Ind. 2022) **Sufficient evidence of burglary while armed with a deadly weapon acquired after breaking and entering home**

Defendant broke and entered home of victim and acquired gun once inside the home and used it to assault victim. Indiana Supreme Court finds that acquiring weapon while inside the home, after the breaking and entering, is sufficient to elevate burglary to level 2 felony for being armed with a deadly weapon. The Court reasoned that burglary is an ongoing crime that continues until the intrusion has ended. Court also found that sentences for burglary, robbery and theft exceeded the statutory cap for a single episode of criminal conduct under the sentencing cap statute and remanded for resentencing.

West v. State (9/30/2021) 177 N.E.3d 856 (Ind. Ct. App.) **No abuse of discretion to deny motion to dismiss computer trespass charge**

Defendant was charged with Class A misdemeanor computer trespass based on allegations she obtained intimate photographs of another woman from her former boyfriend's phone, using a password she retrieved from his laptop, and posted them to social media. After the trial court denied her motion to dismiss, she pursued an interlocutory appeal, arguing that a single computer cannot constitute a "computer system" to satisfy the elements of the computer trespass statute. The Court of Appeals applied the principles of statutory construction to conclude the legislature intended a single computer to fall within the definition of "computer system" under Ind. Cdode 35-43-2-3. Further, the trial court did not err in finding that it is for the trier of fact to determine whether Defendant's use of the laptop meets the definition of a "computer system" under the computer trespass statute. Held, judgment affirmed.

F. Driving Offenses; Specialized Driving Permits

Priest v. State (1/25/2022) 181 N.E.3d 1046 (Ind. Ct. App.) **Denial of motion to suppress evidence of BAC reversed because State only entered the traffic citation itself which was inadmissible hearsay**

In a motion to suppress, Defendant argued the "breath-test results" were inadmissible hearsay in his trial on the traffic offense of operating a commercial motor vehicle with an ACE of .042. On interlocutory appeal, the Court noted that the trial court and the parties "seemed to assume a breath-test result was in the record" while in fact the only evidence in the record related to Defendant's ACE or B.A.C. is the traffic citation itself. That citation was completed and signed by an officer who did not appear at the hearing or otherwise testify. The Court found that statement, alone, is clearly inadmissible hearsay and the trial court's denial of the motion was not supported by substantial evidence of probative value. Held, reversed.

G. Miscellaneous Offenses

State v. Katz (1/19/2021) 179 N.E.3d 431 (Ind.) **Constitutional challenge to nonconsensual distribution of intimate image statute rejected**

The State properly charged Defendant with the nonconsensual distribution of an "intimate image," a Class A misdemeanor pursuant to Ind. Code § 35-45-4-8, after Defendant—without the knowledge of his then-girlfriend—captured cell phone video of her performing oral sex on him and then sent it to another person through Snapchat, a social media platform. An "image" under the statute is defined as a photograph, digital image or video that depicts sexual intercourse, other sexual conduct or the exhibition of the uncovered buttocks, genitals or female breast. The law also makes it a crime for

someone to distribute such an image with intent to harm, harass, intimidate, threaten or coerce the other person. Additionally, the statute makes it a crime to post the image without the consent of a person depicted in that image, even if that person initially agreed to partake in the image. The trial court granted Defendant's pre-trial motion to dismiss, finding the statute violated free speech under the state and federal constitutions. On direct appeal, the Indiana Supreme Court reversed and remanded, first holding that the State sufficiently alleged an offense even though the complaining witness (C.W.) was not identifiable in the video, which did not show C.W.'s face or Defendant's penis. Next, the Court rejected Defendant's claim that the statute is overbroad and unconstitutional under Article 1, Section 9 of the Indiana Constitution, which protects videos as a medium under the right to speak and free interchange clauses. Although criminal prosecution under the statute is a direct and substantial burden on Defendant's expressive activity, which triggers Article 1, Section 9, his restricted activity constituted an "abuse" of the right to express himself, thus the statute and prosecution are constitutional. Although the statutory restriction is content-based and subject to strict scrutiny, the Court held it was not unconstitutional under the First Amendment. The statute passes strict scrutiny because it is narrowly tailored to serve the State's compelling interest in protecting citizens from the unique and significant harms from the nonconsensual distribution of pornography. And even assuming the Court needed to conduct an overbreadth analysis, the statute is not overbroad. Held, reversed and remanded for further proceedings.

Marksberry v. State (3/28/2022) 185 N.E.3d 437 (Ind. Ct. App.) **Neglect of dependent resulting in death -- awareness of a high probability infant placed in a dangerous situation**

Mother left infant with baby's father knowing the father had harmed the baby in the past, was an active heroin user, had thoughts of suicide and of harming the child. Court of Appeals finds that leaving a child with a caretaker with a history of significant drug use, and who has previously injured the child, clearly meets the requirement of a high probability that the child was exposed to actual and appreciable danger and is sufficient to sustain the mens rea element of knowingly leaving child in a situation that endangers child's life or health. Held, neglect of a dependent resulting in death conviction affirmed.

H. Firearm Offenses

Woodward v. State (5/2/2022) N.E.3d (Ind. Ct. App.) **Insufficient evidence of identity for prior felony in SVF conviction; no error in admitting lab report**

In Defendant's trial for serious violent felon in possession of a firearm, the State submitted documents showing a person with his name was convicted of dealing in a controlled substance in 2008, but did not introduce evidence of his social security number or any other evidence linking him to the previous conviction. The Court of Appeals concluded, "based on the limited evidence of the identity of the prior offender, [ ] there is insufficient evidence to find the identification element of the crime of illegal possession of a firearm by a serious violent felon to have been proven beyond a reasonable doubt. We are hesitant to reverse a jury finding on the basis of sufficiency of evidence. Nevertheless,

our precedent is clear. See Davis v. State, 493 N.E.2d 167, 169 (Ind. 1986) (reversing jury's habitual offender determination on the basis that the State failed to provide sufficient evidence)."

Reece v. State (12/22/2021) 181 N.E.3d 1006 (Ind. Ct. App.) **Charge of unlawful possession of a firearm by serious violent felon not unconstitutionally vague as applied**

Defendant was charged and convicted of unlawful possession of a firearm by a serious violent felon. He challenged a 2020 amendment to IC 35-37-4-5 by filing a motion to dismiss, arguing the statute as amended, removing specific language regarding attempt and conspiracies and placing that language in IC 1-1-2-4, failed to provide notice that attempts and conspiracies can serve as predicate serious violent felonies. Defendant argued the amended statute failed to give fair warning and lacked the sufficient definiteness due process requires. The Court of Appeals declined to find the statute unconstitutionally vague as applied, distinguishing Healthscript, Inc., v. State, 770 N.E.2d 810 (Ind. 2002), which found the statute under which Healthscript was charged was too vague to meet the requirements of due process because the penal statute cross-referenced Indiana Code Art 12-15 which included 50 pages and 280 sections. Here, unlike Healthscript, to understand the prohibited conduct a person would only need review IC 35-47-4-5 and IC 1-1-2-4. The Court of Appeals applied principles of interpreting statutes with the primary goal in mind to fulfill the legislature's intent to find the statute was not unconstitutionally vague as applied.

I. Interference with Government Operations

Runnells v. State (4/21/2022) N.E.3d (Ind. Ct. App.) **Insufficient evidence that defendant "forcibly" resisted law enforcement**

Defendant was convicted of criminal trespass and resisting law enforcement after he wandered onto a stranger's porch, refused to leave, and then pulled away from a police officer's grasp while being escorted off the property. On appeal, he challenged the sufficiency of evidence for his resisting law enforcement conviction. The arresting officer had testified, "As soon as I attempted to place handcuffs on Mr. Runnells, he began to pull away or step away from me. I was able to grab his arm, and he began to pull away again from me. At that point, I grabbed him in a bear hug type manner, guided him to the ground, and was able to get him placed in handcuffs . . . . " The Court of Appeals determined that nothing in this testimony suggests any "strength, power, or violence" in Runnells' actions or otherwise proves beyond a reasonable doubt that Runnells acted forcibly. The State argued that Graham v. State, 903 N.E.2d 963 (Ind. 2009), in which our Supreme Court opined that "even stiffening of one's arms when an officer grabs hold to position them for cuffing would suffice" as forcible resistance, was controlling. The Court rejected the argument, observing that the "stiffening" statement in Graham: (1) was not necessary to the Court's decision; (2) is difficult to square with the Court's subsequent holding in K.W.; and (3) appears at odds with other statements made by the Court over the years. The Court further rejected the State's argument--that the resistance was forcible because Defendant possessed a sawed-off shotgun--because there was no evidence he actually possessed at the time of the offense, distinguishing Pogue v. State, 937 N.E.2d 1253 (Ind. Ct. App. 2010). Reversed and remanded.

J. Offenses against Public Health, Order and Decency

Chapman v. State (3/23/2022) 186 N.E.3d 123 (Ind. Ct. App.) **Preliminary determination of matter "harmful to minors" affirmed -- disseminating widely-circulated internet memes**

In disseminating of matter harmful to minors prosecution, trial court did not err in preliminarily determining that the widely-circulated internet memes Defendant circulated to his 17-year-old former band student constituted matter "probably harmful to minors." On interlocutory appeal, Defendant argued that the memes, which involved jokes of a sexual nature, did not meet the standard of "probably harmful to minors" and that, if they did meet the standard, it would constitute a violation of his First Amendment rights. Majority of Court found Defendant's constitutional challenge waived and concluded that while the memes did not show any nudity or sadomasochistic abuse, "almost all, if not all" could be described or represented as sexual conduct or sexual excitement. Although Defendant argued the memes were simply humorous and do not fit the definition of "prurient," they all suggested or used explicit language to refer to sexual activities or sexual situations in crude, vulgar and degrading terms. The Majority deferred to trial court's review of memes and preliminary determination that they were patently offensive to prevailing standards in the adult community with respect to what is suitable matter for minors. Court also found the memes lacked serious literary, artistic, political or scientific value for minors pursuant to Ind. Code § 35-49-2-2. Held, judgment affirmed; Mathias, J., concurring to note the statutory criterion in IC 35-49-2-2(3) regarding what is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable matter for minors in 2022 are not the same as they were when the statute was written in 1983 and that "this change should be carefully considered and weighed by judges (in a preliminary determination as in this case) and juries (when deciding whether conduct charged under this statute amounts to a crime)...and by our General Assembly." Robb, J. dissenting, notes that the statute and First Amendment are entwined because matter is presumptively protected by the First Amendment unless the State can prove it is matter harmful to minors as defined in section 35-49-2-2." Thus, the dissent would not consider the constitutional analysis waived, and also disagreed with Majority's conclusion that the matter was patently offensive, noting it "wishes to pretend the influx of material regularly shared amongst modern youth has not shifted the way we should view what is suitable for minors unless and until the Legislature reconsider the statute. But I cannot ignore these sweeping cultural changes. The sexually suggestive memes at issue are almost certainly in poor taste and I do not support the sharing of them with a seventeen-year-old. Nonetheless, I cannot find this material patently offensive to prevailing standards in the adult community with respect to what is harmful to a teenager on the cusp of adulthood in 2022."

Atwood v. State (6/7/2021) 172 N.E.3d 678 (Ind. Ct. App.) **Repeated sales of methamphetamine to confidential informant sufficient to support level 5 felony conviction for corrupt business influence**

Defendant repeatedly sold small amounts of methamphetamine to a confidential informant and was charged and convicted of dealing in methamphetamine and corrupt business influence as a level 5 felony. Defendant appealed his conviction for corrupt business influence arguing that while he did not

dispute that his multiple deals with the confidential informant was a pattern of racketeering activity, that nearly every drug activity involves the exchange of money or other property for drugs and that if merely obtaining money as a part of a drug transaction was sufficient under the statute nearly every drug transaction would constitute corrupt business influence. The Court of Appeals disagreed, finding the evidence sufficient and specifically noting the statute was amended in 1991 to remove the word "real," which leaves the statutory language to be "a person acquires or maintains an interest in or control of property as an enterprise" and under the unambiguous language of the statute Defendant was guilty. Vaidik, J., dissenting, noting the word "property" should not be construed to include small amounts of cash that changes hands in a garden-variety drug deal and that the RICO statute is meant for people at or near the top of the chain of command.

Peterson v. State (4/29/2022) N.E.3d (Ind. Ct. App.), **Evidence insufficient to prove intent element of intimidation charge**

The State failed to prove the intent element of intimidation, a Level 5 felony, beyond a reasonable doubt. The State did not present any evidence to show that Defendant's communicated threat to kill R.B. or N.P. was made with the intent that they engage in conduct against their will, i.e., refraining from calling the police for assistance. R.B. was the only witness to testify about the threat. R.B. did not testify that Defendant had threatened to kill her and N.P. with the intent that they not call the police or 911. Instead, during R.B.'s cross-examination testimony, she specified that she had not called 911 that evening because she "was worried about leaving" and "was in shock." However, the evidence was sufficient to prove a separate count of intimidation, charged as a Level 6 felony. R.B. refused to open the apartment door to Defendant and told him she would not open the door. In response, Defendant told R.B. that he would "shoot through this effing door" if she did not open the door. That was sufficient to prove a threat to commit a "forcible felony" because it involved an imminent danger of bodily injury to a human being. Held, judgment affirmed in part and reversed in part.

Buti v. State (3/21/2022) 185 N.E.3d 433 (Ind. Ct. App.) **Stalking conviction supported by sufficient evidence**

To convict Defendant of stalking, the State was required to prove beyond a reasonable doubt that he engaged in "a knowing or an intentional course of conduct involving repeated or continuing harassment of [complaining witness (C.W.)] that would cause a reasonable person to feel terrorized, frightened, intimidated, or threatened and that actually cause[d] [the victim] to feel terrorized, frightened, intimidated, or threatened." Ind. Code § 35-45-10-1. Defendant argued on appeal that the evidence was insufficient to establish that his conduct actually caused C.W. to feel terrorized, frightened, intimidated, or threatened. He pointed to C.W.'s testimony that she felt angry as opposed to scared or terrorized, that she never felt that Defendant would actually hurt her, her daughter, or anything around her, and that she was the one who chased Defendant. The Court of Appeals determined that the jury had an obligation to consider all the evidence, not just C.W.'s testimony. It noted that an individual's state of mind may be inferred from that individual's statements and behavior.

The Court held that C.W.'s demeanor and statements to police, her decisions to call 911, and her statements to dispatch were probative evidence supporting an inference that she felt terrorized, frightened, intimidated, or threatened. Held, conviction affirmed.

VIII. DEFENSES

Higginson v. State (2/4/2022) 183 N.E.3d 340 (Ind. Ct. App.) **Effects of battery statute may be used to support self defense claims**

Trial court erred in granting the State's motion to exclude defense expert's anticipated testimony in support of Defendant's claim of self-defense. After being charged with murdering her husband, Defendant filed her notice of intent to raise a claim of self-defense and to introduce effects-of-battery evidence pursuant to Indiana Code § 35-41-3-11(b)(2). Under this statute, effects-of-battery evidence "refers to a psychological condition of an individual who has suffered repeated physical or sexual abuse inflicted by another individual." After administering a variety of tests, Defendant's expert diagnosed Defendant with PTSD and noted that she had suffered from a major depressive disorder in the past. When deposed by the State, the expert answered “No” when asked whether Defendant’s PTSD had prevented her from understanding the wrongfulness of her conduct when she killed her husband. The trial court granted the State’s subsequent motion to exclude expert's testimony on the basis that her anticipated testimony, specifically that Defendant's PTSD “affected her ability to appreciate the wrongfulness of her conduct,” was inadmissible to support a claim of self-defense.

On interlocutory appeal, Defendant argued Ind. Code § 35-31.5-2-109 contemplates the use of psychological evidence to establish that a person is suffering from the effects of battery in a self-defense case. Court agreed, holding "[i]t would make very little sense for Indiana Code section 35-41-3-11 to state that it allows the use of effects-of-battery evidence... in self-defense claims while actually limiting the use of that evidence to insanity defenses. To entirely forbid the use of [this evidence] in self-defense cases that fall under Ind. Code § 35-41-3-11 would render the self-defense portion of the statute superfluous.” The Court also concluded the defense expert may testify as to the general reasonableness of one's apprehension of fear, given the psychological trauma that comes from battery, but may not reach an ultimate factual determination regarding Defendant's specific belief, which is exlcusive to the jury. Held, judgment reversed and remanded for further proceedings.

Turner v. State (2/25/2022) 183 N.E.3d 346 (Ind. Ct. App.) **Parolee was entitled to claim self-defense despite being in violation of parole**

Defendant claimed self-defense to a charge of murder. At trial, over his objection, the State admitted evidence of his parole status to show he was not in a place he had a legal right to rebut his self-defense claim. Following earlier decisions of the Supreme Court in Mayes v. State, 744 N.E.2d 390 (Ind. 2001) and Gammons v. State, 148 N.E.3d 301 (Ind. 2020), the Court decided that a literal

application of the requirement that one be in a place where one has a right to be could bring about unjust or absurd results and defeat "the policy of this state that people have a right to defend themselves and third parties from physical harm and crime" under the language of the self-defense statute. The Court thus held that when a person is not in a place where he or she has a right to be, a self-defense claimed is barred only if there is an immediate causal connection between the person's presence in that place and the confrontation. Because there was no evidence that Defendant violated parole in order to confront the victim, the trial court abused its discretion in determining that his parole status was relevant to his self-defense claim. But the error was harmless in light of overwhelming evidence showing it was not an act of self-defense.

Bennett v. State (8/23/2021) 175 N.E.3d 331 (Ind. Ct. App.) **No error in excluding voluntary intoxication evidence to support self-defense claim**

In murder prosecution, Defendant argued evidence of his voluntary intoxication should have been admitted as evidence to support his subjective belief that force was necessary in support of his self-defense claim. The Court found that Sanchez v. State, 749 N.E.2d 509 (Ind. 2001) prohibits consideration of voluntary intoxication evidence to negate the mens rea requirement in criminal cases and that permitting voluntary intoxication even to support the subjective belief that force was necessary when arguing self-defense would impermissibly resurrect the voluntary intoxication defense, which is not permitted by Sanchez or I.C. 35-41-2-5.

IX. ETHICS

Matter of Steele (8/6/2021) 171 N.E.3d 998 (Ind.) **Professional misconduct - demanding disciplinary complaints be withdrawn as condition of settlement**

Respondent committed attorney misconduct by making an improper demand that disciplinary grievances filed against him be withdrawn as a condition for settlement in a civil matter. The order suspending Respondent stems back to his 2018 breakup with a former girlfriend, who had obtained a protective order against him before Respondent sued her for defamation and other counts. Respondent was subsequently charged with felony stalking and misdemeanor intimidation and harassment counts, which were dismissed in 2019. Respondent's ex-girlfriend and her sister also filed disciplinary grievances against him, which were also eventually dismissed. Prior to the dismissals, Respondent sent an email to opposing counsel in the defamation case, demanding, among other things, that the disciplinary grievances filed against him be withdrawn as a condition precedent to settlement discussions. The Supreme Court reiterated that a coercive threat to file a grievance with the Disciplinary Commission, or (as here) a quid pro quo demand that a grievance be withdrawn, is prejudicial to the administration of justice and violates Rule 8.4(d), even when those grievances are meritless. While Respondent's demand was not actually prejudicial to the outcome of the underlying litigation, and while "having to deal with meritless disciplinary grievances certainly is understandable," the Court concluded that any attempt to

interfere with the investigatory process required by Rule 23 or use the disciplinary process to leverage more favorable settlement terms is "forbidden." Held, Respondent violated Rule 8.4(d) as charged and is suspended from the practice of law in Indiana for 30 days with automatic reinstatement.

Matter of Smith (2/25/2022) 181 N.E.3d 970 (Ind.) **Ethics - criticism of judge's integrity**

Per curiam. Respondent committed attorney misconduct by making several statements about a judge's qualifications or integrity in an appellate brief, either knowing the statements were false or with reckless disregard for their truthfulness, in violation of Indiana Professional Conduct Rule 8.2(a). While the better practice for the Commission would have been to specifically recite in the complaint each and every statement alleged to have violated Rule 8.2(a), under the circumstances of this case the complaint was sufficient to put Respondent on notice of the statements from his appellant's brief in DuSablon v. Jackson County Bank, 132 N.E.3d 69, 71 n.2 (Ind. Ct. App. 2019), that would be at issue in this case. There was ample evidence to support the hearing officer's ultimate finding that Respondent knew his assertions were false or acted in reckless disregard of whether they were true or false. While "attorneys need wide latitude in engaging robust and effective advocacy on behalf of their clients," Matter of Dixon, 994 N.E.2d 1129, 1138 (Ind. 2013), that "wide latitude" is not a blank check. Held, 30-day suspension with automatic reinstatement.

X. EVIDENCE

A. Relevancy/404(b)

Corbett v. State (11/10/2021) 179 N.E.3d 475 (Ind. Ct. App.) **Murder and attempted murder convictions upheld despite erroneous admission of evidence**

Police collected DNA from the scene of a murder where the victim had been stabbed to death and his wife was severely injured. Seven years later, police sent the DNA to a genealogy company for testing and received Defendant's name as a possible lead, resulting in his arrest, charge and conviction. Citing Camm v. State, 908 N.E.2d 215, 224 (Ind. 2009), the Court of Appeals found abuse of discretion under Indiana Evidence Rule 404(b)(2) in admitting evidence of other homes that were burlarized. Defendant also argued — and the State conceded — error in admitting evidence of nonjudicial punishment Defendant received while in the Navy under Ind. Evid. Rule 609(a)(2), because the punishment does not constitute a criminal conviction with which he could be impeached. However, the Court found harmless error in admitting the other burglaries and nonjudicial punishment given the substantial evidence of Defendant's guilt.

Hall v. State (12/17/2021) 177 N.E.3d 1183 (Ind.) **Admission of co-defendant's prior deposition testimony and exclusion of video of police statement affirmed**

In LWOP prosecution, trial court did not abuse its discretion by admitting a section co-defendant's 2017 deposition and excluding his 2015 statement to police, made two days after the murder. Co-defendant refused to testify live at trial. The purpose of introducing the deposition testimony was not to exploit or inflame the jury, but to have the jury hear testimony from the shooter in Defendant's murder-for-hire scheme. Thus, Defendant failed to demonstrate that any prejudice resulting from co-defendant's deposition was unfairly prejudicial under Evidence Rule 403. Defense counsel did not request that the jury watch the deposition videotape rather than have it read to the jury, thus Defendant waived this issue on appeal. As in Pruitt v. State, 622 N.E.2d 469 (1993), Defendant's attempt to introduce extrinsic evidence of co-defendant's statement to police to further impeach co-defendant was unnecessary. The jury was read co-defendant's deposition in its entirety and heard him admit and explain that he lied in his first statement to police. Further, co-defendant had an opportunity to explain or deny this inconsistent statement during his deposition, and he explained that he lied to avoid or lessen his potential culpability in victim's murder. Any error in the admission or exclusion of evidence was harmless, as it would not have affected Defendant's substantial rights given the cumulative and corroborating evidence implicating Defendant in the murder.

Davis v. State, (5/4/2022) N.E.3d (Ind. Ct. App.) **Evidence of subsequent bad act allowed to show intent and motive**

In burglary and domestic violence prosecution, trial court did not abuse discretion in admitting evidence of a subsequent altercation between Defendant and the complaining witness (CW). "[A]lthough Rule 404(b) cases typically involve the issue of whether prior bad acts of the defendant are admissible, the wording of Rule 404(b) does not suggest that it only applies to prior bad acts and not subsequent ones. .... Therefore, when determining the admissibility of evidence of subsequent crimes, wrongs, or other acts, it is appropriate to use the Evidence Rule 404(b) test." The Court of Appeals found that the evidence was properly admitted to show Defendant's intent (contrary to his claim of self-defense) and motive as it related to his hostile relationship with CW. The Court further found that the evidence was not unfairly prejudicial considering the court's limiting instruction to the jury and the fact the evidence was presented for a just short time during the three-day trial. Held, judgment affirmed.

Ramirez v. State (9/23/2021) 174 N.E.3d 181 (Ind.) **Exclusion of prior bad act evidence offered by Defendant upheld**

In murder, neglect and LWOP prosecution, trial court did not abuse its discretion in excluding evidence of mother's prior bad acts involving her children — specifically, the murder victim's buckle fracture suffered a year before her death which the trial court deemed "too remote." Defendant did not demonstrate that the 2017 buckle fracture was evidence of a "strikingly similar" crime or was caused by mother specifically, as required by Garland v. State, 788 N.E.2d 425, 430 (Ind. 2003). And the trial court properly concluded that Defendant failed to show "enough evidence of another appropriate purpose"

under Rule 404(b). Moreover, even if this evidence should have been admitted under Rule 404(b), its exclusion was harmless because its probable impact on the jury in light of the other evidence was so minor that Defendant's substantial rights were not prejudiced.
See also: Mathews v. State, 20A-CR-2229 (Ind. Ct. App. 04/21/2022) (no abuse of discretion in excluding testimony from one of the murder victim's friends, who tried to contact police with information that another suspect was the real killer; the testimony was not relevant to show the police's failure to investigate other suspects because there is no evidence that a detective or any other officer actually received the information about the other suspect); **COMPARE:** *Yeary v. State* (4/7/2022) N.E.3d (Ind. Ct. App.) (in drug-induced homicide prosecution, trial court erred in excluding evidence of text messages the victims sent and received in the days immediately preceding the victim's death; the messages point to potential alternate sources of the fentanyl the victim ingested, and therefore, they affect the probability of whether the drugs Defendant sold him proximately caused his death. Consequently, at least portions were relevant to the issue of causation and should have been admitted).

B. Hearsay/Confrontation

Hemphill v. New York (1/20/2022) 142 S. Ct. 681 (S. Ct.) **"Opening the door" is not an exception to the Confrontation Clause**

The trial court allowed the State to introduce parts of the transcript of a co-defendant's plea allocution as evidence to rebut Hemphill's theory that the co-defendant committed the murder (the co-defendant was out of the country and not available to testify). The Supreme Court held the admission of the plea allocation violated Hemphill's Sixth Amendment right to confront the witnesses against him. The Court rejected the State's argument that Hemphill "opened the door" to the introduction of these testimonial statements because they were "reasonably necessary" to "correct" the "misleading impression" Hemphill had created by pursuing a third-party culpability defense, citing People v. Reid. The Court acknowledged that the Sixth Amendment leaves States with flexibility to adopt reasonable procedural rules governing the exercise of a defendant's right to confrontation. See Melendez Diaz v. Massachusetts, 557 U.S. 305, 327 (2009). But the door-opening principle incorporated in Reid is not a member of this class of procedural rules. Rather, it is a substantive principle of evidence that dictates what material is relevant and admissible in a case. Here, Hemphill did not forfeit his confrontation right merely by making the plea allocution arguably relevant to his theory of defense.

The Court reiterated that the history, text, and purpose of the Confrontation Clause bar judges from substituting their own determinations of reliability for the method the Constitution guarantees. "The trial court here violated this principle by admitting unconfronted, testimonial hearsay against Hemphill simply because the judge deemed his presentation to have created a misleading impression that the testimonial hearsay was reasonably necessary to correct. For Confrontation Clause purposes, it was not for the judge to determine whether Hemphill's theory that [co-defendant] was the shooter was unreliable, incredible, or otherwise misleading in light of the State's proffered, unconfronted plea evidence. Nor, under the Clause, was it the judge's role to decide that this evidence was reasonably

necessary to correct that misleading impression. Such inquiries are antithetical to the Confrontation Clause." Cases in which the Court has previously permitted a State to impeach a defendant using evidence that would normally be barred from use at trial did not involve exceptions to constitutional requirements. The Court left for another day to decide the validity of the common-law rule of completeness as applied to testimonial hearsay. Reversed and remanded.

Stott v. State (8/13/2021) 174 N.E.3d 236 (Ind. Ct. App.) **Erroneous admission of radio traffic recording and surveillance footage - hearsay and insufficient authentication**

In resisting law enforcement prosecution, trial court abused its discretion in admitting an audio recording of police-officer radio traffic that began after the truck fled the traffic stop, in which anonymous witnesses spoke with law enforcement, and police officer's cellphone photographs of a restaurant's surveillance footage. Law enforcement officers were surveying an area of Indianapolis due to a "recent uptick in violence" when they saw an exchange of a handgun between two drivers at a local gas station. Officers followed the vehicles as they left to an apartment and then to a McDonald's, where the officers stopped to watch them. Eventually they conducted a traffic stop when one of the vehicles turned left with its right turn signal on. The car stopped but sped off and later crashed into a tree, with two men running out of the vehicle, including Defendant. An officer viewed the McDonald's surveillance footage, taking several pictures of the video on a cellphone. He "believed" that a man depicted in the footage, who appeared to be wearing an all-denim outfit like the driver, was Defendant. That belief was based on a picture of Defendant the officer had previously received via "an e-mail communication."

The Court of Appeals held that the radio traffic audio recording constituted inadmissible hearsay and State failed to demonstrate that the present sense impression hearsay exception applied. It was unclear whether the witnesses made the statements to police during or immediately after the events described or whether the witnesses personally perceived those events. And at least one anonymous declarant had time to deliberate. These circumstances distinguish the police-radio evidence here from the properly admitted hearsay evidence in the cases relied on by the State.

Further, the State did not satisfy the silent-witness theory's requirement on the issue of the admitted cellphone photographs of the McDonald's surveillance footage. The State here did not produce any evidence about the McDonald's security system or how it operated. Noting that it is "increasingly easier in today's digital age to manipulate or distort images," Court reiterated "that it is the proponent's burden to establish the strong showing of authenticity and competency for the admissibility of photographs used as substantive evidence under the silent-witness theory. The State did not do so here." Error in admission of these two pieces of evidence was not harmless, as the identity of the all-denim-wearing driver of truck was the critical issue in this case. Thus, the Court reversed and remanded for a new trial.

Smoots v. State (7/27/2021) 172 N.E.3d 1279 (Ind. Ct. App.) **Defendant forfeited Sixth Amendment right to confrontation in light of his wrongdoing of threatening witness to prevent him testifying**

Defendant was convicted of battery resulting in serious bodily injury, criminal confinement, obstruction of justice, attempted obstruction of justice and the habitual offender sentencing enhancement and was sentenced to an aggregate term of twenty-four years. At trial, the complaining witness (CW) did not appear and the trial court admitted exhibits involving CW's statements and conversations with law enforcement officers and others. The evidence established that Defendant ordered two others to contact CW and make threats to him to dissuade him from testifying. The Court of Appeals concluded that the State proved by a preponderance of the evidence that Defendant's conduct was designed to procure CW's absence from trial and to prevent him from testifying against him. The Court held Defendant forfeited his right to confront CW at trial in light of that wrongdoing, and his Sixth Amendment right to confrontation was not violated by the admission of CW's statements at trial.

Washington v. State (12/9/2021) 178 N.E.3d 1275 (Ind. Ct. App.) **Trial court abused its discretion in admitting evidence from Drugs.com to identify pills**

Defendant was charged with Possession of a schedule II controlled substance as a class A misdemeanor after an officer recovered pills from his possession. The State did not conduct chemical tests on the pills to identify them, but instead relied on the officer's testimony he matched the appearance of the pills to an image of hydrocodone he found on a website called Drugs.com and an exhibit which was a printout from that website. The Court of Appeals found that, on this issue of first impression for Indiana's courts, using that website to identify the pills was not necessary and that the State did not show that Drugs.com is a reliable source for drug identification. The Court held that the market reports exception to hearsay under Evidence Rule 803(17) does not apply to allow the admission of evidence from Drugs.com that was used to convict Defendant. The trial court abused its discretion when it admitted the evidence and since the State presented no other evidence to show the pills were a controlled substance, Defendant's conviction was reversed. Held, reversed.

Fedij v. State (4/11/2022) N.E.3d (Ind. Ct. App.) **Writings and symbols on packaging of unregulated and illegal products such as edibles are hearsay and inadmissible under market reports exception**

In possession of marijuana and paraphernalia prosecution, trial court erre in admitting into evidence packaging of edibles to prove the truth of the matter asserted on those packages, i.e., that the products within those packages contained levels of THC that would be illegal in Indiana. The State sought admission under the market reports hearsay exception, Ind. Evidence Rule 803(17), arguing the products were regulated somewhere, somehow and so the packaging statements were reliable. The Court of Appeals found the market reports hearsay exception inapplicable because there are no Indiana or federal regulations for labeling of illegal products and so there was no basis to conclude that the packages contained sufficient indicia of reliability for the trustworthiness of their representation as to the THC level. Court also agreed with Defendant that the State presented no evidence that any of the

seized substances had a percent concentration of THC that was more than 0.3%, which would make the item illegal to possess under the statute. At trial, the testimony was that plant material was consistent with both marijuana and hemp. If the State seeks to obtain a conviction under the statute for possession of marijuana, it is the State's burden to prove the proscribed substance in Defendant's possession was in fact an illegal substance. Here, the State failed to do so, and the Court reversed Defendant's conviction.

McMillen v. State (6/1/2021) 169 N.E.3d 437 (Ind. Ct. App.) **Body camera evidence properly admitted**

Following an altercation at their home, Defendant's crying and visibly injured mother (C.W.) spoke to a police officer and told him she and Defendant "got into it" and he "abused" her. The officer recorded their conversation with his body camera and also photographed blood stains he observed in their home. At trial, C.W. acknowledged an argument but maintained Defendant did not hit her. The State introduced the recording from the body camera and the trial court instructed the jury it should not consider the officer's statements as evidence. The Court of Appeals found C.W.'s recorded statements to the officer were admissible under the excited utterance exception to the rule against hearsay and the trial court did not abuse its discretion by admitting the statements into evidence. In proving Defendant's prior battery to elevate the instant offense, the State offered the charging information, probable cause affidavit, law enforcement investigative reports, the plea agreement, and sentencing order which were all certified by the county clerk. The Court of Appeals found that the probable cause affidavit and the law enforcement officer's investigation report do not fall within the public records exception under Evidence Rule 803(8) but that the remaining documents do. The Court held the trial court did not abuse its discretion by admitting records establishing the prior conviction but that if it did, any error is harmless given Defendant's testimony admitting the conviction.

Garth v. State (1/31/2022) 182 N.E.3d 905 (Ind. Ct. App.) **Letter from boyfriend to incarcerated defendant not admissible as recorded recollection; no error in admitting police interview**

Defendant and her boyfriend were charged with conspiring to kill a woman her boyfriend previously dated. The Court of Appeals found no abuse of discretion in excluding from evidence a letter the boyfriend wrote to Defendant while they were incarcerated. The trial court allowed Defendant to question him about statements in his letter regarding the motive for the murder. Defendant asserted the letter was admissible as a recorded recollection, but her express intent in seeking to admit the letter was to contradict her boyfriend's previous testimony regarding his motive for killing the victim. There was no testimony indicating that the boyfriend could not recall his motive.

A woman Defendant sought to call as a witness did not appear to testify after being subpoenaed. The State agreed the witness was unavailable and Defendant was permitted to put her deposition in evidence. On rebuttal, the State was allowed to play the witness's police interview for the jury over Defendant's objection. While the video was being played, the witness arrived at the courthouse. Defendant moved to strike both the deposition and interview video under the best evidence rule because the live witness had appeared. The trial court denied the motion but allowed Defendant (over the State's objection) to call the live witness to the stand and question her. The following morning,

defense counsel moved for a mistrial, arguing that she had learned that the witness was outside the courtroom for an hour and a half while the video was being played, and, had the witness been brought in when she arrived, all the evidence admitted after her arrival would not have been admissible. A statement offered against the accused in a criminal case is inadmissible if it implicates both the declarant and the accused under Ind. Evidence Rule 804(b)(3). The Court held Defendant waived the argument under Rule 804(b)(3) because it was not presented to the trial court. Even if it had been raised, it would not be a reversible error because admitting the video was harmless. Under the circumstances, the Court concluded that the prosecutor did not violate his duty of candor to the tribunal by waiting until publication was complete before informing the court of the witness's arrival. Also, the remedial measures the trial court took under these unusual circumstances by allowing the live witness to testify over the State's objection preserved Defendant's right to a fair trial. Thus, there was no abuse of discretion in denying the motion for mistrial.

C. Witnesses, Privileges & Opinion Testimony

Kincaid v. State (6/3/2021) 171 N.E.3d 1036 (Ind. Ct. App.) **No error in trial court's limitations on expert testimony**

At her trial for aggravated battery and neglect of a dependent, Defendant denied injuring the baby and claimed her conflicting accounts of the baby's injury to police were lies that constituted false confessions. The trial court limited the testimony of Defendant's witness, an expert in interrogations and false confessions, to two areas: the fact people sometimes confess to crimes they have not committed, and certain interrogation techniques contribute to false confessions. Defendant did not object to the limitations at trial but argued it was fundamental error. The Court of Appeals concluded the trial court's refusal to allow the expert to offer an opinion as to whether the officers who questioned her used the Reid technique and whether that could have contributed to her false confession did not deprive Defendant of a fair trial. The Court also declined to hold that Jimerson v. State, 56 N.E.3d 117, 121 (Ind. Ct. App. 2016), was wrongly decided. The Court noted that the officers' testimony that they did not use the technique communicated nothing about the veracity of Defendant's statement and, therefore, was not prohibited by Evidence Rule 704(b). The Court of Appeals found no error in the trial court's limitations on the expert's testimony.

Neal v. State (9/16/2021) 175 N.E.3d 1193 (Ind. Ct. App.) **Detective's improper opinion testimony not fundamental error**

In child molesting prosecution, the investigating detective testified that guilty defendants typically give "a little bit more truth" with each statement they make to law enforcement, as Defendant had in speaking with him. The Court of Appeals found that this is precisely the type of opinion testimony that Evidence Rule 704(b) prohibits because it invades the province of the jury in determining what weight to place on a witness's testimony. However, noting the testimony was one isolated instance in

the two-day trial and that there was a "plethora of unchallenged evidence" that independently supported Defendant's conviction, the Court found the error harmless. Held, affirmed.

Martin v. State (12/30/2021) 179 N.E.3d 1060 (Ind. Ct. App.) **A witness expected to invoke 5th Amendment is not categorically barred from being called as a witness but there is no right to force witness to take the stand solely to invoke a 5th Amendment right**

Defendant was convicted of murder and arson for the death of his former girlfriend's father-in-law. At trial he sought to implicate his accomplice by forcing him to appear before the jury and either testify or invoke his 5th Amendment right against self-incrimination. Defendant argued his right to present a defense as guaranteed by the 6th Amendment of the U.S. Constitution and Article One section 13 of the Indiana Constitution was violated when he was prevented from calling the accomplice to the witness stand. Although trial counsel failed to preserve the issue in the trial court the Court of Appeals addressed the issue citing Stephenson v. State, 864 N.E.2d 1022 (Ind. 2007) (appellate counsel should have raised the issue of the failure to allow the defense to force a witness to invoke the 5th Amendment right as reversible error.) Here, the Court of Appeals held that a witness who is expected to invoke his 5th Amendment privilege is not categorically barred from being called as a witness but there is no right to force a witness to take the stand solely to invoke a 5th Amendment right. It is an abuse of discretion standard that is fact sensitive and the trial court should consider whether any trier of fact might possibly and reasonably believe that the proposed witness might have committed the crime instead of the defendant. Here, the trial court did not abuse its discretion.

D. Evidentiary Foundations/Authentication

Smith v. State (1/11/2022) 179 N.E.3d 1074 (Ind. Ct. App.) **Text messages and cell phone adequately authenticated through witness testimony**

Cell phone and text messages were authenticated even though the State introduced the evidence through a detective not personally involved in Defendant's arrest. Another State's witness, who allegedly sent text messages to Defendant about buying drugs, could not independently verify Defendant's phone number. The Court of Appeals held that taken together, the testimony describing the cell phone and how it was collected and placed into evidence, the extraction report, the witness's testimony, and the text messages were enough to authenticate both the cell phone and, independently, the text messages as being authored by Defendant. The Court further held that even if the trial court erred in admitting the evidence, the error was harmless because it was cumulative of other evidence establishing Defendant's guilt for dealing methamphetamine. The Court rejected Defendant's argument that admitting the cell phone extraction report was also error because its redactions made the evidence confusing and intelligible to the jury. The Court found the claim was waived for lack of an objection, and even still, any error in its admission would be harmless.

Hamilton v. State (2/28/2021) 182 N.E.3d 936 (Ind. Ct. App.) **Homeowner's testimony about copy of surveillance video sufficiently established authenticity - admission of copy of surveillance video not shown to be unfair**

Homeowner checked his surveillance camera and saw an unknown man enter his house and leave with a B.B. gun. Homeowner copied the surveillance video on his phone, put it on a his computer and then put it on a memory stick and gave it to police. Police viewed the video and recognized Defendant who was arrested and charged with burglary. At the bench trial State's Exhibit 1, a copy of the surveillance video made by someone using a hand-held video-recording device to record a playback of the video on a screen was admitted into evidence over objection. Defendant objected to the video under IRE 1002, the best evidence rule, and argued the recording of the video cropped out the time and date stamp and did not fully show the edges of the video and that the recording of the video was poor quality, and that an original is required to prove content unless a rule of evidence or statute provides otherwise. The Court of Appeals first noted the exhibit was admissible under IRE 1003 which provides that a duplicate is admissible unless a genuine question is raised about the authenticity or circumstances making it unfair to admit the duplicate and here Defendant had not shown that its admission was unfair. Also the Court of Appeals found the testimony of the homeowners regarding the video sufficient to provide authenticity to a relative certainly which is the standard for the video to be admitted under the silent witness theory IRE 901 (b)(9).

Calvert v. State (9/27/2021) 177 N.E.3d 107 (Ind. Ct. App.) **Circumstantial evidence of authenticity supported cell phone's admission under Evidence Rule 901**

The Court of Appeals affirmed the admission of cell phone and related records, finding that the State established a reasonable probability the cell phone belonged to Defendant. Evidence that the phone was registered to someone other than Defendant goes to the weight of the evidence and not admissibility.

Kerner v. State (10/22/2021) 178 N.E.3d 1215 (Ind. Ct. App.) **Audio recordings from cell phone admissible**

In murder, attempted robbery and arson prosecution, trial court did not err in admitting audio recordings obtained from another witness's cell phone, even though a forensic scientist examined the recordings and found they had been altered. The forensic scientist could not identify what was changed, but only that they had been changed from the original. The Court concluded, based on other corroborating evidence, that the unidentified alterations in the recordings were insignificant. Because the State made a threshold showing of authenticity, the challenge to the veracity of the recordings went to the weight of the evidence and not admissibility.

XI. JUVENILE

James v. State (11/4/2021) 178 N.E.3d 1236 (Ind. Ct. App.) **Juvenile's nearly-maximum adult murder sentence inappropriate**

Defendant was convicted of a murder committed when he was 13 years old after a two-day bench trial where he admitted to shooting the victim, but invoked self-defense. On appeal, Defendant challenged only his sentence to 63 years of imprisonment. Defendant first challenged the denial of his request for alternative sentencing under I.C. 31-30-4. The Court held that the denial was not an abuse of discretion. The trial court's decision to reject alternative sentencing will be evaluated using the factors to determine whether a child should be waived to adult court in the first place. The ultimate standard imposed is whether the trial court abused its discretion. The trial court found that Defendant's offense was heinous and aggravated, he was beyond the rehabilitation of the juvenile justice system, and that the community's safety and welfare were served by sentencing him as an adult. Refusal to impose alternative sentencing was not an abuse of discretion.

Defendant also challenged the consideration of certain delinquent conduct as aggravating. The trial court discussed an unadjudicated referral, but stated the allegation was not considered as an aggravator in and of itself. The Court held that Defendant offered no reason why the trial court should not be taken at its word, and even if there was error, it was harmless because there were several other aggravating factors that were unchallenged. The Court was confident that the trial court would have imposed the same sentence even had the challenged aggravator been excluded.

Nevertheless, the Court held that Defendant's 63-year-sentence warranted revision using the Court's authority under Appellate Rule 7(B). The main thrust was that a near maximum sentence for an offense committed by a 13-year-old child is inappropriate. The offense was tragic, but lacked the type of malice present in other cases which have been deemed the worst offenses and offenders. As for James' character, he "was barely a teenager when he committed the offense," had lost his father to gun violence at a young age, and had received an unstable upbringing that had caused him PTSD. Ultimately, the Court found the sentencing analysis and circumstances comparable to Legg v. State, 22 N.E.3d 763 (Ind. Ct. App. 2014), and reduced Defendant's sentence to the same 55 years that Legg had received—the advisory sentence for murder.

Conley v. State (3/23/2022) 183 N.E.3d 276 (Ind.) **Denial of PCR in juvenile LWOP case affirmed**

This is a post-conviction relief (PCR) appeal challenging Defendant's life-without-parole sentence for a crime committed when he was seventeen and a half years old. The Court of Appeals had reversed the denial of PCR due to trial counsel's failure to present evidence of juvenile brain science and juveniles' lesser culpability when compared to adults. The Supreme Court held that the then-prevailing cases of Roper and Graham did not clearly apply to juvenile life without parole for a homicide offenses. Moreover, the mitigation efforts focusing on Defendant's age and good character, and the trial court's

acceptance of Defendant's youth as a mitigating factor, demonstrate that there was not a reasonable possibility of a different outcome had the relevant brain science been presented as mitigation.

Further, the Court rejected several more arguments that Defendant's trial counsels were ineffective. First, trial counsels were not ineffective for failing to call certain witnesses who knew Defendant. They in fact did call witnesses who knew Defendant and elicited testimony from the State's witnesses. Defendant failed to demonstrate how the additional witnesses would have developed new evidence. Second, trial counsels were not ineffective for failing to rebut certain testimony of Dr. Hawley. The evidence offered in rebuttal at the PCR hearing was: (1) only a small part of the horrific facts concerning the death, and (2) evidence proving a point that the State had conceded was unproven previously and not relied upon by the trial court in its sentencing decision. Third, they were not ineffective for failing to rebut the State's mental health evidence from Dr.'s Daum and Olive. They attempted to strike some of the opinions, successfully limited their opinions, as well as successfully limited the weight given to their testimony. And fourth, they were not ineffective for failing to investigate more. The affidavit submitted from the investigator at the PCR hearing did not aver that work was left undone. Moreover, the evidence of certain jail records offered at the PCR hearing was cumulative of evidence already presented.

Finally, the Supreme Court held that Defendant's arguments under Appellate Rule 7(B) were barred by res judicata. Unlike the defendant in Stidham v. State, 157 N.E.3d 1185 (Ind. 2020), whose sentence had been previously reviewed under the manifestly unreasonable standard, and prior to the SCOTUS evolution of "the way we evaluate juvenile offenders," Defendant had received appellate review of his sentence in 2012. Since then, the standards for reviewing sentences and how jurisprudence treats juveniles convicted of serious crimes has largely remained the same, thus there are no extraordinary circumstances which overcome the restraints of res judicata.

Kerner v. State (10/22/2021) 178 N.E.3d 1215 (Ind. Ct. App.) **179-year sentence for 17-year-old Defendant affirmed**

Although Defendant was 17 years old when he committed the two murders, attempted robbery and arson, the Court declined to exercise its authority to reduce his 179-year aggregate sentence under Appellate Rule 7(B). The Court found the case different from those where the offender's youth warranted a sentence reduction—in Brown, 10 N.E3d 1, Taylor, 86 N.E.3d 157, and Wilson, 157 N.E.3d 1163. The Court found that Defendant's conduct was "exceedingly heinous" because the victim lingered in pain from being shot before he was beaten to death. The Court also cited abusing the bodies beyond recognition and attempting to cover up the crimes as supporting the enhanced sentence. Further, it found Defendant had a good childhood and no significant substance abuse issues. Finally, it noted Defendant stabbed a man four months before committing the murders under "alarmingly similar circumstances."

Neukam v. State (7/20/2021) 174 N.E.3d 1098 (Ind. Ct. App.), TRANSFER GRANTED **Adult courts do not have subject matter jurisdiction over adults alleged to have committed prior sex acts before reaching the age of 18**

Trial court did not err by denying State's motion to amend charging information in adult criminal case after he was alleged to have committed numerous acts of child molesting before he was a legal adult. Defendant was charged in adult criminal court with multiple counts of child molesting and sexual misconduct with a minor. At the time of the alleged crimes, Defendant would have been 18 and the victim would have been 13 or 14 years old. Two years later after the initial charges were filed, an additional eight charges of child molesting against the same victim were filed in the juvenile court. After the Indiana Supreme Court issued an opinion in D.P. v. State, 151 N.E.3d 1210 (Ind. 2020), the State successfully moved to dismiss Defendant's juvenile delinquency case but then moved to amend the complaint in Defendant's adult criminal case to add the eight dismissed child molesting charges, which it argued constituted an ongoing pattern of alleged criminal activity that began prior to Defendant's 18th birthday. The State asserted that the trial court had jurisdiction over Defendant and the additional child molesting charges because he was considered an adult at the time of the proposed amendment. It further alleged that adding the additional charges would not prejudice Defendant because he had been aware of the allegation since the time of his juvenile delinquency case.

Court agreed with Defendant that the current juvenile statutory scheme does not explicitly provide for the State's proposed action of amending the charging information in Defendant's adult criminal case to add the eight additional child molesting charges that were alleged to have occurred when he was under eighteen. The Court concluded that it didn't need to decide whether a circuit court's jurisdiction in "all criminal matters" would include jurisdiction for allegations of delinquent acts like those charged against Defendant. Even assuming that a circuit court, as the adult criminal court was here, had subject matter jurisdiction for allegations of delinquent acts of child molesting such as the ones that are specifically involved in this case, any such jurisdiction would be subject to the restrictions imposed by the legislature. Thus, the adult criminal court could not grant the State's motion to amend because it would not, based on the allegations, have had the necessary jurisdiction over them. "Until that time when the legislature provides an adult criminal court with jurisdiction over such a situation (as in this case), we cannot interpret the existing statutes to fill that void."

State v. Dibble (9/27/2021) 177 N.E.3d 832 (Ind. Ct. App.) **State's attempt to file charges in adult criminal court for prior delinquent acts fails**

This is an appeal from the trial court's dismissal of a Class B felony child molest charge that had allegedly occurred in 2011 when Defendant was a child himself. Previously, Defendant had been charged with the offense as a delinquent act in 2019, when Defendant was 23 years old, and then waived by juvenile court order in June, 2020. However, on September 8, 2020, the Indiana Supreme Court ruled in D.P. v. State, 151 N.E.3d 1210 (Ind. 2020), that juvenile courts do not possess subject matter jurisdiction over adults charged with prior acts of delinquency. Defendant filed a motion for relief from judgment from the prior waiver order, which the juvenile court granted, and the State dismissed the pending

criminal case that it had initiated after the waiver. Not to be deterred, the State filed the case directly into adult court, and Defendant filed a motion to dismiss. The criminal court granted the motion to dismiss, stating "at this time, the legislature has not created a means by which the State may proceed." The State argued on appeal that trial courts have original and concurrent jurisdiction in all civil and criminal cases. Ind. Code § 33-28-1-2(a)(1). Juvenile courts have jurisdiction over proceedings in which a child is alleged to be a delinquent child, I.C. § 31-30-1-1(1), but Defendant is no longer a child, so therefore the criminal court has subject matter jurisdiction to proceed.

The Court of Appeals rejected this argument, relying upon Ind. Code § 31-30-1-11(a), which mandates a criminal court transfer any allegation that the defendant committed a crime before the defendant is eighteen (18) years of age to the juvenile court. However, because of the D.P. case, transfer to the juvenile court would be moot, and therefore the criminal court's dismissal was affirmed. See State v. Neukam, 2021 WL 3044260 (Ind. Ct. App. July 20, 2021), TRANSFER GRANTED.

State v. Pemberton (3/31/2022) N.E.3d (Ind. Ct. App.) **Adult courts do not have subject matter jurisdiction over adults alleged to have committed crimess before reaching age of 18**

Trial court properly granted Defendant's motion to dismiss child molesting charge filed in adult criminal court for an alleged incident committed when he was age 16. In D.P. v. State, 151 N.E.3d 1210 (Ind. 2020), the Indiana Supreme Court held that juvenile courts do not have subject matter jurisdiction to waive an alleged juvenile delinquent offender into adult criminal court if the individual is no longer a "child," and ordered the juvenile court in this case to grant Defendant's motion to dismiss. Thereafter, the State filed a charge of Class B felony child molesting against Defendant in criminal court for the alleged crime he committed when he was 16. Relying on Ind. Code § 31-30-1-11(a), Defendant filed a motion to dismiss, arguing the adult criminal court did not have jurisdiction over him for the alleged act of juvenile delinquency. The criminal court dismissed the case and the State appealed.

The Court of Appeals affirmed the dismissal, noting "a lack of clarity in the Indiana Code." I.C. 31-30-1-11(a) (the transfer statute) requires the adult criminal court to transfer a case to juvenile court immediately if "a defendant is alleged to have committed a crime before the defendant is eighteen (18) years of age[.]" The State argued that the clause "before the defendant is eighteen (18) years of age" modifies the verb "alleged" — rather than the verb "committed" — such that, regardless of when the act was committed, a criminal court should transfer to juvenile court only those who remain under age 18 at the time of the State's filing of the charges. "To interpret the transfer statute in the manner the State proposes would allow the State to drag into adult court not just those adults who committed acts over which adult courts had jurisdiction if the juvenile was at least sixteen when the act was committed, see Ind. Code § 31-30-1-4, but literally any juvenile delinquent for whom the statute of limitations on adult crimes had not yet run." The Court also noted the Legislature in 2021 attempted to amend the statute to do "precisely what the State insists the legislature intends to have happen to [Defendant, but] chose not to bring that intent to fruition, and we decline the State's invitation to infer the legislature intends the opposite." The Court's role is to interpret statutes, not correct statutory inadequacies. See D.P. v. State, 151 N.E.3d at 1217 (refusing to "violate separation-of-power principles" by rewriting statutes). Held, judgment affirmed; Molter, J., dissenting, believes that if the adult criminal court lacked

subject matter jurisdiction in this case, the transfer statute was not the reason. He would reverse the trial court's order of dismissal of the case on that basis without expressing an opinion as to whether other statutes deprive the court of jurisdiction.

Mahoney Area School Dist. v. B.L. (6/23/2021) 141 S. Ct. 2038 (U.S.) **First Amendment limits but does not entirely prohibit regulation of off-campus student speech by public school officials**

Student used vulgar language when commenting on social media about cheerleading team while outside of school and outside of school hours. Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969), held that the school could not prohibit a peaceful demonstration consisting of pure speech on school property during the school day. In doing so, the Court explained there was no evidence that the protest would "substantially interfere with the work of the school or impinge upon the rights of other students." However, "[C]onduct by [a] student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the right of others is . . . not immunized by the constitutional guarantee of freedom of speech." The special characteristics that give schools license to regulate student speech do not always disappear when that speech takes place off campus. There would be several exceptions or "carve-outs" to any rule limiting the regulation of off-campus student speech by schools, so the Court refused to articulate a "First Amendment rule stating just what counts as 'off campus' speech and whether or how ordinary First Amendment standards must give way[.]" However, the Court articulated three features which diminish the unique educational characteristics that might call for First Amendment leeway: (1) rarely will the school be acting in loco parentis when a student is off-campus; (2) because off-campus speech regulation calls into question the student's speech throughout the entire day, courts should be more skeptical of the schools attempt to regulate; and (3) schools, "as nurseries of democracy," should have an interest in protecting unpopular expressions off campus. Here, B. L.'s words were vulgar, but not obscene or fighting words, and would have received protection had she been an adult. Moreover, there was no evidence of substantial disruption of a school activity, or threatened harm to another student's rights that would justify the school's action. Therefore, the alleged disturbance did not meet Tinker's demanding standard.

I. J. v. State (1/13/2022) 178 N.E.3d 798 (Ind.) **Juvenile's interlocutory appeal challenging placement order dismissed as moot**

In a Per Curiam opinion, the Indiana Supreme Court dismissed as moot a juvenile's appeal challenging her placement at a residential treatment facility, vacating a Court of Appeals' that may not "correctly advise[] courts regarding competency related treatment before Indiana Code Chapter 31-37-26 (addressing competency in the delinquency context) takes effect on December 31, 2022." The juvenile court ordered 14-year-old I.J. to be detained at a residential treatment facility while she received competency restoration services following numerous acts of domestic battery and criminal recklessness she committed against her mom. The State had filed petitions alleging I.J. was delinquent, but the trial court found her incompetent to have those petitions adjudicated and ordered that she receive competency-restoration services at the Youth Opportunity Center, where she remained for 63

days. But the appeal became moot because I.J. had been released from YOC before the Court of Appeals could review her petition to accept jurisdiction over the interlocutory appeal and the delinquency petitions were dismissed without objection. “While moot appeals ordinarily are dismissed, Indiana recognizes an exception that may be invoked when the appeal involves a question of great public importance that is likely to recur. … When appellate courts invoke this exception, it results in ‘decisions which are, for all practical purposes, advisory opinions.’ “… Held, transfer granted, Court of Appeals' opinion at 175 N.E.3d 837 vacated, appeal dismissed as moot.

K.Y. v. State (8/4/2021) 175 N.E.3d 820 (Ind. Ct. App.) **Teen who forwarded cartoon meme from gaming platform to other teens on social media found delinquent for felony intimidation when court finds message threatening**

Trial court found 13-year-old K.Y. to be a delinquent and entered a true finding for felony intimidation for sending a meme through her friend's social media account to other teens that included a cartoon character from an online gaming platform. The meme was a cartoon of a baby holding two guns. K.Y. added the language, "consider this a fucking warning all of you don't come to school on Monday." K.Y. and the kids she sent it to were all attending school remotely. K.Y. testified she meant it as a joke, The Court of Appeals found the necessary intent to create fear could be inferred because the teen was aware of the nation's history of school shootings and that contrary to her testimony, sending the meme was more than a juvenile antic intended as a joke.

XII. FORFEITURE

Abbott v. State (3/30/2022) 183 N.E.3d 1074 (Ind. S. Ct.) **In civil forfeiture proceedings, forfeited funds cannot be used for defense-related expenses**

In civil forfeiture cases, specifically the racketeering forfeiture statute, owners may not use seized cash for defense-related expenses. Here, the State moved to forfeit four firearms and more than $9,000 in cash from Defendant that was found during a search warrant. Defendant was suspected of dealing drugs and the State designated evidence that he had sold methamphetamine and other narcotics to undercover law enforcement during two controlled buys. Defendant unsuccessfully requested the appointment of counsel at public expense for the forfeiture proceeding, as well as a transcript of proceedings on appeal. During a hearing on the State's motion for summary judgment, Defendant claimed the money found in his pocket was lawfully obtained and was set aside to purchase a motorcycle the same day he was arrested. The sale had been postponed, he said, and he simply had not taken the cash out of his pocket. Also, he said, he was employed leading up to his arrest, and his 2015 tax documents showed two sources of lawful wages collectively exceeding $20,000. The Indiana Supreme Court reversed the trial court's summary judgment finding for the State, finding that Defendant's showing of lawful income and testimony that the cash was for a lawful purpose created enough conflicting inferences to preclude summary judgment. Finally, the Court affirmed the denial of

Defendant's request for appointed counsel, stating even if exceptional circumstances may have existed, the trial court did not err in its decision. Held, transfer granted, Court of Appeals' opinion at 164 N.E.3d 736 vacated, judgment affirmed in part and reversed in part. Rush, C.J., concurring in part and dissenting in part, would find an abuse of discretion from the trial court's denial of counsel, noting that defendants like the one in this case, who are incarcerated, indigent, and facing civil forfeiture need not be treated akin to all other civil litigants under the civil appointment of counsel statute.

State v. Timbs (6/10/2021) 169 N.E.3d 361 (Ind.) **Harshness of vehicle's forfeiture grossly disproportionate to the gravity of Defendant's crime and his culpability for the vehicle's misuse**

In forfeiture proceeding, Timbs met his high burden of showing that the harshness of his Land Rover's forfeiture was grossly disproportionate to the gravity of his underlying drug dealing offense and culpability for the vehicle's misuse. In so holding, Court declined the State's invitation to reconsider the proportionality test developed in State v. Timbs, 134 N.E.3d 12 (Ind. 2019) for examining forfeitures under the Excessive Fines Clause. The State argued instead that the court should focus primarily on the question of whether the property to be forfeited is an instrumentality of the crime. "[Timbs'] adoption of the gross-disproportionately analysis was based on a number of reasons — signals from the U.S. Supreme Court that proportionality was a necessary piece of the excessiveness inquiry for in rem fines; the recognition that almost all courts have rejected the State's proposed instrumentality-only test; the fact that modern in rem forfeitures are divorced from their historical roots; and the text and history of the Excessive Fines Clause. " In applying the gross disproportionately framework, Court reached the same conclusion as the trial court that Timbs met his burden, considering his culpability, the harshness of the punishment and the severity of the offense. While Timbs was very blameworthy for the property's misuse, the in rem fine was overly harsh, and the dealing crime was of lesser severity. The forfeiture of the Land Rover was significantly more punitive than remedial, and contrary to the State's claim, the trial court did not endorse a blanket rule that if a crime didn't have a discernible victim, then a forfeiture must be grossly disproportionate. "Rather, the trial court's analysis focused on a fact that even the State's brief seems to acknowledge: Timbs' crime did 'not involve specific injuries to specific victims." The Court further pointed out that other factors revealed the purpose of the use-based in rem forfeiture was to significantly punish Timbs, including the extent to which the vehicle's forfeiture would remedy the harm caused; the Land Rover's market value; other sanctions imposed on Timbs; and the effects the forfeiture will have on him. Slaughter, J., concurring to highlight his "deep concerns" with what the Court's totality-of-the-circumstances excessiveness test means and how lower courts will apply it in future cases. Massa, J., dissenting, disagrees that Timbs met his high burden to show gross disproportionately.

XIII. CHINS/TERMINATION OF PARENTAL RIGHTS

A. CHINS

Matter of A.A.D. (9/3/2021) 172 N.E.3d 714 (Ind. Ct. App.) **Trial court lacked authority to order informal adjustment**

Trial court was without statutory authority to order Father to participate in an informal adjustment without his consent, and once the trial court determined that there was insufficient evidence to support a CHINS adjudication, it was required to discharge the Children from its jurisdiction. DCS agreed that Indiana statutory law does not support the trial court's order and that reversal is appropriate. See Ind. Code § 31-34-8-2 ("The child and the child's parent, guardian, custodian, or attorney must consent to a program of informal adjustment."); Ind. Code § 31-34-11-3 ("If the court finds that a child is not a child in need of services, the court shall discharge the child."). Held, order directing Father to participate in informal adjustment reversed.

Matter of K.T. (5/5/2022) N.E.3d (Ind. Ct. App.) **No error in holding factfinding hearing 123 days after CHINS petition filed**

Good cause existed to continue CHINS factfinding hearing beyond the 120-day deadline based on: (1) the parties' representations to the court that a settlement was likely; and (2) the court's reliance on those representations in scheduling a minimal amount of time for the hearing. Mother had the opportunity to contest DCS's representations that "a resolution was imminent" and did not. Held, judgment affirmed.

In the Matter of To.R. v. Child in Need of Services (9/27/2021) 177 N.E.3d 478 (Ind. Ct. App.) **CHINS – parents' substantial health issues, inability to understand & appreciate child's severe medical needs; lack of stable housing**

Child was born critically ill in 2016 with multiple health issues including chronic lung disease, hypertension, and kidney failure. Among other issues child required a feeding tube, a ventilator and a constant tracheotomy to keep his airway from collapsing. In 2020, DCS received a report of medical neglect involving Mother stemming from Mother's conduct and disputes with medical staff about child's care while child was at Riley Hospital. Parents were kicked out of Ronald McDonald house after an altercation where they were both intoxicated. In a consolidated appeal, Father argued the trial court's findings were erroneous in stating Father needed requisite training to care for child but child was placed at a facility that did not offer the requisite training. The Court of Appeals found that while Covid-19 did play a part in parents' failure to get training, there were other facilities parents could attend to obtain the necessary training but that training would not be ordered until child was ready to leave facility and parents had not remedied other challenges such as stable housing that would permit placement of child outside the facility. Father is a double amputee and argued he cannot be denied placement based upon

his disability. The Court of Appeals found there were multiple other findings regarding father's inability to care for child and that he was not denied placement of child due to his disability. Parents argued coercive intervention of the court was not required because child's needs are being met by medical providers. However, Court of Appeals finds this ignores underlying issues that prevented child from being placed in parents' care, including chronic housing issues, domestic violence, alcohol abuse, criminal activity, mental and physical health issues. Father filed a motion to transfer the CHINS to St. Joseph County where father resided and argued the trial court erred in not granting his motion to transfer venue until after the dispositional hearing. When father filed his motion to transfer venue, the child resided in a facility in Cass county, not St. Joseph county where father requested case to be transferred. Thus father's motion was not properly governed by IC 31-32-7-3 because he did not request the case be transferred to county in which the child resided and the trial court did not abuse its discretion when it waited to transfer the case until after it entered the dispositional order.

In the Matter of K.W. and R.W. (10/21/2021) 178 N.E.3d 1199 (Ind. Ct. App.) **No abuse of discretion to hold CHINS hearings outside statutory time frames**

In a CHINS proceeding, Father filed two motions to dismiss on grounds the fact-finding and dispositional hearings were conducted after the statutory deadlines. In finding no abuse of discretion in moving the fact-finding hearing, the Court of Appeals pointed to Trial Rule 53.5 and Matter of M.S., 140 N.E.3d 279, 282 (Ind. 2020). "Although the trial court's specific reasoning does not appear in its written order, it appears that trial court granted a continuance due to delays caused by the COVID-19 pandemic, Father's failure to appear for the August hearing, and Father's request for new counsel." Additionally, the Court found no abuse of discretion in moving the dispositional hearing outside the 30-day statutory deadline. "Pursuant to our Supreme Court's holding in M.S., Trial Rule 53.5 trumps Indiana Code Section 31-34-19-1 on matters of procedure. Accordingly, Trial Rule 53.5 allows an extension of the statutory deadline to conduct a CHINS dispositional hearing where 'good cause' is shown. The trial court here found good cause for a continuance because of the COVID-19 pandemic, transfer of new systems to Odyssey, docket congestion, and the trial court judge's surgery." In analyzing the evidence in the case, the Court of Appeals also determined the trial court did not clearly err in determining the children were CHINS.

B. Termination of Parental Rights

In re I.L. (3/2/2022) 181 N.E.3d 974 (Ind.) **TPR hearing conducted via remote video did not violate due process**

Trial court did not violate parent's due process rights by holding the termination of parental rights hearing via remote video hearing. In a per curiam opinion, Supreme Court held that the Court of Appeals correctly decided the due process issue and expressly adopted and incorporated by reference Part 1 of the Court of Appeals' opinion at 177 N.E.3d 864 as Supreme Court precedent.

L.S. v. DCS (2/28/2022) 183 N.E.3d 362 (Ind. Ct. App.) **Termination of parental rights -- severe medical condition requiring extensive care Mother was unable to provide**

Child was born with short bowel syndrome, which required extensive and precise daily care and feeding. Child was removed because mother was unable to provide the medical needs of the child. Over the course of three years, Mother was unable to complete and maintain the necessary training to properly care for the child's extreme and extraordinary needs. Court of Appeals finds the evidence sufficient to affirm termination of parental rights.

A.S. v. DCS (7/30/2021) 175 N.E.3d 318 (Ind. Ct. App.) **Successor judge's order certifying unrecorded evidence in parental termination proceeding was not erroneous**

A successor judge who did not hear the evidence in a termination of parental rights hearing had authority to certify the recreated record pursuant to Ind. Appellate Rule 31. An equipment malfunction left most of the hearing unrecorded, so Mother filed a motion to remand the case to the trial court for the purpose of reconstructing the unavailable part of the record. The Court of Appeals remanded, but by the time the parties filed their statements of the evidence, the judge who had heard the case was succeeded by a successor judge, who certified the statements of the evidence. Court found that the very problem of which Mother complains — that the successor judge who certified the statement of the evidence was different from the judge who heard the evidence — is attributable to Mother. Had Mother abided by the appellate court's October 22, 2020, order to complete her statement of evidence within 15 days, the presiding judge who heard the case would have been available. In addition, Mother's failure to object on grounds that successor judge could not certify the reconstructed record was invited error. The Court also found no abuse of discretion for the trial court to deny Mother's motion to continue and to conduct the termination hearing in her absence at the second hearing. Mother waived this issue because she failed to object on due process grounds before the trial court when her motion to continue was denied.

XIV. APPEALS/POST-CONVICTION RELIEF/EXPUNGEMENT

A. Appeals/Belated Appeals

McDonald v. State (7/19/2021) 173 N.E.3d 1043 (Ind. Ct. App.) **After open guilty plea, defendant cannot raise double jeopardy challenge to validity of conviction on direct appeal**

Following Yost v. State, 150 N.E.3d 610 (Ind. Ct. App. 2020), Court held that defendants who plead open without a plea agreement cannot bring double jeopardy claims on direct appeal of the sentence. Here, Defendant challenged his felony convictions on constitutional and common law double jeopardy grounds, but Court agreed with the State that Defendant could not challenge the validity of his convictions following his guilty plea. But as to sentencing, Court agreed with Defendant that trial court

improperly entered his HVSO sentencing enhancement as a separate, consecutive sentence rather than specifically attaching it to one of his felony convictions. And although trial court incorrectly stated that the HVSO enhancement was non-suspendible, Court concluded that trial court would not have suspended Defendant's enhancement and would have imposed the same sentence had it realized that it could have suspended it. Held, judgment reversed and remanded to correct abstract of judgment on suspendibility point and to specify which conviction is enhanced with HVSO finding; double jeopardy claims dismissed without prejudice so that they may be brought through petition for post-conviction relief.

NOTE: The Supreme Court granted transfer in McDonald v. State, 22S-CR-46 (Ind. 1/31/2022) and in a per curiam opinion, summarily affirmed the "Double Jeopardy" section of the Court of Appeals opinion, agreeing "[i]t is well-established that a defendant who has pleaded guilty may not challenge the validity of his conviction on direct appeal." (citing Tumulty v. State, 666 N.E.2d 394, 395 (Ind. 1996). The Court nevertheless remanded for resentencing because the trial court incorrectly entered the HVSO enhancement as a separate, consecutive sentence rather than as an enhancement to a felony conviction, and did not understand that the HVSO enhancement could be suspended. Given the multiple irregularities in Defendant's sentencing, the Court could not be sure that it would have imposed the same sentence had it realized its errors.

Kirkland v. State (9/27/2021) 176 N.E.3d 986 (Ind. Ct. App.) **Direct appeal challenging waiver of counsel at probation violation dismissed without prejudice -- admission to probation violation is issue properly raised in PCR proceeding, not direct appeal**

Defendant argued on direct appeal that he did not knowingly, intelligently, and voluntarily waive his right to counsel at his probation revocation. The State argued and the Court of Appeals found the issue not properly before the Court of Appeals, relying on Tumulty v. State, 666 N.E.2d 394 (Ind. 1996), Huffman v. State, 822 N.E.2d 656 (Ind. Ct. App. 2005), Ind. PCR rule 1(1)(a)(5) and J.W. v. State, 113 N.E.3d 1202 (Ind. 2019). The Court of Appeals found that the issue was not properly before the Court in direct appeal and dismissed the appeal without prejudice to pursue post-conviction relief.

See also: Dobrowolski v. State, 21A-CR-1775 (Ind. Ct. App. 4/14/22) (after admitting probation violation, probationer could not challenge waiver of counsel in belated appeal).

Wihebrink v. State (1/24/2022) 181 N.E.3d 448 (Ind. Ct. App.) **Appellate challenge to improper aggravators barred by waiver of right to appeal in plea agreement**

Defendant pleaded guilty to Level 1 felony neglect of a dependent resulting in death with a cap of 30 years and received the maximum sentence. Her plea agreement contained a waiver of the right to appeal. Defendant then filed a pro se petition for permission to file a belated notice of appeal under Indiana Post-Conviction Rule 2. The State objected, arguing Defendant was not an "eligible defendant" under the rule because she had waived the right to appeal her sentence under the plea agreement. On appeal from the denial of the petition to file a belated notice of appeal, Defendant argued that some of

the six aggravators found by the trial court were invalid and that she was therefore not sentenced "in accordance with the law." In denying the right to a belated appeal, the majority of the Court of Appeals found that nowhere in Crider v. State, 984 N.E.2d 618 (Ind. 2013), did the Indiana Supreme Court suggest that reliance on one or more invalid aggravators makes a sentence "illegal" or "contrary to law." The Court stated "if a defendant who waived the right to appeal their sentence was allowed to appeal on the ground that the trial court found improper aggravators or failed to find proper mitigators, the appeal waiver explicitly sanctioned in (Creech v. State, 887 N.E.2d 73 (Ind. 2008)) would be largely gutted in those cases where a defendant does not agree to a specific sentence as any defendant could make such an argument". Najam, J., dissented, citing three cases where belated appeals had been granted when Defendants argued their sentences were contrary to law: Crouse v. State, 158 N.E.3d 388 (Ind. Ct. App. 2020), *trans.* not sought, Fields v. State, 162 N.E.3d 571 (Ind. Ct. App. 2021), *trans. denied*, and Haddock v. State, 112 N.E.3d 763 (Ind. Ct. App. 2018), *trans. denied*. The dissent would grant Defendant permission to file a belated notice of appeal despite fact she agreed to a cap of 30 years, because she did not agree to be sentenced to the full 30 years based upon improper aggravators.

B. Principles of Appellate Review – waiver/mootness/res judicata

Hostetler v. State (3/22/2022) 184 N.E.3d 1240 (Ind. Ct. App.) **Despite continuing objection, challenge to inventory search waived by Defendant saying "no objection" when evidence was admitted**

Defendant filed a pretrial motion to suppress evidence seized during a purported "inventory search" of his vehicle. The trial court denied the motion to suppress. When the officer who searched the car began to recount finding suspected narcotics in his testimony, defense counsel stated, "I'm going to interrupt here to object to the admission of any evidence discovered during the inventory search and make that a standing objection." The trial court overruled the objection, noting Defendant had a "standing objection." When the State introduced photographs of items found in the car, defense counsel stated, "We have no objection, Your Honor." When the State introduced lab test results, defense counsel said, "No objection." In 2013, our supreme court amended Indiana Evidence Rule 103, recognizing the use of a continuing objection at trial. The Court of Appeals took the opportunity to echo and supplement the proper procedure for defendant who seeks to rely on continuing objection as outlined in Hayworth v. State, 904 N.E.2d 684 (Ind. Ct. App. 2009): Upon a defendant's "timely" and "sufficiently specific objection to a particular class of evidence" at trial, the defendant's request for a continuing objection should ideally specify that it is pursuant to Evidence Rule 103(b). See Hayworth, 904 N.E.2d at 686; Evid. R. 103(a),(b). The trial court may then "rule[] definitively on the record at trial" on the defendant's continuing objection request. See Evid. R. 103(b). Thereafter, "during the subsequent admission of that class of evidence" to which the defendant sought the continuing objection under Evidence Rule 103(b), the "proper procedure" is for the defendant to "remain silent[.]" Hayworth, 904 N.E.2d at 686, 694. If the defendant were to make a statement to the admission of the evidence, especially where a trial court asks if the defendant has any objection, the recommended procedure would be for the defendant to simply state that he is relying upon his continuing objection under Evidence Rule 103(b). Here, Defendant obtained a continuing objection but then affirmatively stated

"no objection" when the challenged evidence was admitted. The Court of Appeals held that "despite the request for a continuing objection, [Defendant] has waived his appellate challenge to the admission of evidence by his subsequent affirmative statements that he had no objection to the evidence."

State v. Barnett (8/25/2021) 176 N.E.3d 542 (Ind. Ct. App.) **Issue preclusion prevented prosecutor from relitigating alleged victim's age after full and fair opportunity to litigate issue in related proceeding in another county**

Trial court did not abuse its discretion by giving preclusive effect to the Marion County Probate Court's 2012 age-change order and the March 7, 2017, order reaffirming same, thus preventing the State from relitigating the alleged victim's age; and the trial court did not err in dismissing multiple counts against the defendants because the charges were filed outside of the five-year statute of limitations period. Defendants were charged with multiple counts of neglect of a dependent and filed Motions to Dismiss on the grounds of res judicata, collateral estoppel and the statute of limitations. After the trial court granted the Motion to Dismiss, in part, the State filed an interlocutory appeal. The charges stem from when Defendants (at the time of the charges husband and wife), living in Hamilton County, adopted through a Hamilton County court a person (adoptee) born with a form of dwarfism called diastrophic dysplasia. After adoption, the adoptee began to demonstrate threatening behavior and Defendants began to believe adoptee was older than her date of birth suggested. Defendants petitioned a Probate Court in Marion County to change adoptee's birth year. The petition to change her date of birth was granted by the Probate court and adoptee was then deemed an adult. After the birthdate was changed, Defendants moved the adoptee to an apartment in Tippecanoe County and assisted her in obtaining disability benefits. However, DCS attempted to open a CHINS proceeding, alleging the adoptee was a child who had been abandoned. The CHINS petition was dismissed, finding it lacked jurisdiction because the adoptee was judicially determined to be an adult. Next, a prosecutor from Marion County filed an appearance in the Probate age-change case, appearing on behalf of adult protective services. Although the State entered its appearance, it did not appear at a hearing to vacate the age-change. At the hearing, evidence was presented, and the age-change was affirmed. Two-and -a-half years later, the Tippecanoe County Prosecutor's office filed multiple charges of neglect against Defendants. The State argued the Marion County Probate court's name change order should not have been given effect because adoptee's age was already determined by a court in Hamilton County at the adoption proceeding. The Court of Appeals found the adoption court was not required to determine adoptee's age and when Defendant's petitioned to change the birth date, they did not move to set aside the adoption and the petition for age-change was not, as the State alleged, an impermissible collateral attack on the adoption. The Court of Appeals found the State was precluded from raising issues regarding the age-change and was bound by principles of res judicata because the State had entered an appearance and had the opportunity to appear at the age-change probate hearing years before. Finally, the Court of Appeals found Trial court did not err in finding that some of the charges should be dismissed because they were filed outside the limits of the statute of limitations and Defendants did not commit any act to conceal the alleged crime.

Commitment of E.F. (11/30/2021) 179 N.E.3d 1017 (Ind. Ct. App.) **Appeal of temporary involuntary commitment dismissed as moot**

E.F.'s term of temporary commitment had expired before the appeal was fully briefed. One exception to the mootness doctrine is for "'questions of great public interest that are likely to recur." Here, the majority of the Court of Appeals held that, despite the court historically treating every involuntary commitment appeal as raising issues of public interest likely to recur, this appeal was moot and no exception applied. The court based its reasoning on the Supreme Court's decision in T.W. v. State, 121 N.E.3d 1039, 1042 (Ind. 2019), which it interpreted as "clarif[ying] that temporary commitment appeals should be, as a rule, dismissed as moot, though in rare circumstances a question of great public interest may justify not dismissing the otherwise moot appeal." Nothing about the sufficiency of the evidence supporting any given temporary commitment is an out-of-the-ordinary issue in need of resolution under the great public importance exception. Held, appeal dismissed. Vaidik, J., dissenting, disagreed that T.W. altered the well-established doctrine that temporary involuntary-commitment cases should be addressed on the merits without any specific showing of great public interest. Otherwise, these cases would entirely evade appellate review. T.W. addresses a completely different issue: whether a commissioner (as opposed to a judge) lacks the authority to enter a commitment order. The dissent would address the appeal on the merits and invited further clarification from the Supreme Court.

C. Post-conviction Relief – IAC Claims

Baumholser v. State (4/8/2022) N.E.3d (Ind. Ct. App.) **Counsel ineffective in not moving to dismiss charges barred by statute of limitations**

Trial counsel provided ineffective assistance by failing to move to dismiss the class C felony child molesting charges at trial when the State rested because the State's evidence proved that the statute of limitations had passed by the time the State charged him. At trial, the complaining witness (C.W.) unequivocally testified that all of the acts of molestation occurred when she was six years old before Christmas of 2007 and no acts occurred after that. As such, the statute of limitations expired at Christmas of 2012. The post-conviction court erroneously determined that acts of concealment tolled the statute of limitations based on an allegation in the probable cause affidavit that Defendant told C.W. not to tell her mother and C.W.'s trial testimony that she was afraid of Defendant because he drank a lot and kept weapons in the house. The post-conviction court's reliance on the probable cause affidavit was unjustified because the probable cause affidavit was not evidence of any matter for the jury's determination and contained hearsay. Nothing in C.W.'s trial testimony supported the allegation in the probable cause affidavit that Defendant told her not to tell her mother. C.W.'s testimony that she was afraid of Defendant is not evidence that he took a positive act calculated to conceal the fact that a crime had been committed and thus does not support the application of fraudulent concealment to toll the statute of limitation. Therefore, Defendant was entitled to relief on that claim. The Court of Appeals denied Defendant's claim that trial counsel provided ineffective assistance by failing to move for a mistrial at the close of the State's evidence because the evidence of the class C felony molestations was

inadmissible pursuant to Indiana Evidence Rule 404(b) and its admission subjected him to grave peril in his defense of the class A felonies. Defendant failed to carry his burden to show that C.W.'s testimony of his prior molestations had a reasonable probability of swaying the jury's verdict on the class A felony charge. The Court also denied Defendant's claim that trial counsel failed to object to voir dire questioning that improperly conditioned jurors to favor the child witness over him. Even if the four complained-of questions were improper, in light of all the questions and comments during jury selection, Defendant did not carry his burden to show prejudice.

Isom v. State (6/30/2021) 170 N.E.3d 623 (Ind.) **Denial of post-conviction relief affirmed in death penalty case, no ineffective assistance of counsel**

In assessing the ineffective assistance of counsel claims the Court found the post-conviction court did not err in denying relief under the standard established in Strickland v. Washington. In review of ineffective assistance of trial counsel claims the Court found trial counsel was not deficient in screening and selecting jurors. Defendant argued he was forced to accept jurors who should have been stuck for cause when prospective jurors discussed the case, that one juror indicated he could not be impartial, and that another gave an inaccurate response on her juror questionnaire. The post-conviction court found the seated jurors were not tainted and Defendant failed to show deficient performance or prejudice and the Indiana Supreme Court agreed. In the guilt phase Defendant argued testimony from a defense witness implicitly conceded Defendant's guilt and violated McCoy v. Louisiana, 18 S. Ct. 1500 (2018). However, the Indiana Supreme Court distinguished the implicit concession of guilt made by the witness in Defendant's case from McCoy where defense counsel made unambiguous concessions of guilt over the client's repeated and adamant objections. Here, Defendant alleged his counsel refused to properly present a plea offer to him, but the post-conviction court found that counsel addressed the State's plea offer in Defendant's presence on the record and again there was no basis for reversal under McCoy v. Louisiana. At the penalty phase Defendant argued his counsel was ineffective for failure to investigate and present mitigation, specific to jail records and a specific witness. However, the post-conviction court rejected the claim that the jail records and specific witness would have changed the jury's recommendation. Defendant argued his counsel was ineffective for failing to challenge penalty-phase jury instructions which caused the jury to consider only behavior defined as mental disease, mental defect, or intoxication. The post-conviction court found that taking the instructions as a whole the jury was advised to consider all facts it thought were mitigating and found no error and the Indiana Supreme Court agreed. Likewise, the Court found appellate counsel was not ineffective for failure to raise fundamental error challenges on direct appeal to specific instructions. The Justices found the Defendant's free-standing challenges to the post-conviction court's rulings, including denial of renewed motion for a competency hearing, Defendant's discovery request for the State's lethal injection protocol, and discovery request for juror-contact information waived. The Court also reviewed and denied the claim the post-conviction court erred in limiting the testimony of two expert witnesses and found Defendant's challenge to his petition's filing date waived. Ultimately, it concluded that because Defendant did not establish that the post-conviction court erred, he wasn't entitled to relief on any of the challenges. In summary, the Supreme Court found trial counsel was not ineffective in all phases of Defendant's trial and specifically there were no errors in jury selection, guilt phase or penalty phase.

Bradbury v. State (10/1/2021) 177 N.E.3d 608 (Ind.) **Ineffective assistance of counsel claim rejected - stipulating to disputed element of crime and failing to seek lesser included offense instruction**

In murder prosecution, trial counsel was not ineffective for failing to request a jury instruction on the lesser-included offense of reckless homicide and in stipulating to the fact that the co-defendant had been convicted of murder as the principal, thus conceding that co-defendant had the requisite intent to kill. 15-year-old Defendnt was charged as an adult and convicted of murder as an accomplice with a gang enhancement after his 19-year-old friend shot and killed a toddler while opening fire on a rival during a gang dispute. Counsel indicated that he entered into the stipulation because he believed the jury was less likely to convict Defendant if it knew "justice had been done to the actual shooter." Also, Defendant had initially confessed that he was the shooter and the stipulation served to show that it was a false confession. The stipulation did not relieve the State of the burden to prove Defendant's intent. And even if defense counsel had not agreed to the stipulation, there was enough evidence to prove co-defendant's intent to kill the intended victim. A 3-2 majority of the Indiana Supreme Court also concluded that counsel made a reasonable strategic decision under the circumstances not to seek a lesser-included offense instruction and pursue an all-or-nothing trial strategy. Defendant's theory of the case was that the State did not sufficiently prove his intent and that the shooting was a rogue action by co-defendant that Defendant did not join or have any knowledge. Held, transfer granted, Court of Appeals opinion at 160 N.E.3d 256 vacated, denial of post-conviction relief affirmed. Massa, J., joined by Slaughter, J., concurring to express his belief that defense counsel's performance here was "extraordinarily effective" and "something to compliment, not second-guess," even if it failed to result in an acquittal. Goff, J., joined by Rush, C.J., dissenting, would find counsel's performance deficient because he failed in his duty to consult with Defendant on whether to request a lesser-included instruction, and counsel testified that his failure to request such an instruction was not a strategic decision. This deficient performance resulted in prejudice to Defendant given the conflicting evidence "that would have likely created a serious enough dispute over Bradburry's culpability as an accomplice for the court to have given the instruction."

Hale v. State (6/9/2021) 171 N.E.3d 141 (Ind. Ct. App.) **Trial and appellate counsel not ineffective for failing to challenge constitutionality of sentencing enhancement**

Post-conviction relief petitioner argued that under Johnson v. United States, 576 U.S. 591 (2015) and Whatley v. Zatecky, 833 F. 3d 762 (7th Cir. 2016), his trial and appellate counsel were ineffective for failing to make a facial constitutional challenge to the sentencing enhancement provision of having manufactured drugs within 1000 feet of a youth program center. This enhancement doubled the Defendant's sentencing exposure. The Court of Appeals found no prejudice to Petitioner, stating that there may be a case where a facial constitutional challenge can be appropriately made under Johnson, *supra*, but here Petitioner could not show prejudice because a facial constitutional challenge would have faced several obstacles. The Whatley decision was an as applied challenge and the Court of Appeals determined Petitioner would not have standing to raise a facial unconstitutional challenge because the statute was not unconstitutionally vague as applied to him. Therefore, Petitioner could not show

prejudice and trial counsel was not ineffective. Because there was no objection at trial, the issue was waived and appellate counsel would have had to argue fundamental error. The Court of Appeals concluded the failure to make the facial constitutional challenge does not rise to fundamental error on appeal and therefore appellate counsel was likewise not ineffective.

Washington v. State (11/8/2021) 177 N.E.3d 498 (Ind. Ct. App.) **Ineffective assistance of counsel for failure to object to an erroneous instruction and to tender a correct instruction on sudden heat**

Defendant was charged with murder in a drug deal gone bad that resulted in a fight and death of victim. Trial counsel failed to object to an erroneous instruction on voluntary manslaughter as a lesser included offense of murder and tendered an erroneous instruction that was given to the jury that misstated Indiana law on sudden heat. The Court of Appeals found this to be deficient performance and that Defendant was prejudiced because had jury been properly instructed they may have opted to convict Defendant of voluntary manslaughter instead of murder. Held, denial of post-conviction relief reversed on direct appeal.

Bell v. State (7/20/2021) 173 N.E.3d 709 (Ind. Ct. App.) **Ineffective assistance of appellate counsel -- failing to raise habitual offender phase jury waiver issue on direct appeal**

After Defendant was convicted of murder and conspiracy to commit robbery, he admitted his prior convictions with respect to the habitual offender count without personally waiving his right to jury. On direct appeal, counsel did not raise the issue as a fundamental error. The Court of Appeals concluded the trial court failed to advise Defendant of his right to a jury trial regarding the habitual phase and his personal expression of his desire to forgo a jury trial is not apparent from the record. Noting that our Supreme Court has long held that the failure to secure a proper waiver of a defendant's jury-trial right is fundamental error, the Court of Appeals found that the post-conviction court's decision was contrary to law. The Court held the trial court committed a fundamental constitutional error that caused Defendant prejudicial harm and would have merited automatic reversal on direct appeal and that the outcome of his appeal would have been different if the issue had been raised. Held, reversed and remanded with instructions to vacate the habitual offender adjudication and to conduct a new trial on the habitual offender information.

Robinson v. State (9/14/2021) 175 N.E.3d 859 (Ind. Ct. App.) **No reversible error in freestanding claim prosecutor suborned perjury; appellate counsel not ineffective for failing to raise double jeopardy issue that would have been a novel argument at the time**

On PCR, Defendant raised a freestanding claim of fundamental error alleging that the prosecutor in his case suborned perjury when he elicited testimony from a witness at Defendant's trial that there was no agreement that could benefit the witness in exchange for his testimony. The Court of Appeals concluded that the evidence does not unmistakably show the prosecutor suborned perjury. Instead, the implication from the exchange was that there was no promise or "deal" that testifying would benefit him, just that the plea was open, and the State would recommend the minimum sentence. The Court of

Appeals also held that appellate counsel did not render ineffective assistance by failing to raise a double jeopardy argument under the Indiana Constitution. The Court concluded that based on the precedent available to counsel at the time of his direct appeal, there was no state double jeopardy issue to raise. Held, denial of petition for PCR affirmed.

D. Expungement

Allen v. State (1/25/2022) 181 N.E.3d 454 (Ind. Ct. App.) **Denial of petition for expungement affirmed**

Under the permissive expungement statute, a trial court may deny an expungement petition after considering the nature and circumstances of the crime, and the petitioner's character. Here, after the Indiana Supreme Court remanded this case to the trial court and ordered it to conduct a hearing on Defendant's Petition for Expungement, the trial court held a hearing and denied the petition. Defendant appealed and the Court of Appeals noted the trial court's findings make clear that it considered the nature and circumstances of Defendant's crime and character, including his rehabilitation efforts since his conviction, and concluded the trial court did not abuse its discretion in denying the petition. The Court declined to reweigh the evidence as to whether the trial court gave sufficient weight to Defendant's rehabilitation efforts. Held, judgment affirmed.

INDIANA PUBLIC DEFENDER COUNCIL LEGISLATIVE UPDATE

June 3, 2022

Indiana Public Defender Council

Bernice A. N. Corley
Executive Director

Michael Moore
Assistant Executive Director

Joel Wieneke
Senior Staff Attorney

Contents:

INTRODUCTION:

The Indiana General Assembly met for business on organization day, November 16, 2021, and adjourned *sine die* on March 9, 2022. Throughout the session, IPDC staff pursued the legislative agenda adopted by the IPDC Board, specifically:

- Juvenile Justice Overhaul;
- Remove Home Detention violations as a basis for an Escape charge;
- Expand OVWI defense for THC to situations where there was no accident resulting in SBI or death;
- Amelioration for those convicted pre-2014; and
- Amend credit time for pretrial home detention credit

While Executive Director Bernice Corley, Assistant Executive Director Michael Moore, and Senior Staff Attorney Joel Wieneke lead the legislative efforts, the entire IPDC staff contributed their expertise and timely analysis throughout the session.

IPDC had significant success. First, progress was made in the juvenile justice arena through the adoption of HEA 1359. This legislation provides concrete, positive change with respect to detention of children under 12 years of age; provides for transitional services for children released from the Department of Correction; and requires the Commission of Improving the Status of Children to create a statewide juvenile justice oversight body, which will develop certain aspects of the juvenile delinquency system. Second, the ongoing effort to reform the crime of Escape resulted in some movement for the better. While there was not a complete removal of Home Detention violations, a provision contained in SEA 9 removed certain technical violations from the definition of Escape.

Unfortunately, some efforts were not successful. There was no movement on an expansion of the THC defense for OVWI, and legislation that would have increased the amount of credit time for pretrial home detention failed to receive a committee hearing. Finally, the attempt to secure ameliorative relief for those currently serving a sentence in DOC for certain non-violent offenses committed before 2014 failed along the same fractures within the supermajorities of the House and Senate. Each republican caucus advanced a bill on the topic, however, differences of opinion on key aspects of amelioration has, for the second year in a row, ended with nothing passing.

SUMMARY OF IPDC'S LEGISLATIVE INITIATIVES:

Passing Ameliorative Relief: Provides that people incarcerated in DOC who were convicted of nonviolent offenses pre-2014, would be released via a parole board process set forth by the legislation.

Bill Number:	HB 1369, Sentence Modification
Author:	Robert Morris (R-Ft. Wayne)
Status:	The bill passed the House. An amended version passed the Senate. The House adopted a conference committee report ("CCR") that reconciled the different versions of the bill, but the Senate rejected the CCR.

Removing Home Detention Violations from the Elements of Escape: IPDC sought an amendment that would have removed a violation of a home detention rule from the elements of Escape. Sen. Kyle Walker was willing to add a modified version of this proposal to his bill. His language provides that a home detention violation based on possession or consumption of alcohol or a controlled substance, tardiness or missed appointments, or a failure to pay user fees cannot serve as a basis to file Escape.

Bill Number:	SEA 9, Electronic Monitoring
Author:	Kyle Walker, (R-Indianapolis)
Status:	Passed and will be effective July 1st.

Expanding the THC Defense to OVWI: In 2021, the general assembly added a defense to operating a vehicle with a controlled substance or its metabolite in the blood if the controlled substance is marijuana or a metabolite of marijuana. However, the defense only applies when the blood was taken following an accident resulting in serious bodily injury or death. IPDC believes this was an oversight and the defense should exist when there is no accident resulting in serious bodily injury or death. The recommendation was that Subsection (d)(2)(D) should include reference to IC 9-30-6 as well. Unfortunately, after approaching the author of the defense, Sen. R. Michael Young, he would not author the proposed change.

Increasing Credit time for Pretrial Home Detention. Currently, a person on pretrial home detention receives 1 credit day for every 4 days of actual time on home pre-trial home detention. Effectively, each day on pre-trial home detention counts as a ¼ day. The rules, restrictions and conditions of pre-trial home detention are the same rules a person is subjected to when serving the same type of sentence after a finding of guilty. This credit class, upon conviction, unnecessarily prolongs supervision. Studies show that the longer a person is on supervision unnecessarily, the more likely they are to have a rule violation, exposing them to

revocation and incarceration. IPDC proposed that people on pretrial home detention receive the same credit time as those who are incarcerated pretrial.

Bill number:	SB 194, Credit time for pretrial home detention
Author:	Rodney Pol, (D-Chesterton)
Status:	This bill was assigned to the Committee on Corrections and Criminal Law but did not receive a hearing

Overhauling Juvenile Justice: Center for State Government (CSG) conducted an in-depth review of Indiana's juvenile delinquency system, working closely with state and local jurisdictions. HEA 1359 was the result of those efforts. The center piece of HEA is the creation of the Juvenile Justice Oversight Body, which is charged to: (1) create a plan for collecting juvenile justice data; (2) adopt policies and procedures for using screening tools at diversion, detention, and disposition (which are now required); (3) guide the shift to county-controlled grant program for behavioral health services; (4) develop transitional services for youth leaving the DOC; (5) create policies and programs for diversion and community based alternatives to detention. Further, the new law prohibits holding children younger than 12 in detention (with exceptions).

Bill number:	HEA 1359, Juvenile Law Matters
Author:	Rep. Wendy McNamara (R-
Status:	Signed into Law

INTERIM STUDY COMMITTEES:

During the interim between legislative sessions, the Legislative Council authorizes committees composed of members of both houses and often lay members to examine issues requiring more study than can be conducted during the legislative session. On May 24, 2022, the Legislative Council authorized the following topics of interest to public defense (to see the full list go to the following link: http://iga.in.gov/documents/ef4b4ee7).

Interim Study Committee on Child Services: This committee is charged with reviewing the reports of state and local child fatality review teams and DCS concerning child safety.

Interim Study Committee on Corrections and Criminal Code: In addition to its statutory duty to review current trends with respect to criminal behavior, sentencing, incarceration, and treatment, Legislative Counsel charged this committee with studying the "[l]ogistics" of connecting "release-ready patients and offenders" to "appropriate care." The committee will also identify programs currently in operation to provide care and explore the funding needed to support care. Finally, the committee will study those portions of the criminal code "concerning HIV."

Interim Study Committee on Courts and the Judiciary: Pursuant to statute, this committee is tasked, in every even number year, with reviewing, considering, and making recommendations concerning all requests for new courts, new judicial officers, and changes in jurisdiction of existing courts and reviewing and making recommendations related to the most recent weighted caseload measurement system report published by the office of judicial administration.

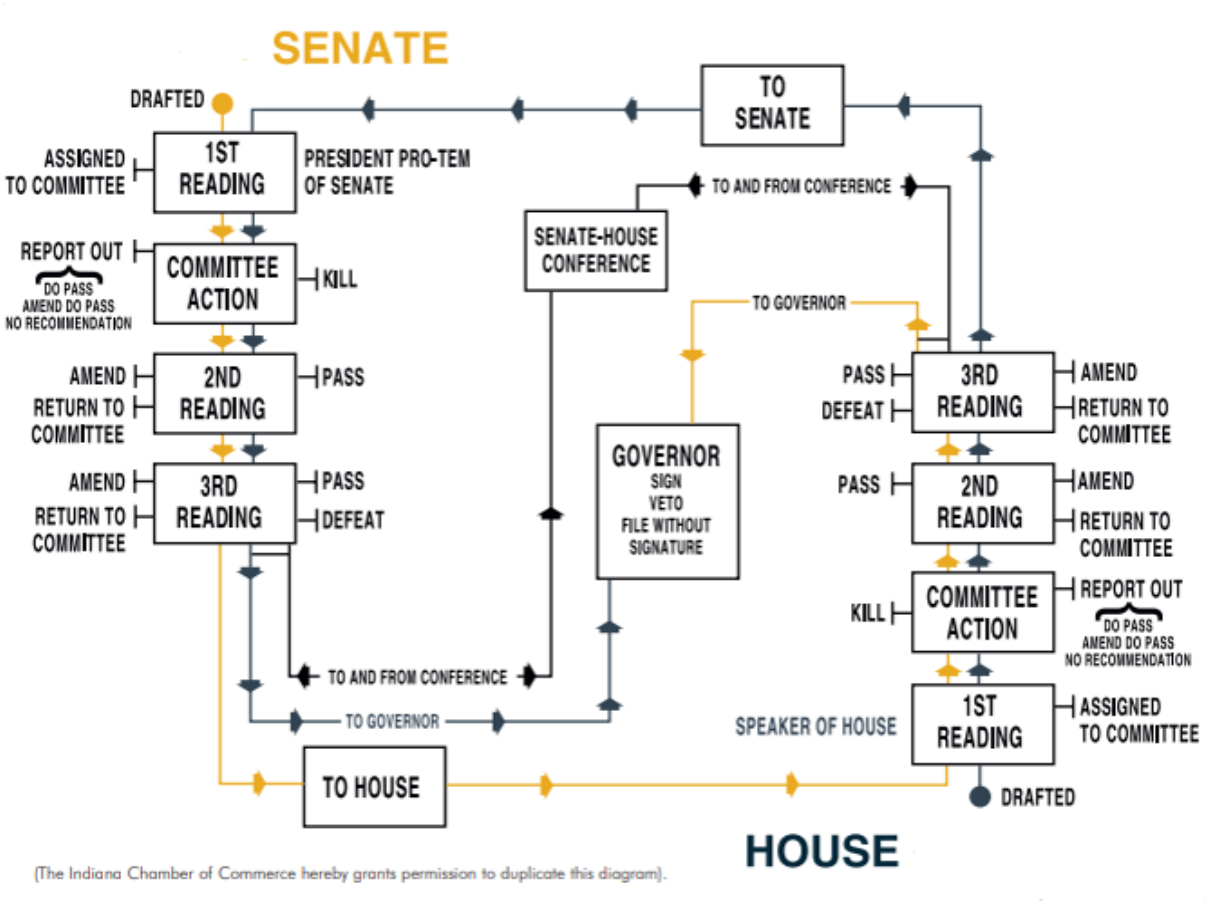
Interim Study Committee on Public Health, Behavioral Health, and Human Services: This committee will investigate conditions at Logansport State Hospital. It will also examine THC products regarding potential health benefits, potential decriminalization, and other potential consequences. the committee will examine the use of private attorneys in lieu of prosecutors in Title IV-D programs.

Interim Study Committee on Roads and Transportation: Legislative Councils has directed this committee to study the consequences and fiscal impact of issuing driver record cards to residents who meet training, certification, and insurance criteria but are ineligible for a driver's license.

The Housing Task Force: The newly created Housing Task Force will review a host of concerns relating to the shortage of low-income and middle-income housing. There is no specific charge to study the intersection of housing and criminal justice, but the topics that will be studied will almost certainly have some bearing on that issue.

THE LEGISLATIVE PROCESS:

How a bill becomes law in Indiana is governed by the Constitution, statutes, and the General Assembly's rules. The Indiana Chamber of Commerce created this graphic depiction of the flow of the legislative process:



(The Indiana Chamber of Commerce hereby grants permission to duplicate this diagram).

RELEVANT BILLS THAT PASSED THIS SESSION:

House

HEA 1004 Department of correction. Amends and updates certain terms involving direct placement in a community corrections program. Updates the definition of "community corrections program". Specifies that a court may suspend any portion of a sentence and order a person to be placed in a community corrections program for the part of the sentence which must be executed. Provides that a person placed on a level of supervision as part of a community corrections program: (1) is entitled to earned good time credit; (2) may not earn educational credit; and (3) may be deprived of earned good time credit. Provides that when a person completes a placement program, the court may place the person on probation. Provides that a court may commit a person convicted of a Level 6 felony for an offense committed after June 30, 2022, to the department of correction (department), and that, consistent with current law, a court may commit a person convicted of a Level 6 felony for an offense committed before July 1, 2022, to the department only if certain circumstances exist. Establishes certain conditions of parole for a person on lifetime parole and makes the violation of parole conditions and commission of specified other acts by a person on lifetime parole a Level 6 felony, with an enhancement to a Level 5 felony for a second or subsequent offense. Provides that, for purposes of calculating accrued time and good time credit, a calendar day includes a partial calendar day. Makes conforming changes.

HEA 1075 Commissions and committees. Repeals the following: (1) Indiana advisory commission on intergovernmental relations. (2) Public highway private enterprise review board. (3) Lake Michigan marina and shoreline development commission. (4) Orange County development advisory board. Moves a definition from a statute being repealed. Requires the interim study committee on government to biennially make recommendations to the legislative council regarding: (1) repeal of inactive groups; and (2) continuation of membership in interstate compacts. Requires the salary matrices prescribed for certain officers of the state police department, alcohol and tobacco commission, department of natural resources, and the Indiana gaming commission to be reviewed and approved by the budget agency biennially in even-numbered years. Requires the justice reinvestment advisory council to report to the legislative council before November 1, 2022, regarding how to reduce the membership of an advisory board, with recommendations regarding membership of a community corrections advisory board, including how to reduce the membership of an advisory board. Changes the name of the Indiana commission to combat drug use to the Indiana commission to combat substance use disorder. Requires the services for individuals with intellectual and other developmental disabilities task force to make certain recommendations to the legislative council. Adds one member representing the Indiana Association of Rehabilitation Facilities to the 211 advisory committee.

HEA 1079 Elements of rape. Provides that a person commits rape if the person engages in sexual activity with another person and the person disregards the other person's attempts to refuse the person's acts.

HEA 1093 (sec. 10) Education matters. Amends the membership and duties of the early learning advisory committee. Makes changes to the definition of "school resource officer". Provides that, after June 30, 2023, if a school corporation or charter school enters into a contract for a school resource officer, certain school corporations or charter schools must enter into a memorandum of understanding with the law enforcement agency that employs or appointed the law enforcement officer who will perform the duties of a school resource officer. Provides that certain parties are prohibited from incentivizing the enrollment, reenrollment, or continued attendance of a student or prospective student by offering or giving an item that has monetary value. Requires the Indiana charter school board (board) to appoint an executive director to carry out the duties and daily operations of the board. Establishes the executive director's duties. Provides that the board shall establish certain processes. Establishes the Indiana charter school board fund and provides that money in the fund is appropriated continuously for purposes of the board. Provides that the department of education (department) may grant an accomplished practitioner's license under certain conditions. Establishes: (1) a definition for "virtual student instructional day"; and (2) requirements for virtual student instructional days. Provides that a public school may conduct not more than three virtual student instructional days that do not meet the established requirements. Provides that a public school that does not comply with these provisions may not count a student instructional day toward the 180 day student instructional day requirement. Allows the department to waive these requirements. Provides that the instructional days tuition support distribution formula take into account only certain schools and grades within a school corporation if fewer than all the schools fail to conduct the minimum number of student instructional days. Authorizes the department to study and, if recommended, use machine scoring. Provides that, after a school receives statewide assessment score reports, a teacher of a student shall discuss the student's statewide assessment results with a parent at the next parent/teacher conference or, if the school does not hold parent/teacher conferences, send a notice to a parent of the student offering to meet with the parent to discuss the results. Provides that the department may include in a contract entered into or renewed after June 30, 2022, with a statewide assessment vendor a requirement that the vendor provide a summary of a student's statewide assessment results that meets certain requirements. Changes the department's review period for certain funds. Provides that the state board of education shall assign to a school or school corporation (including adult high schools) a "null" or "no letter grade" for the 2021-2022 school year. Repeals a provision concerning staffing of the board.

HEA 1103 Department of natural resources (Sec. 6). Repeals code provisions regarding commercial fishing on Lake Michigan. Removes the requirement that the director of the department of natural resources (department) send, to a person who has a license that is placed on probationary status, notice that includes a description of the amount of child support in arrears and an explanation of the procedures to pay child support arrearage. Repeals the mussels license issued by the department. Provides that a law enforcement officer or an employee of the department is not liable for the destruction of a permitted animal that escapes an enclosure and poses a threat to public safety. Provides instances when a construction permit for a floodway is not required to remove a logjam or mass of wood debris that has accumulated in a river or stream. Provides that, beginning January 1, 2022, the director of the department shall not exercise authority to remove

or eliminate an abode or residence from a floodway if the abode or residence was constructed before January 1, 2022. (Current law provides that the director of the department shall not exercise the authority if the residence or abode was constructed before January 1, 2020.) Provides that before July 1, 2023, the department shall adopt a license for the removal of trees; channel maintenance; and bank reconstruction, repair, and stabilization in a floodway. Provides that a local floodplain administrator shall utilize the best floodplain mapping data available as provided by the department and located on the Indiana Floodplain Information Portal when reviewing a permit application for a structure or a construction activity in, or near, a floodplain. Provides that a contract to purchase timber must be in writing. Allows the collection of damages for costs associated with a claim or action, including attorney's fees, or damages specified in a contract with a timber buyer or a person who cuts timber but is not a timber buyer. Requires a timber buyer to keep complete and accurate records for at least five years after a transaction. Allows the director of the department to suspend a timber buyer's license for not more than 90 days before a final adjudication if the director of the department finds that the holder of the timber buyer's license poses a clear and immediate danger to public health, safety, or property if allowed to continue to operate. Provides that the director of the department may renew the suspension for periods of not more than 90 days. Makes technical and conforming changes.

HEA 1137 Protective orders. Provides that an order for protection issued ex parte or upon notice and a hearing, or a modification of an order for protection issued ex parte or upon notice and a hearing, is effective: (1) for two years after the date of issuance; or (2) indefinitely after the date of issuance if the respondent is a sex or violent offender and is required to register as a lifetime sex or violent offender and the petitioner was the victim of the crime that resulted in the requirement that the respondent register as a lifetime sex or violent offender. Requires a respondent who is subject to an indefinite order for protection to request a hearing in objection to the order of protection within 30 days of the order being issued. Allows any party to request a hearing on a two year order for protection at any time. Provides that a person may only request one judicial review hearing on a protection order.

HEA 1167 Bureau of motor vehicles. Allows an advanced practice registered nurse to sign certain health documents concerning driving privileges. Requires the bureau of motor vehicles (bureau) to establish and maintain an audit working group. Provides that meetings of the audit working group are not subject to open door laws. Provides that the bureau, rather than the state board of accounts, is required to conduct an audit of each license branch. Amends certain dates regarding the statewide electronic lien and title system (system). Removes system provisions concerning qualified service provider payments, participation notification, and annual fees. Provides that the bureau and participating qualified service providers or lienholders may charge certain system fees, but sunsets the provisions on July 1, 2025. mends dates concerning the voluntary or required use of the system. Requires the bureau to distribute at least one time each month the fees collected and deposited from certain special group recognition license plates. Repeals the law providing for the Earlham College trust license plate. Provides that interference with highway traffic is considered unreasonable if the interference occurs for more than 10 consecutive minutes except for: (1) machinery or equipment used in highway construction or

maintenance by the Indiana department of transportation, counties, or municipalities; and (2) firefighting apparatus owned or operated by a political subdivision or a volunteer fire department. Provides that a public agency or towing service that obtains the name and address of the owner of or lienholder on a vehicle shall, not later than three business days after obtaining the name and address, notify the owner of the vehicle and any lienholder on the vehicle, as indicated by the certificate of title or as discovered by a search of the National Motor Vehicle Title Information System or an equivalent and commonly available data base. Requires the bureau to process an electronic application for a certificate of authority not more than five business days after the submission of the application if the application meets certain requirements. Provides that an individual is not required to be a citizen of the United States as shown in the records of the bureau to apply for a replacement driver's license or learner's permit by electronic service. Provides that a suspension for failure to satisfy a judgment imposed before December 31, 2021 terminates on December 31, 2024. Removes the requirement that the bureau collect an administrative penalty if a dealer fails to apply for a certificate of title for a motor vehicle that is purchased or acquired in a state that does not have a certificate of title law. Provides that a manufacturer or distributor may not sell or offer to sell, directly or indirectly, a new motor vehicle to the general public in Indiana except through a new motor vehicle dealer holding a franchise for the line make covering the new motor vehicle. Provides that the sales of new motor vehicles by a manufacturer or franchisor to the federal government, a charitable organization, an employee of the manufacturer or distributor, or a manufacturer or distributor under certain conditions. Provides that an individual subject to both an administrative license suspension and a court ordered license suspension must file a petition for specialized driving privileges in the court that ordered the suspension. Repeals a statute requiring the use of a turn signal 200 feet before making a turn. Makes technical corrections.

HEA 1181 Youth offender boot camps and inmate calling services. Provides that juvenile offenders may not be placed in department of correction boot camps beginning July 1, 2022. Provides, for purposes of juvenile offenders who are already participating in the boot camp program on July 1, 2022, that the boot camp program expires December 31, 2023. Provides that a rate for intrastate: (1) collect calling; (2) debit calling; (3) prepaid calling; or (4) prepaid collect calling; in connection with inmate calling services shall not exceed the rate cap for the comparable interstate service, as set by the Federal Communications Commission (FCC) and in effect at the time the call is initiated. Provides that this intrastate rate cap is subject to any distinctions in the comparable interstate rate cap set by the FCC that are based on: (1) the type or size of the correctional facility from which the inmate calling services call is placed; and (2) whether any site commission is sought to be recovered through the intrastate rate. Specifies that a provider that has been granted a waiver by the FCC from the interstate rate caps with respect to a particular: (1) correctional facility; or (2) contract for the provision of inmate calling services; is not subject to the intrastate rate caps for the comparable intrastate services provided to the same correctional facility or under the same contract. Prohibits a provider from charging an ancillary service charge for an intrastate inmate calling services call, other than those ancillary service charges permitted by the FCC for interstate or international inmate calling services calls at the time the call is initiated. Provides that a rate for a permitted ancillary service charge for an intrastate inmate calling services call shall not exceed the rate for the comparable ancillary service charge permitted by the

FCC for interstate or international inmate calling services calls at the time the call is initiated. Specifies that a provider that has been granted a waiver by the FCC from the ancillary service charge caps for interstate or international inmate calling services calls with respect to a particular: (1) correctional facility; or (2) contract for the provision of inmate calling services; is not subject to the intrastate caps for the comparable intrastate ancillary services provided to the same correctional facility or under the same contract. Prohibits a provider of inmate calling services from impeding the completion of, or otherwise degrading, intrastate collect calling based on the lack of a billing relationship with the called party's communications service provider. Prohibits a provider from charging any taxes or fees in connection with intrastate inmate calling services calls, except for: (1) authorized fees; and (2) mandatory taxes and fees. Provides that: (1) authorized fees; and (2) mandatory taxes and fees; may not include a markup, unless the markup is specifically authorized by a federal, state, or local statute, rule, or regulation. Prohibits a provider from: (1) imposing a per call or per connection charge for any intrastate inmate calling services call; or (2) offering flat rate calling for intrastate inmate calling services. Provides that after June 30, 2022, a provider shall not enter into or renew a contract for the provision of inmate calling services at a correctional facility in Indiana unless the terms of the contract comply with these provisions. Provides that any term, condition, or provision that: (1) is included in such a contract; and (2) violates these provisions; is void. Provides that a provider that violates these provisions: (1) commits a deceptive act that is actionable by the attorney general or by a consumer under the deceptive consumer sales act (act); and (2) is subject to the remedies and penalties under the act.

HEA 1193 Opioid litigation. Amends the deadline by which a political subdivision may opt back in to an opioid litigation settlement. Requires a political subdivision to submit a copy of the agreement executed between the political subdivision and the private legal counsel of the political subdivision when opting back into the opioid litigation settlement. Removes language providing that no political subdivision has any claim to any settlement proceeds for litigation against any opioid party not yet filed by the state as of a certain date. Removes certain requirements concerning the payment of costs, expenses, and attorney's fees and costs arising from opioid litigation. Changes the basis by which the agency settlement fund distributes funds to cities, counties, and towns. Reduces the percentage of opioid litigation settlement funds distributed for use of statewide treatment, education, and prevention programs for opioid use disorder. Provides that 35% of opioid litigation settlement funds are to be distributed to cities, counties, and towns for programs for treatment, prevention, and care that are best practices for opioid use disorder. Provides that funds received from the opioid settlement may not be distributed to a city, county, or town that has opted out of the settlement and that the remaining funds shall be distributed to the cities, counties, or towns that have opted into the settlement.

HEA 1217 Coerced abortion. Requires that a pregnant woman seeking an abortion must be informed that a coerced abortion is illegal. Provides that certain medical personnel must inquire with a pregnant woman seeking an abortion whether the abortion is coerced. Requires certain medical personnel who believe that an abortion is coerced to offer the pregnant woman information on certain services, the use of a telephone, and an alternative exit from the health care facility. Makes it a Level 6 felony if a person knowingly or intentionally coerces a pregnant woman into

having an abortion. Mandates reports of a coerced abortion to law enforcement. Provides that a law enforcement agency must immediately respond and initiate an investigation upon receipt of a complaint of coercion or attempted coercion. Makes it a Class C infraction if a reproductive health facility knowingly employs a mandatory reporter who violates the mandatory reporting statute.

HEA 1222 (sec. 16) Various FSSA matters. Allows the family and social services administration to deny or revoke licensing for a child care home based on a household member's conviction for certain specified criminal offenses. Removes a limitation specifying that an occupancy provision regarding school-age children in class I child care homes applies only during the school year. Eliminates the bureau of quality improvement services and reassigns the bureau's responsibilities to the bureau of developmental disabilities services. Renames the bureau of child care as the office of early childhood and out of school learning. Amends the required composition of mobile crisis teams that provide behavioral health services in conjunction with the 9-8-8 suicide prevention hotline. Provides that a contract entered into with a third party by the division of mental health and addiction (division) for provision of competency restoration services to a defendant may confer to the third party all authority the division would have in providing the services to the defendant at a state psychiatric institution. Requires the division of mental health and addiction to: (1) establish a plan to expand the use of certified community behavioral health clinics in Indiana; and (2) make certain considerations in preparing the plan. Allows the office of the secretary of family and social services to apply for a Medicaid waiver to provide behavioral health services to a committed offender held by the department of correction. Makes conforming amendments.

HEA 1247 Child fatality reporting. Requires the state child fatality review coordinator to provide to each local child fatality review team a data collection form for reporting data regarding child fatalities. Specifies additional information that must be included in the department of child services' annual report regarding child fatalities that are the result of abuse or neglect.

HEA 1283 Exoneration payments. Provides that a person applying to the Indiana criminal justice institute seeking compensation for wrongful incarceration must prove that he or she is actually innocent by a preponderance of the evidence. Specifies that payments may be suspended while a defendant is incarcerated for a different offense.

HEA 1292 Compensation for victims of violent crimes. Changes, for purposes of the law concerning compensation to victims of violent crime, the definition of "claimant" to include certain family members of a victim. Expands the list of expenses eligible for compensation to include crime scene cleanup and replacement windows or door locks. Allows the victim services division of the Indiana criminal justice institute to accept proof that evidence was collected during a forensic exam as a claimant's cooperation with law enforcement. Specifies that a person who contributed to the injury or death of the victim may not receive benefits.

HEA 1294 Restraint of pregnant inmates; pregnancy from certain sex offenses. Provides that a correctional facility, including a jail, shall: (1) use the least restrictive restraints necessary on a pregnant inmate when the pregnant inmate is in the second or third trimester of pregnancy; or (2)

use no restraints on a pregnant inmate who is in labor, delivering a baby, during the immediate postdelivery period, or dealing with a medical emergency related to the pregnancy, with certain exceptions. Repeals the current statute concerning prenatal and postnatal care and treatment and incorporates it into the new chapter concerning pregnant inmates. Adds sexual misconduct with a service provider as a Level 4 felony to the definition of "violent offense", and requires a person convicted of: (1) sexual misconduct with a service provider; (2) child molesting; and (3) rape; to pay restitution for pregnancy and childbirth expenses to the victim if the pregnancy is a result of the offense.

HEA 1296 Firearms matters. Repeals the law that requires a person to obtain a license to carry a handgun in Indiana. Specifies that certain persons who are not otherwise prohibited from carrying or possessing a handgun are not required to obtain or possess a license or permit from the state to carry a handgun in Indiana. Prohibits certain individuals from knowingly or intentionally carrying a handgun. Creates the crime of "unlawful carrying of a handgun" and specifies the penalties for committing this crime. Allows particular individuals who do not meet the requirements to receive a handgun license and are not otherwise prohibited to carry a handgun in limited places. Allows a resident of Indiana to obtain in certain circumstances a license to carry a handgun in Indiana. Makes theft of a firearm a Level 5 felony. Defines certain terms. Makes conforming amendments and repeals obsolete provisions.

HEA 1300 Bail. Defines "charitable bail organization" and allows a charitable organization to pay bail on behalf of specified defendants if the organization meets certain criteria and is certified by the commissioner of the department of insurance (commissioner). Specifies the circumstances under which a certification may be revoked, and exempts from the certification requirement a person that pays bail for: (1) not more than three individuals in any 180 day period; or (2) a relative. Requires the commissioner to adopt rules, including emergency rules, for the certification of charitable bail organizations. Prohibits the state and a political subdivision from: (1) posting bail for any person; or (2) for the purpose of posting bail for any person, providing a grant or other funding, directly or indirectly, to an entity that posts bail for any person. Requires a person paying cash bail, including a charitable bail organization, to execute an agreement allowing the court to retain all or part of the bail to pay certain court costs. Requires that bail be returned to the person who posted it. Provides that a case management system developed and operated by the office of judicial administration must include a searchable field for certain information of the bail agent or a person authorized by the surety that pays bail for an individual.

HEA 1354 Requirements for SNAP participants. Urges the legislative council to assign to an interim study committee the following topics: (1) Requiring the custodial and noncustodial parents to cooperate with the child support bureau as a condition of eligibility for assistance under the Supplemental Nutrition Assistance Program (SNAP). (2) Assigning individuals who are subject to federal work requirements for SNAP eligibility to an employment and training program.

HEA 1359 Juvenile law matters. Requires the commission on improving the status of children in Indiana (commission) to create a statewide juvenile justice oversight body (oversight body) to

do the following: (1) Develop a plan to collect and report statewide juvenile justice data. (2) Establish procedures and policies related to the use of certain screening tools and assessments. (3) Develop a statewide plan to address the provision of broader behavioral health services to children in the juvenile justice system. (4) Develop a plan for the provision of transitional services for a child who is a ward of the department of correction. (5) Develop a plan for the juvenile diversion and community alternatives grant programs. Provides that the oversight body shall, not later than July 1, 2023, submit to the commission and the legislative council: (1) the plan for the juvenile diversion and community alternatives grant programs; and (2) the juvenile justice data collection plan and the plan for the use of screening tools, assessments, and services. Requires the judicial conference of Indiana to develop statewide juvenile probation standards that are aligned with research based practices, and requires the board of directors of the judicial conference of Indiana to approve the standards by July 1, 2023. Requires the use of a risk and needs assessment tool, a risk screening tool, and a diagnostic assessment when evaluating a child at specific points in the juvenile justice system to identify the child's risk for reoffense. Requires an intake officer and the juvenile court to use the results of a detention tool to inform the use of secure detention and document the reason for the use of detention if the tool is overridden. Requires a court to: (1) after use of a detention tool, include in a court order the reason for a juvenile detention override; and (2) submit details of the juvenile detention override to the office of judicial administration (office). Requires the office to provide an annual report to the governor, chief justice, and legislative council before December 1 of each year that includes information about a court's use of a detention tool and reasons for overriding the results of the detention tool. Provides that a child less than 12 years of age cannot be detained unless detention is essential to protect the community and no reasonable alternatives exist to reduce the risk. Establishes a procedure for juvenile diversion. Requires the office to provide an annual report to the governor, chief justice, and legislative council before December 1 of each year that includes data on any child diverted through the juvenile diversion program. Repeals provisions requiring a child who participates in a program of informal adjustment to pay an informal adjustment program fee. Provides that a child who is a ward of the department of correction may receive at least three months of transitional services to support reintegration of the child back into the community and to reduce recidivism. Requires the department of correction to provide an annual report to the governor, chief justice, and legislative council before December 1 of each year that includes collected data that will help assess the impact of reintegration improvements for juveniles, including tracking recidivism beyond incarceration and into the adult system. Provides that a juvenile court may recommend telehealth services as an alternative to a child receiving a diagnostic assessment. Establishes: (1) the juvenile diversion and community alternatives grant programs and grant programs fund; and (2) the juvenile behavioral health competitive grant pilot program and grant pilot program fund; as of July 1, 2023. Requires the Indiana criminal justice institute (institute) to administer each program and fund. Requires the local or regional justice reinvestment advisory council or another local collaborative body to oversee certain juvenile community alternatives grants awarded to a county. Requires the institute to prepare an annual report to the governor, chief justice, and legislative council before December 1 of each year that details certain performance measures that counties receiving grants must collect and report. Requires the office of judicial administration to administer the statewide juvenile justice data aggregation plan. Makes conforming changes. Makes a technical correction.

HEA 1363 Department of child services matters. Repeals provisions under which certain parties may file a petition during a child in need of services proceeding to require a parent, guardian, or custodian of the child to participate in a program of care, treatment, or rehabilitation for the child. Provides that a party that receives notice of a motion filed by the department of child services (department) to change the out-of-home placement of a child has ten days (rather then 15 days, under current law) to file a written objection and initiate a hearing regarding the motion. Requires the department to file a motion with a juvenile court in order to change the out-of-home placement of a child who: (1) has been in the same out-of-home placement for one year or more; and (2) is in a foster family home or in the care of a relative. Allows the person with whom a child is placed to waive the person's right to contest a motion filed by the department to change the child's placement, and allows the juvenile court to make an expedited ruling on the motion if the court is provided with written notice of the person's waiver. Provides that a child is a child in need of services if the child is a victim of certain offenses committed by a parent, guardian, or custodian of the child. Provides for a defense to prosecution for possession of child pornography for: (1) a department employee acting within the scope of the employee's duties; and (2) an attorney acting in the attorney's capacity as legal counsel for a client. Specifies that costs paid from COVID-19 federal stimulus funds may not be disallowed when setting rates for 2023.Provides that a person who knowingly or intentionally produces, disseminates, or possesses with intent to disseminate an image that depicts or describes sexual conduct: (1) by a child who the person knows is less than 18 years of age; (2) by a child or a person who appears to be a child, if the image is obscene; or (3) that is simulated sexual conduct involving a representation that appears to be a child, if the representation of the image is obscene; commits the offense of child exploitation. Provides that a person who, with intent to view the image, knowingly or intentionally possesses or accesses an image that depicts or describes sexual conduct: (1) by a child who the person knows is less than 18 years of age; (2) by a child or a person who appears to be a child, if the image is obscene; or (3) that is simulated sexual conduct involving a representation that appears to be a child, if the representation of the image is obscene; commits the offense of possession of child pornography. Specifies that it is not a required element of the offense of child exploitation or possession of child pornography that the child depicted actually exists under certain circumstances. Defines "image". Provides for a defense to prosecution for possession of child pornography for: (1) a department of child services employee acting within the scope of the employee's duties; and (2) an attorney acting in the attorney's capacity as legal counsel for a client. Makes conforming changes.

Senate

SEA 7 Marion County crime reduction pilot. Establishes the Marion County crime reduction board (board) as part of the Marion County crime reduction pilot project. Allows the board to approve interoperability agreements between law enforcement agencies to expand the duties and responsibilities of law enforcement agencies operating in downtown Indianapolis. Requires the board to annually report certain information to the legislative council.

SEA 9 Electronic monitoring standards. Requires the justice reinvestment advisory council to conduct a review of statutes concerning electronic monitoring and home detention and provide a recommendation with regard to electronic monitoring standards to the legislative council in an electronic format not later than December 1, 2022. Establishes standards, including notification time frames, for persons and entities responsible for monitoring individuals required to wear a monitoring device as a condition of probation, parole, pretrial release, or community corrections. Provides immunity for acts or omissions performed in connection with implementing monitoring standards. Provides that a defendant commits escape if: (1) the defendant disables or interferes with the operation of an electronic monitoring device; or (2) the defendant violates certain conditions of home detention (under current law, any violation of a condition of home detention constitutes escape). Makes escape committed by a juvenile status offender a status offense under certain circumstances. Makes conforming amendments.

SEA 19 Sentence enhancement for use of firearm. Adds an investigator for the inspector general to the definition of "police officer" for purposes of the statute providing a sentence enhancement for individuals who point or discharge a firearm at a police officer while committing certain crimes.

SEA 70 Obstruction of justice. Provides that a person commits obstruction of justice if the person induces a witness in a legal proceeding to: (1) withhold or delay producing evidence that the witness is legally required to produce; (2) avoid a subpoena or court order; (3) not appear at a proceeding to which the witness has been summoned; or (4) give a false or materially misleading statement. Provides that a person commits obstruction of justice, as a Level 5 felony, if the person induces a witness to give a false or materially misleading statement during the investigation or pendency of a domestic violence or child abuse case. Establishes a uniform definition of "communicates" for the criminal code. Makes other changes and conforming amendments.

SEA 80 (sec. 27, 28, 43, 45, 46, 47) Code publication amendments. Makes Code publication corrections. Repeals and relocates specific Indiana Code chapters consisting of definitions or statutory lists for organization of the provisions by alphabetical or Code cite order. Updates the statutory lists. Resolves technical conflicts: (1) between various enrolled acts passed during the 2022 legislative session; and (2) between various enrolled acts passed during the 2022 legislative session and ESB 80. Makes technical corrections in HEA 1363-2022.

SEA 117 Police log information. Provides that certain information contained in a daily log of a law enforcement agency relating to the victim of a crime or delinquent act who is less than 18 years of age may not be disclosed by a public agency without the consent of the child's parent, guardian, or custodian, unless access to the records is specifically required by a state or federal statute or is ordered by a court under the rules of discovery. Provides that the information may be disclosed to the department of child services. Provides that a law enforcement agency shall maintain a daily log or record that lists suspected or investigated crimes, accidents, or complaints. (Current law provides that a law enforcement agency shall maintain a daily log or record that lists suspected crimes, accidents, or complaints.) Prohibits, after June 30, 2023, the broadcast of a Social Security number by police radio unless the broadcast is encrypted.

SEA 131 Uniform electronic legal material act. Implements the Uniform Electronic Legal Material Act, which establishes a process for certain legal materials stored electronically to be: (1) designated as official; (2) authenticated; (3) preserved; and (4) made available to the public.

SEA 148 Prosecuting attorneys. Permits a prosecuting attorney to purchase a crime insurance policy instead of executing a surety bond. Permits the department of child services or a prosecuting attorney to file a paternity action in certain cases. Renames the drug prosecution fund as the substance abuse prosecution fund. Broadens the types of expenses a county auditor shall pay the prosecuting attorney in connection with a criminal case. Allows a prosecuting attorney to appoint employees with the approval of the county council. Allows the prosecuting attorneys council of Indiana to call two conferences each year and specifies who may attend the conferences. Requires the prosecuting attorneys council of Indiana to conduct certain training. Provides a prosecuting attorney with defense and indemnification in a disciplinary action for conduct that occurred within the scope of employment.

SEA 155 Human trafficking. Modifies the definition of "protected person" for purposes of the admission of a statement or videotape of an individual who is less than 14 years of age at the time of the offense but less than 18 years of age at the time of trial. Provides that a person who knowingly or intentionally: (1) pays, or offers or agrees to pay, money or other property; or (2) offers a benefit; for a human trafficking victim with the specific intent to induce or obtain the product or act for which the human trafficking victim was trafficked commits human trafficking, a Level 4 felony. Specifies that consent by the human trafficking victim is not a defense to a prosecution. Requires law enforcement agencies to report human trafficking investigations to the attorney general within 30 days after an investigation begins. Makes a technical correction.

SEA 182 Court procedures. Specifies that an arrest, criminal charge, or juvenile delinquency allegation that results in an adjudication for an infraction does not result in a conviction for purposes of expungement. Authorizes a person participating in a pretrial diversion program to file a petition for expungement with the authorization of the prosecuting attorney. Requires a court to automatically issue an expungement order, subject to certain exceptions, if: (1) all pending charges or allegations against a person are dismissed; (2) the person is acquitted or the conviction or true finding is vacated; (3) one year has passed since allegations were filed against a juvenile and the state is not pursuing the case; or (4) the person is arrested for a crime and no charges have been filed within 180 days. Makes conforming amendments.

SEA 263 Evidence preservation requirements. Establishes additional requirements for the disposition of property held as evidence that may contain biological evidence related to an offense, including matters involving postconviction DNA testing and analysis.

SEA 328 Elections. Requires the director, assistant director, or co-director of a board of elections and registration (rather than a member of the board) to attend a meeting called by the election division. Allows a member of a county election board to attend a meeting called by the election

division. Provides reimbursement for the individuals who attend the meeting (current law only provides reimbursement for those required to attend). Makes changes to the county election officials instructional meeting, including duration, compensation, and expenses. Provides that record retention under seal does not prevent counties from conducting audits after an election as authorized by statute. Provides that a voter with print disabilities who chooses to vote by electronic mail must have the voter's absentee ballot application submitted to the circuit court clerk not later than 11:59 p.m. 12 days before election day. Provides that except for casting a replacement ballot under election law, a voter who knowingly or intentionally votes more than one ballot in the same election commits a Level 6 felony. Makes a technical correction.

SEA 336 Racketeering and fraud. Specifies that "racketeering activity", for purposes of the crime of corrupt business influence, includes certain forgery, fraud, and deception offenses.

SEA 347 Tribal law enforcement. Authorizes police officers appointed by a tribe to exercise police powers in Indiana if the tribal police officer meets the standards of the Indiana law enforcement academy. Provides that a tribe may authorize a tribal police officer to exercise police powers in the entire state, or in any part of the state, if certain conditions are met. Requires a tribe seeking to employ an individual as a tribal police officer who will exercise police powers in Indiana to request the individual's employment history, if the individual was previously employed by a law enforcement agency. Makes conforming amendments.

SEA 410 Unlicensed caregiver intervention in juvenile court proceeding. Defines "unlicensed caregiver" and allows an unlicensed caregiver of a child to intervene as a party in a: (1) child in need of services proceeding; or (2) proceeding to terminate the parent-child relationship; concerning the child.

LEGISLATIVE ISSUES EXPECTED IN UPCOMING SESSIONS:

While it is impossible to anticipate all topics that will be presented during the next session, a budget and a long session, here is what we anticipate.

Juvenile Matters/Family Law matters:

Right to Counsel: Two bills were filed this session which would have impacted the right to counsel. SB 180 which sought to set forth when and how counsel would be assigned to children in TPR/CHINS matters failed to pass. Though the bill did not pass, it is expected that work will continue on this topic over the interim by a multidisciplinary work group which will result in legislation next session. SEA 410 which permits unlicensed caregivers to intervene in CHINS/TPR matters passed. During the legislative process language was considered to give unlicensed caregivers a right to counsel which would have been provided by the public defender system. We anticipate that this matter will continue to be considered in the next session and worked on during the interim.

General Criminal matters:

We anticipate legislation which will:

- Seek to create an off ramp or diversion/deflection process from the criminal legal system for people who have mental/behavioral health issues which is treatment focused rather than sanction focused. This legislative effort is aligned to the State's mission to create a sustainable infrastructure of coordinated crisis care for residents in mental health, substance use, and suicidal crises. This goal of the State's mission is to adopt a SAMHSA approved *Crisis Now* Model, which will include:
    - A statewide 24/7 coverage for 988 calls, text, and chat (**Someone to Talk to**)
    - Centrally deployed, 24/7 mobile crisis (**Someone to Respond**)
    - Short-term sub-acute residential crisis stabilization programs (**A Place to Go**)
    - A system that will serve anyone, anytime, and anywhere

Criminal Law Update 2022

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I DIDN'T KNOW THAT, EITHER···


INDIANA PUBLIC DEFENDER COUNCIL
BILL of RIGHTS

Updated IPDC Publications

- Motions (5/21)
- Pretrial Manual (2/26/21)
- Evidence Manual (8/20)
- Search & Seizure (8/20)
- Confessions (11/20)
- Expungement (11/20)
- Performance Guidelines (8/20)
- Defending a Capital Case (2/21)
- Alibi Defense Guide (2/21)
- CHINS/TPR (uploaded 1/21)
- Self-defense guide (1/21)
- Defending child molest & other sex offenses (1/21)
- Mental Health Manual (Indiana Law Section, ch. 6) (1/21)

IPDC
CONTACT INFO

- Researchhelp@pdc.in.gov
- (317) 232-5505
- Juvenile Delinquency Questions: Jwieneke@pdc.in.gov


News +++ Information +++ News +++ Information +++ News +++ Information +++ News
Changes in legislation

Legislative Session

Second regular session of the 122nd Indiana General Assembly

"Short" session which statutorily runs from January to March

Session officially began on Organization Day, November 16th, 2021, when the new General Assembly first met and organized

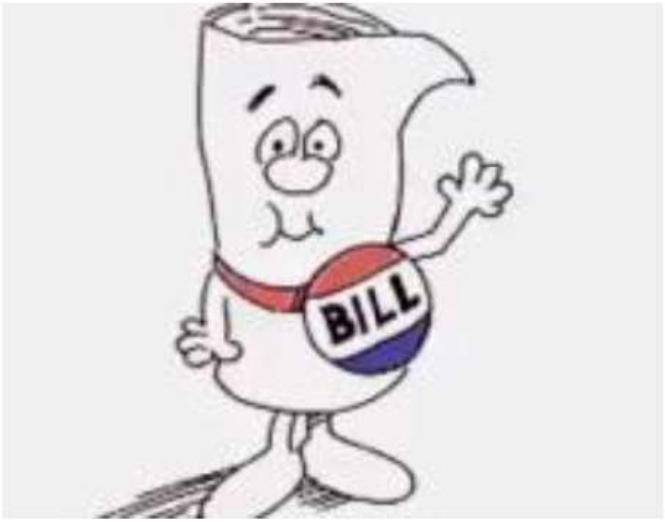
Session convened for considering legislation on Monday, January 4, 2022

Sine die on March 9, 2022

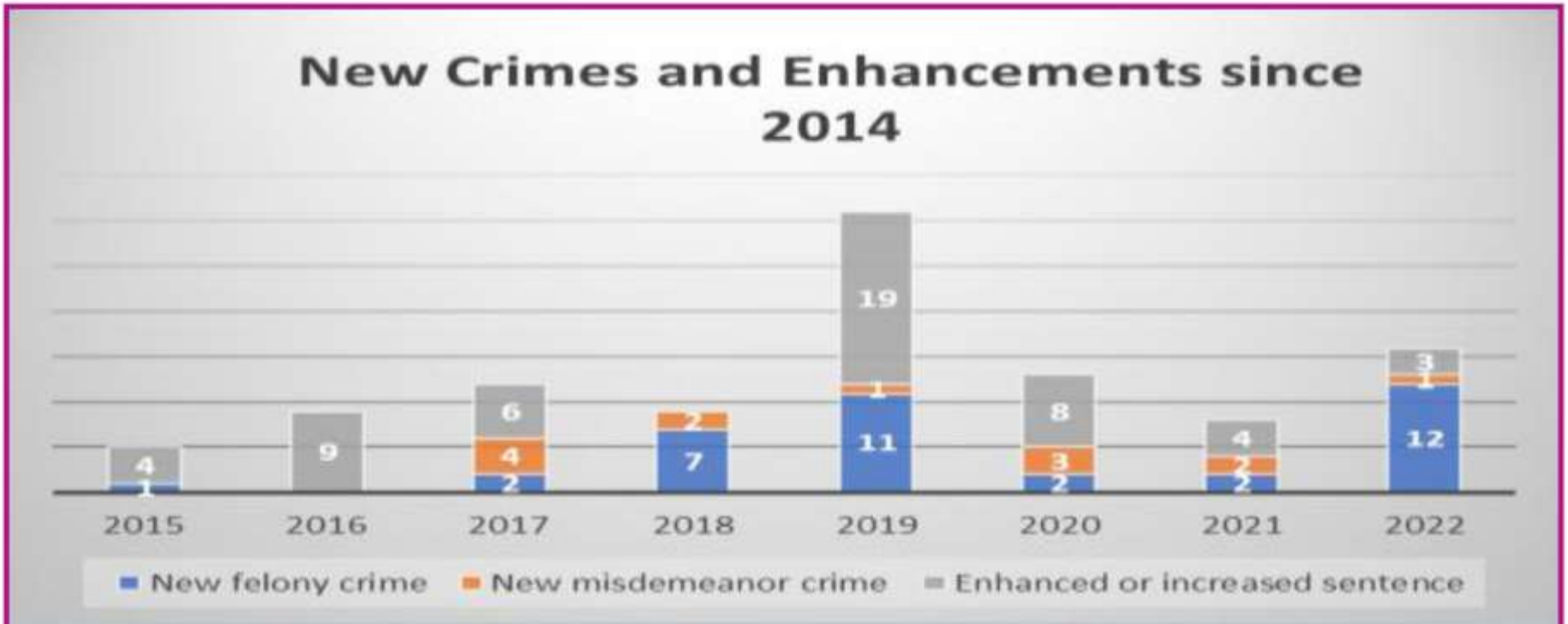
Bills and Resolutions

- Legislation filed:
  - House: 432
  - Senate: 417

- Legislation passed:
  - House: 82
  - Senate: 95



- Passage Rates:
  - House: 18.9%
  - Senate: 22.7%
  - Overall: 20.8%



	New felony crime	New misdemeanor crime	Enhanced or increased sentence
2015	1		4
2016			9
2017	2	4	6
2018	7	2	
2019	11	1	19
2020	2	3	8
2021	2	2	4
2022	12	1	3

NOTABLE LEGISLATIVE TRENDS

- Marion County Takeover
- Longer detention
- Extending the right to counsel to children in CHINS/TPR cases & relatives in such cases

Marion County/Local gov't control

- SB 7: Marion County Crime reduction pilot
- SB 9: Electronic monitoring standards

SEA 7: Marion County Violent Crime Reduction Pilot

Citations effected: IC 5-2-6-26; 5-2-6-27; 10-13-2-5; 16-18-4-7; 21-39-4-6; 36-8-26 Effective: 7/1/2022

Creates Marion County Violent Crime Reduction Pilot—making it eligible to receive funds from the Indiana Criminal Justice Institute, not to exceed $500,000

Creates a Board to function within IMPD's downtown district which includes: IMPD, IN Homeland security, security manager for the IN Convention Ctr and Lucas Oil Stadium, VP for safety and security for Pacers Sports and Entertainment, and many others.

Provides that police entities of downtown hospitals and educational institutions can go beyond their statutory limitations if the terms of an interoperability agreement expands their boundaries.

Each year the Board will produce a report to Legislative Council which will include copies of the interoperability agreements, crime clearance rates, and the number of times law enforcement made a referral to a social worker or mental health service provider.

The provisions of this legislation expire 12/31/2027

SEA 9: Escape crime modified

Citations effected: IC 11-13-1-4; 11-13-1-9; 31-37-2-8; 33-38-9.5-7; 34-30-2-149.7; 35-31.5-2-24.7; 35-31.5-2-205; 35-31.5-2-318.5; 35-31.5-337.3; 35-31.5-2-352.5; 35-33-8-11; 35-38-2.5-2.3; 35-38-2.5-3; 35-38-2.5-10; 35-38-2.5-12; 35-38-2.7; 35-44.1-3-4 Effective: 7/1/2022

Bars the state's ability to file an escape charge against both juveniles and adults in instances where a person:

- knowingly/intentionally violates by possessing/consuming alcohol or a controlled substance in the person's home;
- tardiness to or missed appointments with supervising staff; or
- failure to pay user fees.

SEA 9: Electronic Monitoring Standards

Citations effected: IC 11-13-1-4; 11-13-1-9; 31-37-2-8; 33-38-9.5-7; 34-30-2-149.7; 35-31.5-2-24.7; 35-31.5-2-205; 35-31.5-2-318.5; 35-31.5-337.3; 35-31.5-2-352.5; 35-33-8-11; 35-38-2.5-2.3; 35-38-2.5-3; 35-38-2.5-10; 35-38-2.5-12; 35-38-2.7; 35-44.1-3-4 Effective: 7/1/2022

Develops electronic monitoring standards (35-38-2.7).

Among other things requires an employee of a supervising agency to provide notice to the supervising agency within 15 of being aware that a tracked individual is in a prohibited exclusion zone or has disabled monitoring device.

If there is a victim of the tracked individual, that person must be notified as well.

The supervising agency shall, ASAP seek a warrant for the arrest of the tracked individual. A ripple effect continues with respect to how quickly a warrant must be transmitted to all active units.

Longer Detention

- HB 1004: Department of Correction
- HB 1300: Bail

HEA 1004
L6 & DOC, Credit time

Citations effected: IC 11-13-3-4; 11-13-3-11; 35-38-2.6-2; 35-38-2.6-3; 35-38-2.6-4.2; 35-38-2.6-4.5; 35-38-2.6-6; 35-38-2.6-7; 35-38-3-3; 35-44.1-3-9; 35-50-6-.05; 35-50-6-3; 35-50-6-3.1; Eff 7/1/2022

Repeals provisions that limited a person convicted of a L6 felony from going to DOC.

> After June 30, 2022, a person convicted of a L6 felony **may be** committed to DOC. A person convicted of a L6 felony before July 1, 2022, may not be committed to DOC without other factors such as commitment due to revocation of probation, parole, or community corrections if the offense occurred prior to or on 6/30/20222

Amends definition of "accrued time" to include a partial day. Any part of a day served in custody counts as a calendar day when calculating credit time.

HEA 1300 Charitable Bail Organization (aka "The Bail Project")

Citations effected: IC 33-24-6-3 , 35-33-8-3.2: New Sections 27-10-2-4.1, 27-10-2-4.5, 35-33-8-0.6
Effective Immediately

Defines "Charitable bail organization" as a nonprofit organization that exists for the purpose of paying cash bail for more than 3 defendants in any 180-day period.

Requires "charitable bail organization" to be certified by the commissioner of the department of insurance (DOI) and allows for revocation of such certification under certain circumstances

A charitable bail organization may not pay bail for a defendant who:

(A) is charged with a crime of violence; or
(B) is charged with a felony and has a prior conviction for a crime of violence.

Prohibits the state and a political subdivision from: (1) posting bail for any person; or (2) for the purpose of posting bail for any person, providing a grant or other funding, directly or indirectly, to an entity that posts bail for any person.

Requires a person paying cash bail, including a charitable bail organization, to execute an agreement allowing the court to retain all or part of the bail to pay certain court costs.

Noteworthy Miscellaneous Legislation

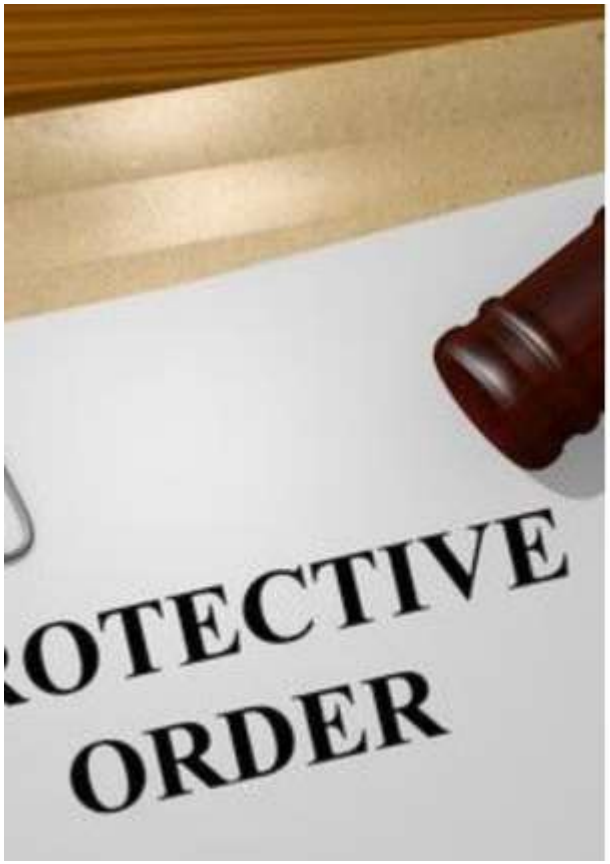
HEA 1079 Elements of Rape

Citations effected: IC 35-42-4-1
Effective: July 1, 2022

Adds new element to the crime of Rape

(4) the person disregarded the other person's attempts to physically, verbally, or by other visible conduct refuse the person's acts;

Restitution: (SEA 80) additional language requires trial court to order the person to pay restitution under to the victim for any expenses related to pregnancy and childbirth if the pregnancy is a result of the offense



HEA 1137 Protective Orders

Citations effected: I.C. 34-26-5-9, 34-26-5-10 **Effective: July 1, 2022**

Provides that an order for protection is effective:

(1) for two years after the date of issuance; or

(2) indefinitely after the date of issuance if

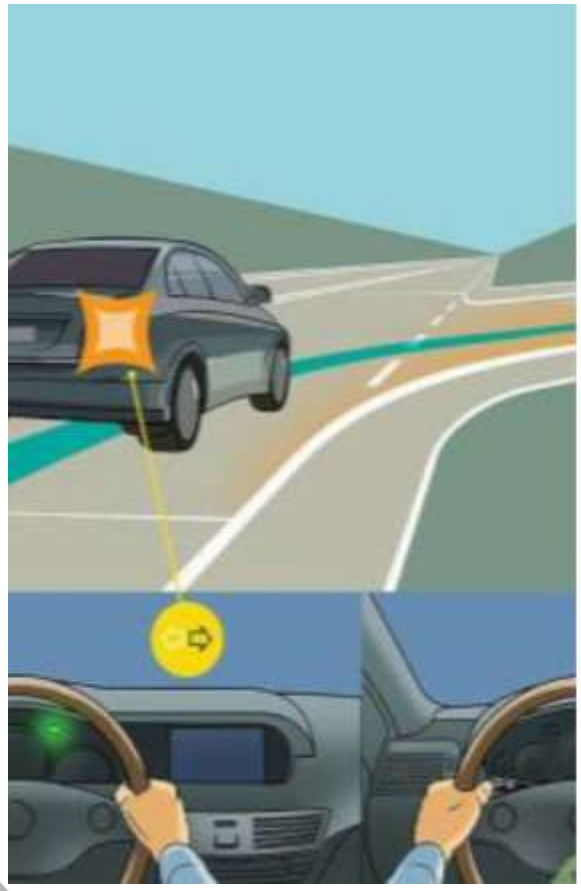
a) the respondent is a sex or violent offender and is required to register as a lifetime sex or violent offender, and

b) the petitioner was the victim of the crime that resulted in the requirement that the respondent register as a lifetime sex or violent offender.

Requires a respondent who is subject to an indefinite order for protection to request a hearing in objection to the order of protection within 30 days of the order being issued.

Allows any party to request a hearing on a two-year order for protection at any time.

Provides that a person may only request one judicial review hearing on a protection order.



HEA 1167 Driving law changes

Citations effected: 9-30-3-8.5, 9-21-8-24, 9-21-8-25 **Effective Immediately**

200 Foot Turn Signal Law Repealed: Repeals law requiring a motorist to signal at least 200 feet before making a turn. Law still requires a motorist to signal or use a horn when a pedestrian will be affected by the turn.

Specialized Driving Privileges: Requires an Indiana resident who is the subject of an active administrative suspension and an active court ordered suspension under IC §§ 9-30-16-3 or 3.5 to file any petition for specialized driving privileges in the court that has ordered or imposed the court-ordered suspension.

Judgment Suspensions: Any suspension that is imposed as a result of an unpaid judgment for a violation of a traffic ordinance or the commission of a traffic infraction imposed before 12/31/2021 shall terminate on 12/31/2024. Fixes an outstanding license suspension intended to be addressed in HEA 1199 (2021)

1193 Opioid Litigation & Settlement

Citations effected: IC 4-6-15-2; 4-6-15-3; 4-6-15-4; 4-6-15-5
Effective: immediately

- Political subdivisions may opt into the state settlement by July 15, 2022;
- Funds at the state and local level can be used for treatment, education and prevention programs for opioid use disorder and any co-occurring substance use disorder or mental health issues
- Distribution is over 18 years, involves 4 companies, and total dollars are $506M ($253M to State, $253M to locals, which is divided into $171M to counties and $82M to cities/towns)

HEA 1217 Coerced abortion

Citations effected: IC 16-18-2-214.9; 16-18-2-282; 16-18-2-317.3; 16-34-2-1.1; 16-34-6; 35-52-16-23.5

- Creates the offense of "coerced abortions":

  "A person who knowingly or intentionally coerces a pregnant woman to have an abortion commits a Level 6 felony."

Concern: this new offense is unconstitutionally vague and would not put a person of ordinary intelligence on notice or provide objective criteria for determining whether statute applies

Introduced version of the bill provides examples of "coercion" to include revoking, attempting to revoke, or threatening to revoke a scholarship; denying, removing, or threatening to deny or remove financial support or housing from the pregnant woman or a dependent of the pregnant woman **but was removed**.

1296 Firearms Matters

Citations effected: 35-43-4-2; 35-47-2-1.5; IC 14-16-1-23, 31-30-1-4 Eff: 7/1/2022

Permit-less carry bill: Persons who are not prohibited under federal law or Indiana law can now carry a handgun without a license in Indiana.

- Persons not allowed to carry, but who do commit a Class A misdemeanor or Level 5 felony, if
- Committed on school property, or within 500 feet; prior conviction for unlawful carry or CHWOL, or any felony conviction within prior 15 years.

Permits will still be issued so Hoosiers can have reciprocity in other states that require a permit.

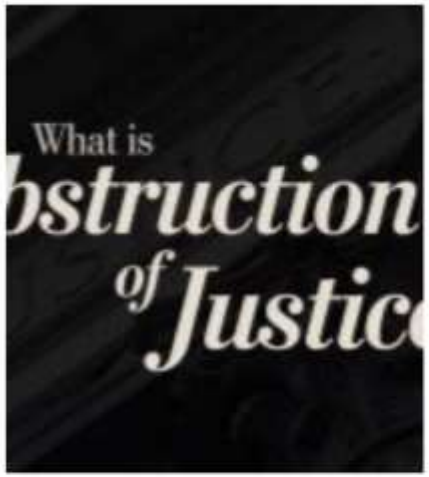
Increases theft of a firearm from a Level 6 to a Level 5 felony.

HEA 1296 (cont.) Prohibitions on Carrying

- Adjudicated mental defective (including insanity in a criminal proceeding)
- "Alien" who is not lawfully in the U.S.
- Committed to a mental institution
- Crime of domestic violence
- Dangerous as defined by IC 35-37-14-1
- Fugitive from justice
- Indictments for offenses > one year
- Convictions > one year (accept certain white-collar crimes)
- Dishonorably discharged from military or National Guard
- Restrained by protective order under IC 34-26-5
- Renounced U.S. citizenship
- Person less than 18 (unless authorized under IC 35-47-10), or 23 with an adjudication for an SVF (IC 35-47-4-5)

SEA 70 Obstruction of Justice

Citations effected: IC 35-31.5-2-47.5, 35-31.5-2-330, 35-38-2-2.7, 35-42-4-12, 35-44.1-2-2, 35-45-2-1, 35-45-10-3, 35-46-1-13 Effective July 1, 2022

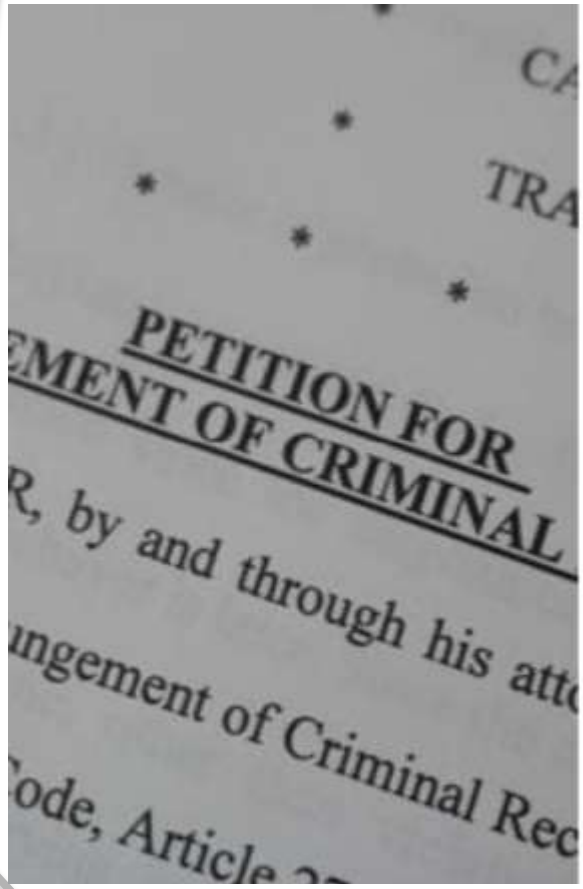


Establishes a uniform definition of "communicates" & "communicating" throughout the Ind Code

To make a statement to another person, directly, indirectly, or through an intermediary. The term includes a statement made to another person or on behalf of another person by any medium, including in person, in writing, electronically, on a social networking web site, or telephonically.

Provides that a person commits obstruction of justice if the person induces a witness in a legal proceeding to: (1) withhold or delay producing evidence **that the witness is legally required to produce**; (2) avoid a subpoena or court order; (3) not appear at a proceeding to which the witness has been summoned; or (4) ***give a false or materially misleading statement***.

Level 5 felony, if the person induces a witness to give a false or materially misleading statement during the investigation or pendency of a domestic violence or child abuse case.



SEA 182 Expungement

Citations effected: IC 35-38-9-1 Effective: 7/1/2022

Arrest, criminal charge, or juvenile delinquency allegation that results in an infraction is not a conviction for purposes of expungement.

Authorizes a person participating in a pretrial diversion program to file a petition for expungement with the authorization of the prosecuting attorney.

Post 6/30/2022 charges or allegations: Automatic expungement if:
(1) all pending charges or allegations against a person are dismissed; (Expungement effective sixty (60) days from the date of the dismissal)
(2) the person is acquitted, or the conviction/true finding is vacated; (Expungement effective sixty (60) days from the date of the dismissal/acquittal)
(3) one year has passed since allegations were filed against a juvenile and the state is not pursuing the case; or
(4) the person is arrested for a crime and no charges have been filed within 180 days.

SEA 328 Elections New Crime
Citations effected: 3-14-2-31
Effective: Upon Passage

Except for casting a replacement ballot in accordance with this title, a voter who knowingly or intentionally votes more than one (1) ballot in the same election commits a Level 6 felony.

Ind. Code 3-14-2-31

For More Information

Indiana General Assembly website:

www.iga.in.gov

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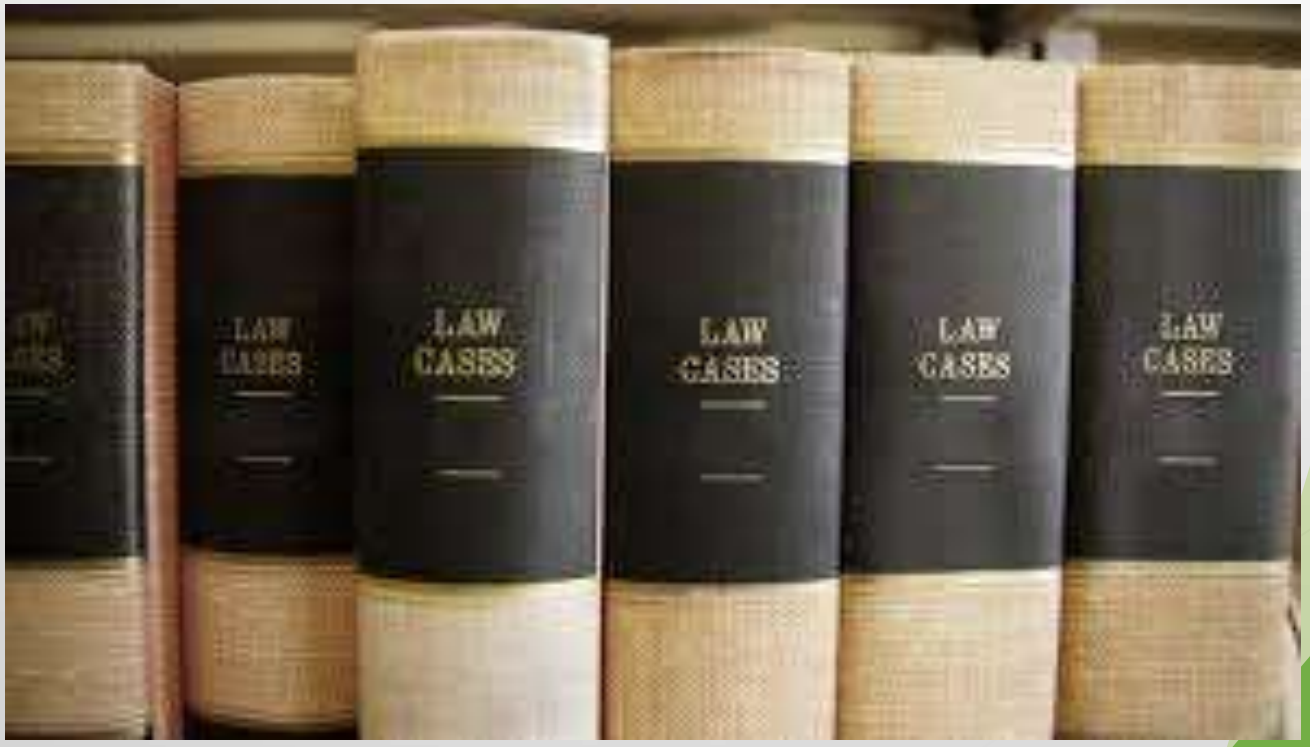
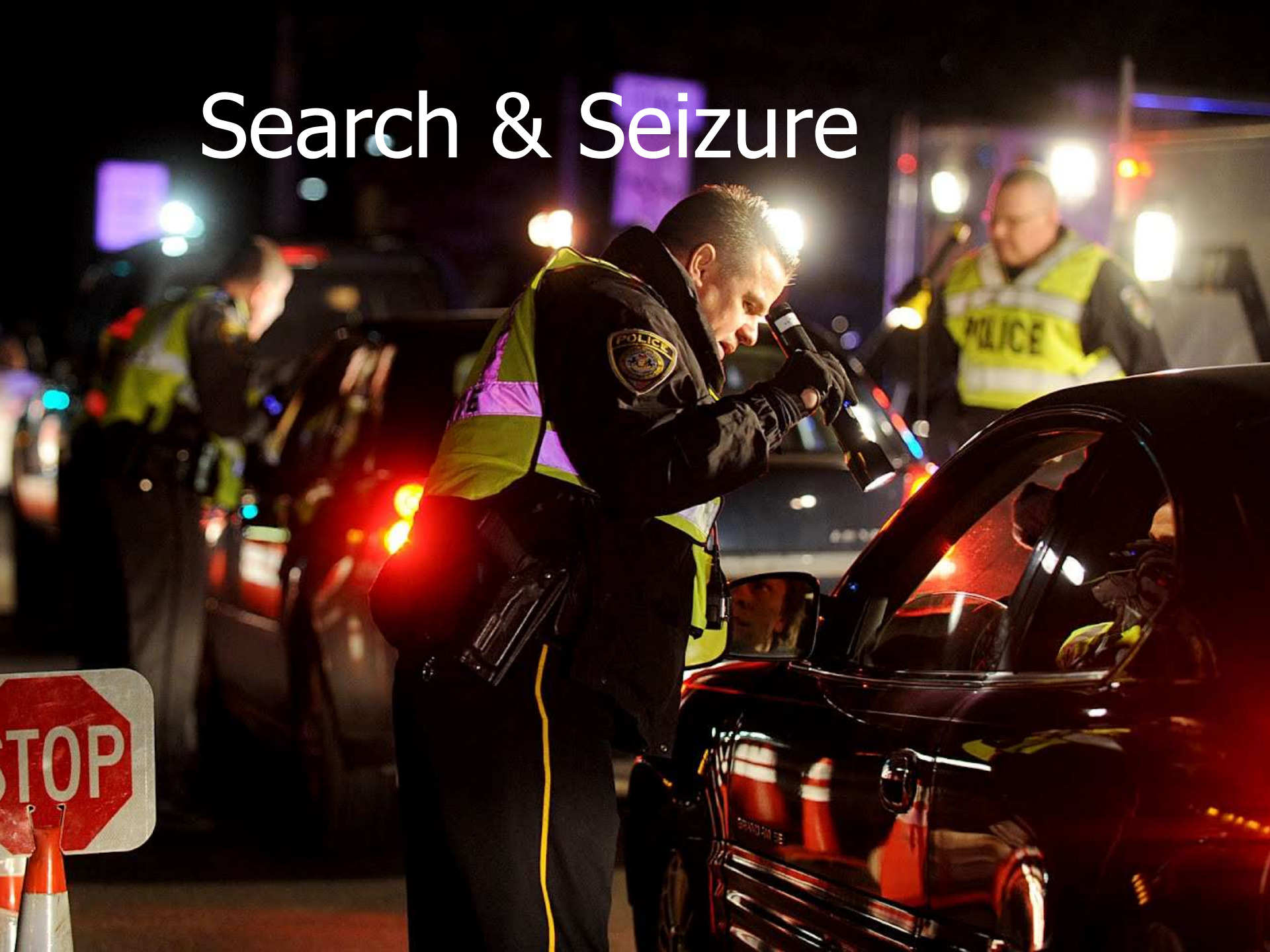
Indiana Public Defender Council

Case Law

(or is it caselaw . . . ?)



Search & Seizure



I.G. v. State,
177 N.E.3d 75
(Ind. Ct. App. 2021)

Odor of burnt and raw marijuana from car with three occupants did not provide probable cause to arrest.

Posso v. State, 180 N.E.3d 326 (Ind. Ct. App. 2021)

- Warrantless cell phone search is one of the "weightiest intrusions" to trigger advisement under *Pirtle v. State*
- *Pirtle* places burden on State to prove **explicit** waiver of right to counsel.

WARRANTS

Lange v. California, 141 S.Ct. 2011 (2021)

- Pursuit of fleeing misdemeanor suspect does not **always** qualify as exigency to justify warrantless entry into home
- Must consider all circumstances to see if law enforcement emergency exists
- "But when the officer has time to get a warrant, he must do so—even though misdemeanant fled."

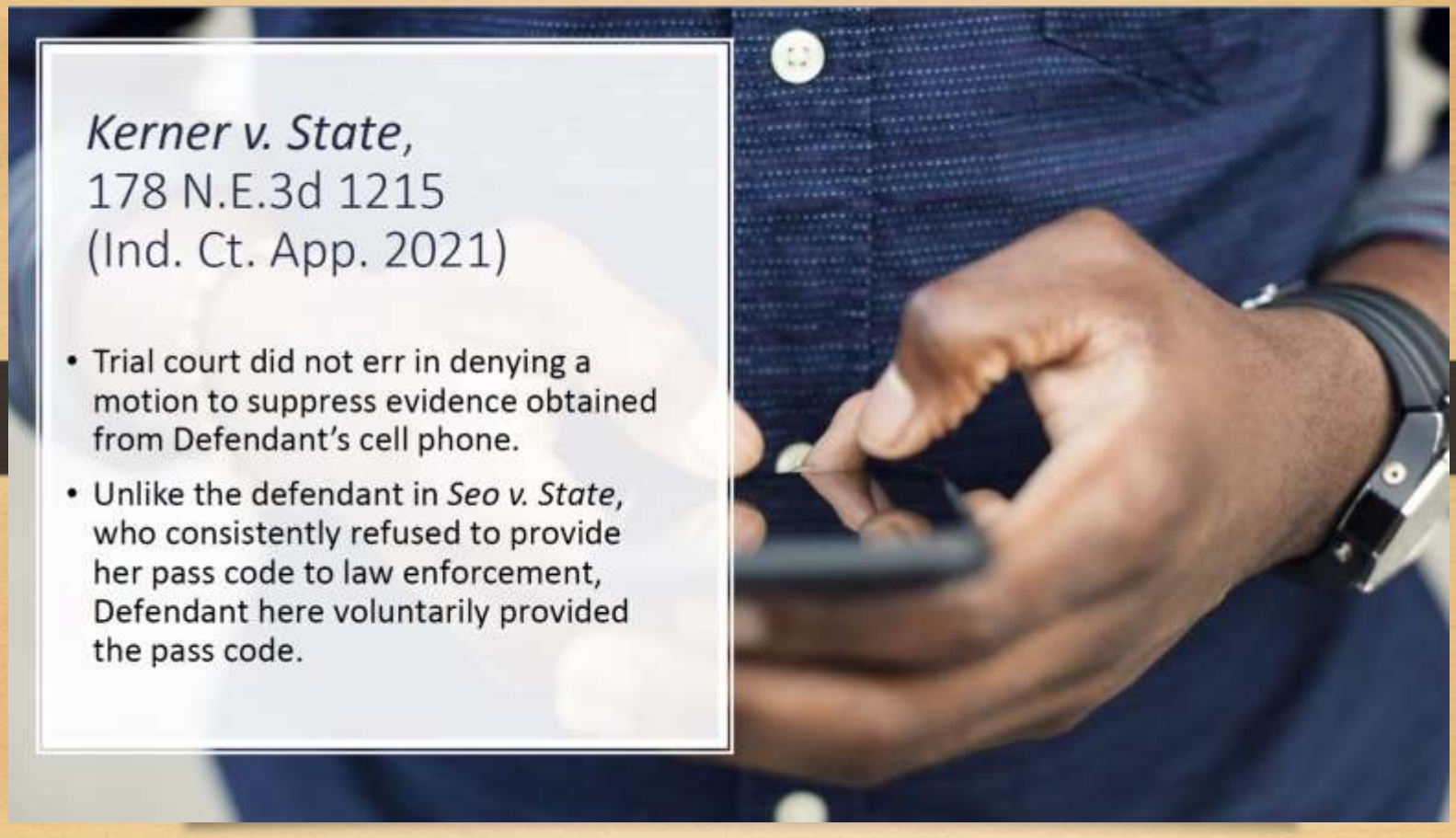
Bunnell v. State, 172 N.E.3d 1231 (Ind. 2021)

Trained officer seeking search warrant based on smelling marijuana need not further detail their qualifications to recognize odor beyond basic "training and experience."


CONFESSIONS &
COMPELLED TESTIMONY

State v. Diego, 169 N.E.3d 113 (Ind. 2021)

- No Miranda warnings needed for voluntary, non-custodial interview at police station
- "True, the couple was told they 'needed' to come to the police station, [detective] did carry his gun, [defendant] was outnumbered in the interview room, and the couple had to move through several barriers. But given the casual atmosphere, exploratory and conversational line of questioning, and relatively unimpeded pathway to the room, the totality of these objective circumstances does not represent a curtailment akin to formal arrest."



Kerner v. State,
178 N.E.3d 1215
(Ind. Ct. App. 2021)

- Trial court did not err in denying a motion to suppress evidence obtained from Defendant's cell phone.
- Unlike the defendant in *Seo v. State*, who consistently refused to provide her pass code to law enforcement, Defendant here voluntarily provided the pass code.


BAIL

Dewees v. State, 180 N.E.3d 261 (Ind. 2022)

- No abuse of discretion in refusing to reduce $50,000 cash only bond for 18-year-old who drove men to home invasion.
- If trial court follows procedural safeguards and sufficient evidence supports its bond ruling, appellate court will affirm.

Medina v. State, 188 N.E.3d 897 (Ind. Ct. App. 2022)

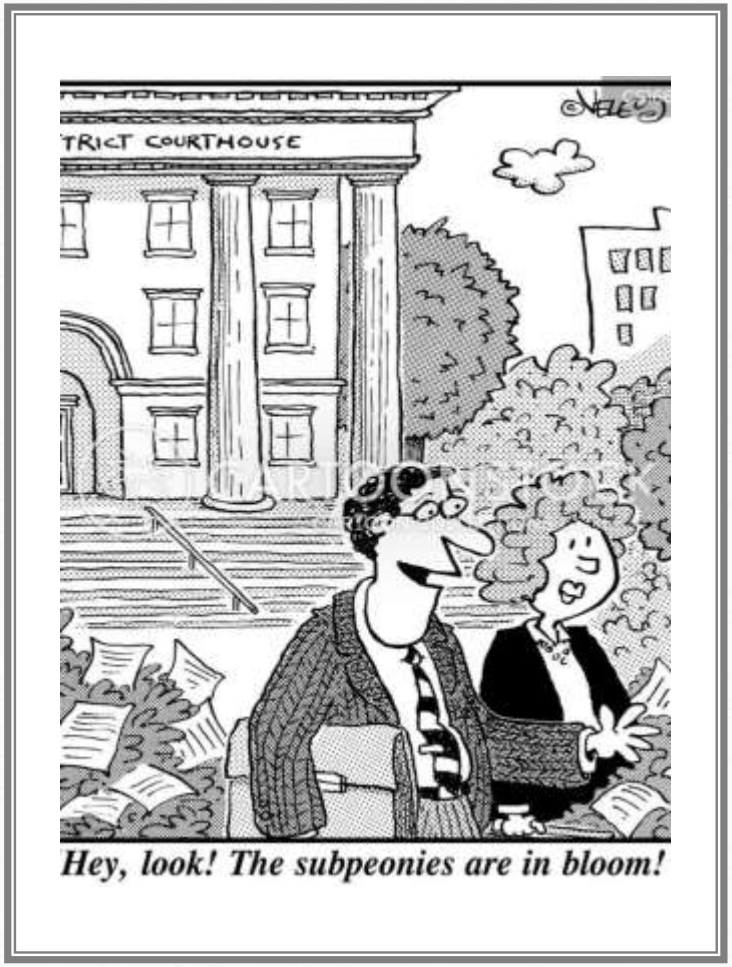
- So long as trial court followed proper procedure, and its bond decision was based on facts and circumstances in the record, appellate court must affirm, "even if we believe the court made the wrong call."


SPEEDY TRIAL

Blake v. State,
176 N.E.3d 989
(Ind. Ct. App. 2021)

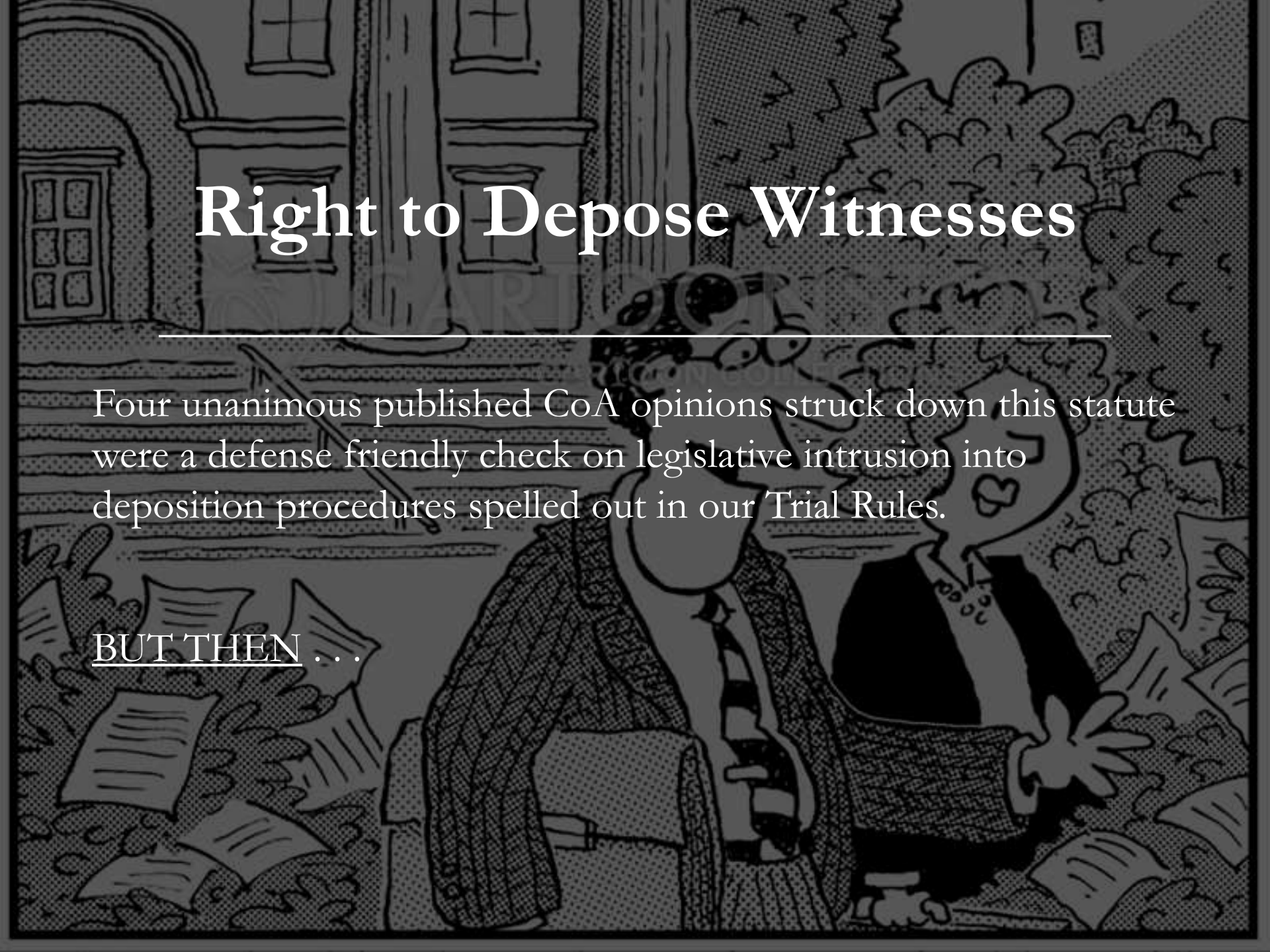
The trial court's finding that an emergency existed was reasonable considering circumstances relating to Covid-19 pandemic that existed at the time.


DISCOVERY



Right to Depose Witnesses

- *Sawyer v. State*, Ind. Ct. App. 5/19/21
- *Church v. State*, Ind. Ct. App. 6/28/21
- *State v. Riggs*, Ind. Ct. App. 7/29/21
- *Pate v. State*, Ind. Ct. App. 8/9/21
- Ind Code § 35-40-5-11.5 (eff. 3/18/20) restricts D's ability to take depositions of alleged child victims of sex offenses by requiring prosecutor consent or showing "extraordinary circumstances"
- Because statute is procedural in nature and conflicts w/ Ind. TRs 26 & 30, the Trial Rules govern & statutory provisions in conflict are a nullity.



Right to Depose Witnesses

Four unanimous published CoA opinions struck down this statute were a defense friendly check on legislative intrusion into deposition procedures spelled out in our Trial Rules.

BUT THEN . . .

Church v. State, 189 N.E.3d 580 (Ind. 2022)

- Defendant was properly prevented from deposing the child victim, pursuant to Ind. Code § 35-40-5-11.5, because the statute was not being retroactively applied to defendant. It was not a procedural statute that could conflict with Trial Rules, nor did it violate the separation of powers enshrined in the Constitution.

Minges v. State, 2022 Ind. LEXIS 469 (Aug. 23, 2022)

The Indiana Supreme Court overturned a 30+ -year-old precedent and found that its previous ruling that police reports fell under the work product doctrine no longer applies due to to state discovery rule changes and technological advances bringing an end to the arduous task of editing documents using a Marks-a-Lot marker


Ramirez v. State,
186 N.E.3d 89
(Ind. 2022)
• Reversible error to deny continuance to complete discovery and prepare for trial
• Defendant's attorney improperly denied copy of alleged CW's forensic interview; record devoid of any specific reason to support issuing protective order for video
• Local Rule void: imposed requirements not found in trial rules for obtaining otherwise discoverable evidence


State v. Lyons, 189 N.E.3d 605 (Ind. Ct. App. 2022)
Exclusion of State's evidence was an appropriate sanction for **serious** discovery violation.

TRIAL

RIGHT TO BE PRESENT

Wells v. State, 176 N.E.3d 977 (Ind. Ct. App. 2021)

- Excluding defendant from trial for failing drug test improper
- In such instances, trial court should apply, and exhaust, lesser contempt penalties, before imposing extreme sanction of deprivation of fundamental rights

Warren v. State, 182 N.E.3d 295 (Ind. Ct. App. 2022)

- A trial court may conduct a sentencing hearing at which the defendant appears by video, but only after obtaining a written waiver of his right to be present and prosecutor's consent.


VOIR DIRE

Glover v. State, 179 N.E.3d 526 (Ind. Ct. App. 2021)

- No abuse of discretion in permitting State to give "mini opening" that explored jurors' understanding of domestic violence
- Justice David dissented from denial of transfer to give guidance on regulating mini opening statements. *See Glover,* 181 N.E.3d 982 (Ind. 2022)

Doroszko v. State, 185 N.E.3d 879 (Ind. Ct. App. 2022)

- Refusal to allow defendant or his attorney to directly question prospective jurors was harmless error under *Logan v. State*, 729 N.E.2d 125 (Ind. 2000) & T.R. 47(D)
- In a footnote, Court disagreed with another panel's decision in *Peppers v. State*, 152 N.E.3d 678 (Ind. Ct. App. 2020


CLOSING ARGUMENT

Vasquez v. State,
174 N.E.3d 623
(Ind. Ct. App. 2021)

- Trial court erred in allowing the prosecutor to argue an appellate standard of review in closing argument
- Trial court allowed the prosecutor to construe the evidence in light of legal precedent holding that uncorroborated testimony of child victim is sufficient to support a child molesting conviction

JURY INSTRUCTIONS

Larkin v. State, 173 N.E.3d 662 (Ind. 2021)

- Reference to "handgun" in charging information for voluntary manslaughter gave defendant fair notice of lesser included involuntary manslaughter instruction


SENTENCING

Strack v. State, 186 N.E.3d 99 (Ind. 2022)

- At sentencing, defendant who enters open guilty plea has right to allocution, which is distinct from right to present evidence on his or her behalf

Wooden v. United States, 142 S.Ct. 1063 (2022)

- Burglarizing 10 units in one storage facility constitutes only one conviction for purposes of enhancement under Armed Career Criminal Act
- Government's contrary view could make someone a career offender in the space of a minute


CREDIT TIME

Temme v. State, 169 N.E.3d 857 (Ind. 2021)

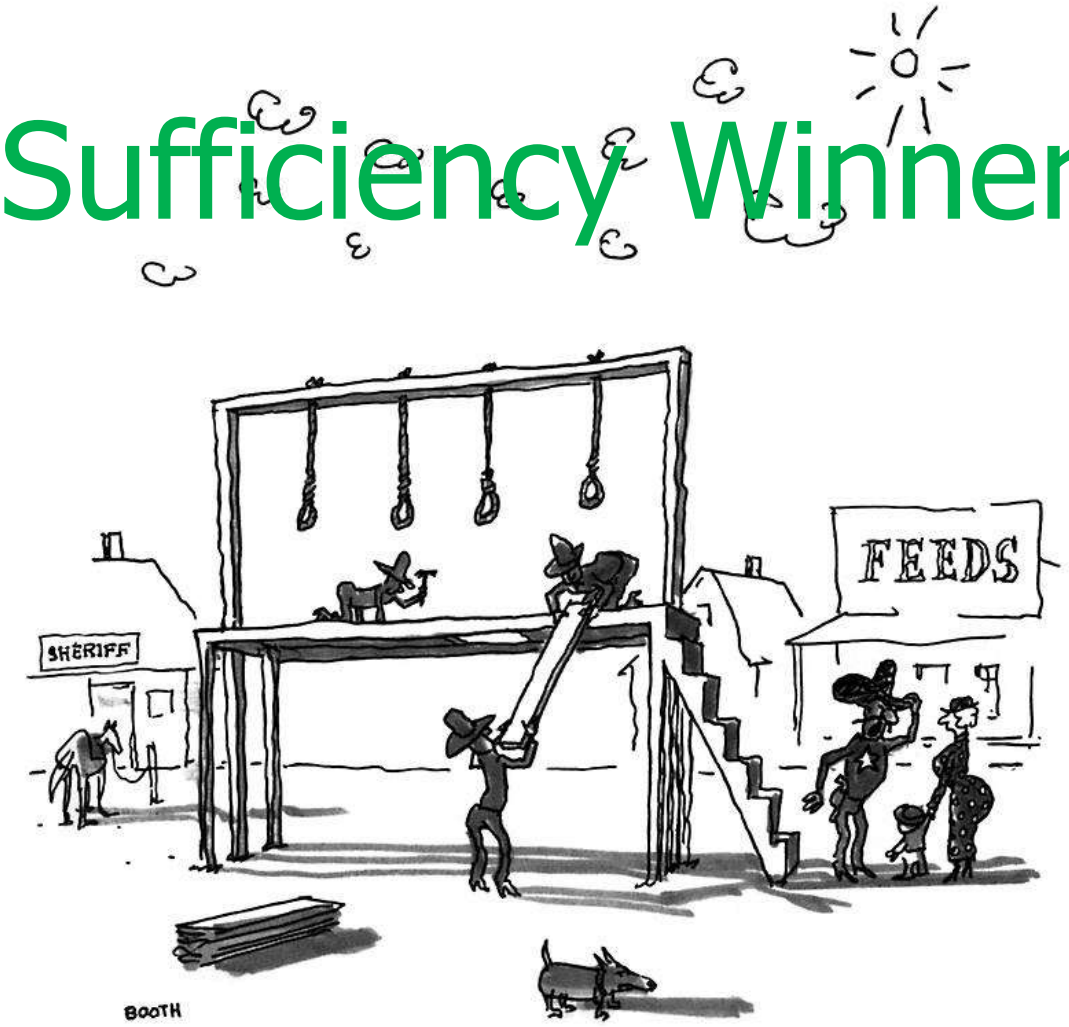
- As long as the defendant bears no active responsibility in his early release, he or she is entitled to credit while erroneously at liberty as if still incarcerated

Paul v. State, 177 N.E.3d 472 (Ind. Ct. App. 2021)

- "first in, first out"
- When a person has been simultaneously confined in connection with multiple causes and court must impose consecutive sentences, Indiana law requires court to calculate credit time at rate associated with first sentence in sequence of sentences and allocate the time to that first sentence


SUBSTANTIVE OFFENSES

Sufficiency Winner



"There was 'reasonable doubt,' Ma'am, so we're hanging a few lawyers."

Young v. State,
187 N.E.3d 969 (Ind. Ct. App. 2022)

Rare reversal of murder conviction for insufficient evidence.

Evidence was not sufficient because one of the main items of evidence was the fact that defendant's DNA was on a cigarette found in the alley in the same general area where the person in the alley footage discarded a lit object. But the cigarette was found two days after the shooting in a high-traffic, public alley, impacting the credibility of the evidence.

Sexual Battery

Gliva v. State,
178 N.E.3d 321
(Ind. Ct. App. 2021)

- Sexual battery statute requires that victim be "unaware" of touching as it occurs, not before it occurs

Drug Possession

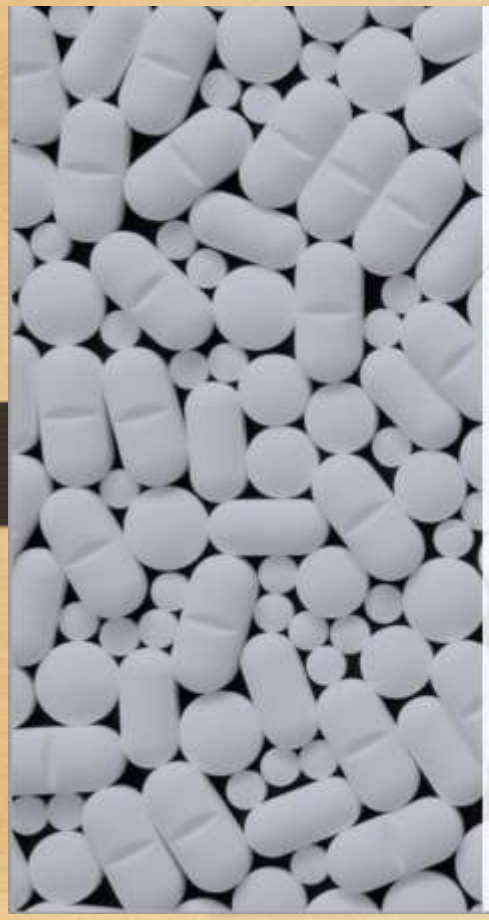
Page v. State, 173 N.E.3d 723 (Ind. Ct. App. 2021)

- Expired prescription was still "valid prescription" under possession of narcotic drug statute

Failure to prove substance was *in fact* illegal

Fedij v. State,
186 N.E.3d 696
(Ind. Ct. App. 2022)

- Aside from improperly admitted labels, State presented no evidence that any of seized substances had concentration of THC more than 0.3%, which would make the item illegal to possess
- Plant material was consistent with both marijuana and hemp



Drug-Induced Homicide Statute

Yeary v. State, 186 N.E.3d 662 (Ind. Ct. App. 2022)

- Statute constitutional because State must prove causal connection between controlled substance defendant delivered and victim's death
- Reversible error found in trial court's refusal of defendant's tendered instructions explaining concept of proximate causation

Burglary

***Wilburn v. State*, 177 N.E.3d 805 (Ind. Ct. App. 2021)**

- No "breaking" when defendant entered through unlocked door of business two minutes before it closed

***Fix v. State*, 186 N.E.3d 1134 (Ind. 2022)**

- Sufficient evidence for burglary while armed with a deadly weapon where defendant broke into victim's home unarmed but subsequently obtained and used handgun against the victim

Forcibly Resisting Law Enforcement

Runnells v. State, 186 N.E.3d 1181 (Ind. Ct. App. 2022)

- Defendant did not "forcibly resist" law enforcement by pulling away from officer's grasp
- Found "stiffening" language from *Graham*, 903 N.E.2d 963, was not guiding principle in this case

Dissemination of Matter Harmful to Minors

Chapman v. State,
186 N.E.3d 123
(Ind. Ct. App. 2022)

- No error in trial court's preliminary determination that widely-circulated internet memes defendant showed to his 17-year-old former band student constituted matter "probably harmful to minors"


ETHICS
Criticism of judge's integrity.

Matter of Smith, 181 N.E.3d 970 (Ind. 2022)

- Respondent committed attorney misconduct by making statements about judge's qualifications or integrity in appellate brief—either knowing statements were false or with reckless disregard for their truthfulness—violating Prof. Conduct Rule 8.2(a)


EVIDENCE

Washington v. State, 178 N.E.3d 1275 (Ind. Ct. App. 2021)

- Market reports exception to hearsay under Evid. Rule 803(17) does not apply to admission of evidence from Drugs.com to prove identity of pills

PRESERVATION OF ERROR

Hostetler v. State, 184 N.E.3d 1240 (Ind. Ct. App.2022)

- Even with continuing objection, challenge to warrantless search waived by defendant saying "no objection" when evidence admitted

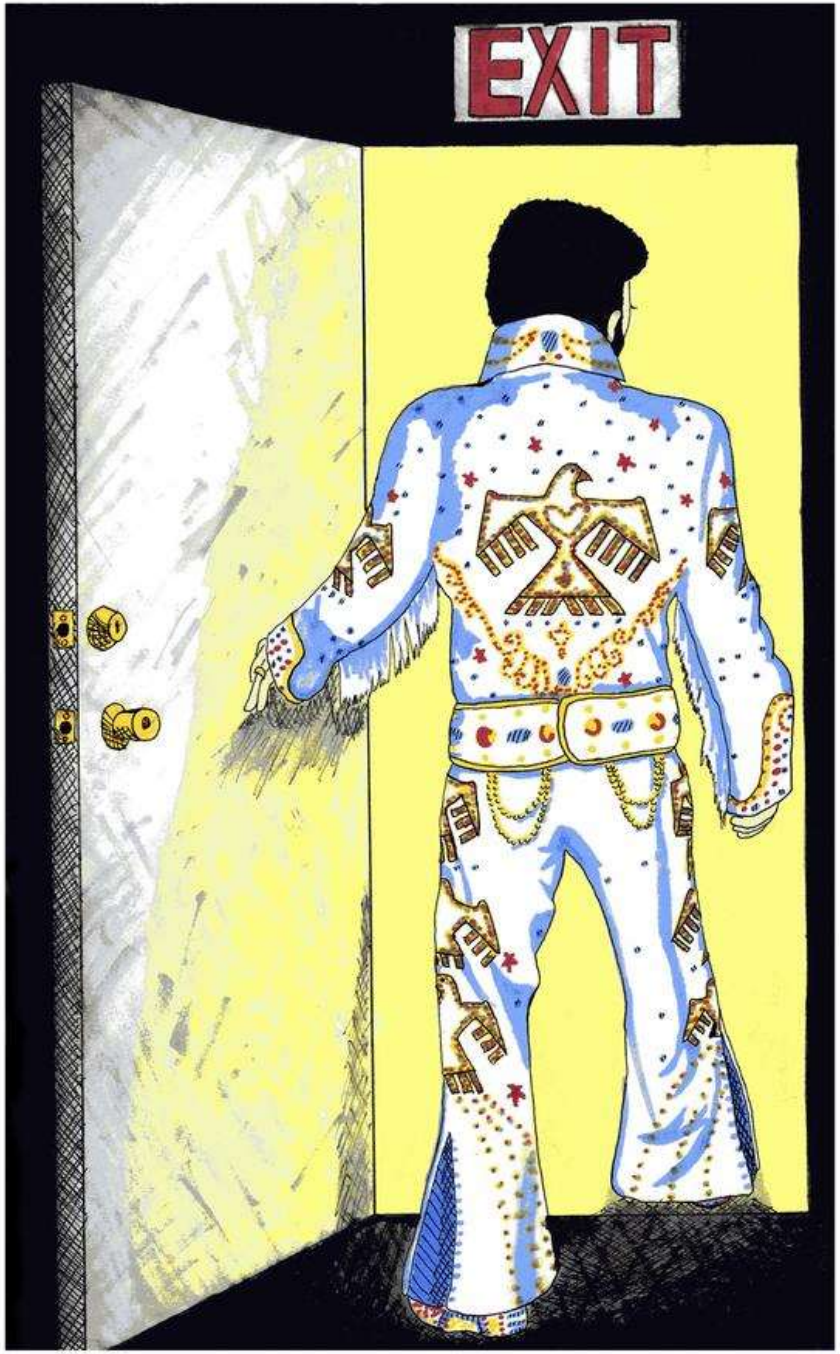
Youth Justice

Line Drawing Between Criminal and Juvenile Court

"Jurisdiction" over persons who aged out of the juvenile system.

State v. Neukam, 189 N.E.3d 152 (Ind. 2022)

- "[I]f a court having criminal jurisdiction determines that a defendant is alleged to have committed a crime before the defendant is eighteen (18) years of age, the court shall immediately transfer the case . . . to the juvenile court." Ind. Code § 31-30-1-11.
  - As the circuit court lacked jurisdiction over the criminal charges the State sought to add against defendant who was older than 21 for conduct occurring before he turned 18, the denial of the State's motion to amend the charging information was proper; Ind. Code §§ 33-23-1-4 and 31-37-1-2 showed that criminal and delinquent acts were distinct classes of conduct determined by age.


EXIT

Section Sixteen

ANNUAL UPDATE ON BANKRUPTCY AND COMMERCIAL LAW (2022)

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Section Sixteen

Annual Update on Bankruptcy and Commercial Law (2022)……..Thomas P. Yoder
Robert C. Allega

UNITED STATES SUPREME COURT

Siegel v. Fitzgerald, No. 21-441 (June 6, 2022)

The Supreme Court held the Bankruptcy Judgeship Act of 2017, which required large chapter 11 debtors to pay a significantly increased fee into the United States Trustee System Fund, was unconstitutional. Bankruptcy judges throughout the country used to perform both the administrative and judicial duties associated with presiding over a bankruptcy petition. However, this resulted in a large workload and concerns about conflicts of interest. Congress therefore created the United States Trustee Program. The Program expanded to every district in the United States, save six districts located in North Carolina and Alabama. The debtors in the trustee districts were required to pay a fee which was used to fund the USTP. However, the six districts which continued to operate under the administrator program were funded out of the court's general budget. This resulted in debtors in trustee districts paying higher fees to file bankruptcy, and the Ninth Circuit held this was unconstitutional. In response, Congress authorized the Judicial Conference of the United States to equalize payments between the trustee districts and the administrator districts, which the Judicial Conference did. The Judicial Conference also decided to raise the fee debtors were required to pay in order to increase funding for the United States Trustee Program. The trustee districts therefore increased fees in the first quarter of 2018 on all pending chapter 11 cases whereas the administrator districts did not increase fees until October 1, 2018, and the administrator districts only collected the increased fee from debtors who filed after that day. In *Siegel v. Fitzgerald*, the Supreme Court held this discrepancy was unconstitutional, but the Supreme Court remanded the matter back to the Fourth Circuit in order to fashion a remedy. The Fourth Circuit subsequently remanded *Siegel* back to the bankruptcy court to fashion a remedy, and the bankruptcy court has not yet ruled on remedy.

There are three logical ways for lower courts to decide to fashion a remedy. The first option is to refund the money to the debtors who paid the higher fee. The second option is to retroactively raise rates on the debtors who were able to take advantage of the fee discrepancy. Third, the lower courts could leave the imbalance uncorrected.

In one post-*Siegel* lower court decision, the Tenth Circuit Court of Appeals held the government must pay a refund to a chapter 11 debtor based on what the debtor would have paid over the same time were the debtor in an administrator district. *John Q. Hammons Fall 2006 LLC v. U.S. Trustee (In re John Q. Hammons Fall 2006 LLC)*, 20-3203 (10th Cir. Aug. 15, 2022). There is also a class-action filed by chapter 11 debtors throughout the country who paid the increased fee pending in the Court of Federal Claims in Washington D.C.

Bartenwerfer v. Buckley, No. 21-908 (cert. granted)

The Supreme Court has granted certiorari in a case presenting the issue of whether the imputation of liability on a debtor for an agent's fraud automatically results in non-dischargeability or must the debtor have some degree of scienter?

A couple bought a house with the intention of flipping it. The husband did most of the renovations, and the wife's participation was very minimal. The couple sold the home, and the buyer later sued the couple alleging the couple failed to disclose known defects in the home. A jury found for the buyer and awarded $540,000 in damages. The couple filed for chapter 7 bankruptcy. The bankruptcy judge discharged the debt as to wife finding she did not know nor should have known the disclosure was fraudulent. However, the Ninth Circuit reversed, holding the debt was non-dischargeable. The United States Supreme Court granted certiorari and oral argument will likely be held in the fall.

A circuit split currently exists on this issue. The Second, Fourth, Seventh, and Eighth Circuits hold the debtor must have some degree of scienter before an imputed liability for fraud becomes non-dischargeable. The leading case among circuits taking this position is *Walker v. Citizens State Bank (In re Walker)*, 726 F.2d 452 (8th Cir. 1984). The Fifth, Sixth, Ninth, and Eleventh Circuits hold a debt is non-dischargeable as to an entirely innocent debtor based on the fraud of a partner or agent. The flagship case among circuits taking this position is *Deodati v. M.M. Winkler & Assocs. (In re M.M. Winkler & Assocs.)*, 239 F.3d 746 (5th Cir. 2001).

SEVENTH CIRCUIT

Court of Appeals

Osicka v. Office of Lawyer Regulation, 21-1566 (7th Cir. Feb. 7, 2022)

The debtor was an attorney in Wisconsin, and the Wisconsin Supreme Court disciplined him for neglecting client matters and failing to cooperate with the Supreme Court's investigation. The Court issued a public reprimand and ordered the debtor to pay $150 in restitution and $12,000 in costs. The debtor failed to pay the associated costs, so the Wisconsin bar suspended his law license. The debtor closed his law practice and filed a chapter 7 bankruptcy petition. The debtor received a general discharge in the bankruptcy case, but the bar association would not reinstate the debtor's law license until he repaid the cost of the investigation. The debtor then reopened his bankruptcy petition and filed an adversary proceeding against the bar association.

The bar association argued the debt was excepted from the discharge under Sections 523(a)(7) and (c)(1) because it was a "fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a [particular] tax penalty." Judge Michael Y. Scudder, Jr. of the Seventh Circuit agreed and held the costs were non-dischargeable debts under Section 523(a). Judge Scudder concluded the costs constituted a "penalty," citing the Black's Law Dictionary's definition of the word, because the costs were assessed "as punishment for either a wrong to the state or a civil wrong." He also determined the costs did not constitute compensation for "actual pecuniary loss" because he narrowly defined

that term to mean "the disappearance or diminution of something having monetary value resulting from the real and substantial destruction of property[.]" Therefore, the debt was non-dischargeable. This case expands the general rule that debts which are rehabilitative and penal, not compensatory, are non-dischargeable. The decision is also consistent with how the First, Ninth, and Eleventh Circuits have addressed the issue.

In re Terrell, 21-3059 (7th Cir. July 12, 2022)

The debtors confirmed a 60-month chapter 13 plan that included a $30,000 claim by the state for overpayment of public assistance. The plan treated this claim by the state has having Section 507(a)(1)(B) priority as a "domestic support obligation." However, four months after confirmation of the plan, the Seventh Circuit handed down *In re Dennis*, 927 F.3d 1015 (7th Cir. 2019), which held that overpayments of public assistance are not entitled to Section 507(a)(1)(B) priority as a "domestic support obligation." If *Dennis* had been the law when the debtors confirmed their plan, the duration of the plan would only have been 36 months. The debtors then filed a motion objecting to the state's priority claim about 17 months after confirmation. The bankruptcy court eliminated the state's priority status, and the Seventh Circuit agreed to hear a direct appeal.

The Seventh Circuit reversed. Judge Easterbrook held the only possible method of relief available to debtors was through Civil Rule 60, but the debtors' motion was untimely under that rule. He explained the debtors could have sought relief under Rule 60(b)(1) when Dennis was decided, on the basis that granting the state priority status was a mistake. However, the debtors failed to do so within one year of confirmation of the plan, as required by Rule 60(c)(1). Judge Easterbrook noted the debtors also could have invoked Rule 60(b)(6), which allows relief from a judgment for "any other reason that justifies relief." However, Rule 60(c) requires such a motion to be made "within a reasonable time" and Judge Easterbrook concluded 17 months was not a reasonable time.

Bill Rochelle, former practitioner and Bloomberg journalist, observed that "[a]ssuming other courts would agree with Judge Easterbrook, the opinion seems to mean that a change in decisional law would similarly require modification of a chapter 11 plan within one year of confirmation."

Harshaw v. Harshaw (In re Harshaw), 21-1423 (7th Cir. Feb. 23, 2022)

This case has important implications for family law. Judge David F. Hamilton of the Seventh Circuit Court of Appeals held bankruptcy protections for former spouses do not apply to unmarried couples. The Seventh Circuit explained that for a property division to be enforceable between unmarried people, the order or agreement to divide property needs to amount to a transfer of ownership.

A Lake County, Indiana, couple married in 1985 but later divorced. After the divorce, they reconciled and lived together for 15 years. They did not get remarried, and they eventually split

up again. The couple agreed to arbitrate a division of property regarding the assets the couple had accumulated during the 15 years they lived together but were unmarried. The arbitrator awarded the woman $435,000, representing half of the 401(k) retirement account the man had accumulated while they were living together unmarried. The man then filed for bankruptcy, seeking to discharge the $435,000 award. The woman contended the award transferred ownership of specific property to her which meant the bankruptcy did not affect the award. The bankruptcy court agreed with the woman, but the district court reversed the bankruptcy court.

Judge Hamilton noted that while the arbitration order itself said the award was not dischargeable in bankruptcy, the initial phrases in the award used the language of a money judgment. Also, the arbitration order awarded post-judgment interest, and Indiana law only allows post-judgment interest on money judgments. The arbitration award gave the man three options for transferring half of the 401(k) to the woman, and one of those options was the direct payment of money. Therefore, Judge Hamilton concluded the award was a dischargeable money judgment. Section 523(a)(5) does prohibit discharge of a support award, but only for a spouse, former spouse, or child. However, the woman could not win under that subsection even if she were considered a former spouse because "the award [of] a non-dischargeable support obligation for the purpose of Section 523(a)(5) was not actually litigated in the prior proceeding." Therefore, Judge Hamilton affirmed the district court and held the award was a dischargeable debt.

Section 523(a)(15) did not except the award from discharge because the man was a chapter 13 debtor.

Archer-Daniels Midland v. Country Visions Cooperative, 21-1400 (7th Cir. April 4, 2022)

Three years before bankruptcy, creditor was given a right of first refusal to buy the debtor's real property, and this interest was recorded with the land records. Debtor filed chapter 11 bankruptcy but did not schedule the right of first refusal (ROFR). The bankruptcy court confirmed the plan and approved a sale of the property free and clear of all liens, claims, and encumbrances. Buyer of the real property at the bankruptcy sale knew of the ROFR before the bankruptcy sale because the buyer ran a title search. However, neither the buyer nor the debtor informed the creditor of the sale before it occurred. Buyer resold the property to a third party, and the creditor then sued the buyer in state court.

The buyer sought relief from the bankruptcy court to enforce the "free and clear" aspects of the sale. However, the bankruptcy court refused to enjoin the suit in state court under Section 363(m), and the district court affirmed.

Judge Frank Easterbrook of the Seventh Circuit held Section 363(m) did not protect the buyer, but he also stated in *dicta* that if anyone should be made to compensate the creditor, it is the debtor's two principals. Judge Easterbrook looked to the text of Section 363(m) which provides: "The reversal or modification on appeal of . . . a sale . . . of property does not affect the validity of a sale . . . to an entity that purchased . . . such property in good faith . . ." Judge Easterbrook held the buyer did not buy the property in good faith because the buyer had both actual and

constructive notice of the creditor's ROFR, but the buyer did not notify the creditor about the bankruptcy sale.

Thus, a buyer will not be considered in good faith under Section 363(m) if the buyer does not give written notice required by the Bankruptcy Code and Rules to someone with an interest in the property being sold. The buyer is not in good faith even if the holder of the interest knows or should have known about the bankruptcy or the sale.

In re Helmstetter, 21-2486 (7th Cir. Aug. 11, 2022)

The debtor filed for chapter 7 bankruptcy while a suit was pending against his former employer. In the debtor's original schedule, he listed liabilities of between $6.5 million and $10.5 million. He listed his assets as $8.5 million, but he included a recovery of between $5 million and $7.5 million from the lawsuit in this calculation. The chapter 7 trustee negotiated a settlement whereby the debtor's former employer would pay $550k in exchange for dismissal of the suit. The trustee filed a motion for approval of the settlement, and the debtor objected. The debtor also filed an amended schedule showing liabilities of $20 million and $43 million in assets, including a recovery of $16 million from the lawsuit and $20 million worth of "other assets" which the debtor attributed to his claims against third parties. The bankruptcy court went ahead and approved the settlement, and the district court dismissed the debtor's appeal for lack of standing.

Judge Candace Jackson-Akiwumi likewise dismissed the debtor's appeal to the Seventh Circuit for lack of standing. The debtor argued he was entitled to recover from the estate after the creditor distribution. However, Judge Jackson-Akiwumi held that for standing to appeal, a chapter 7 debtor must substantiate allegations that the estate is solvent. "Speculative support" for the value of the assets will not suffice.

<u>Bankruptcy Courts in Seventh Circuit</u>

Royal Garden Produce LLC v. Sanchez (In re Sanchez), 19-32364 (Bankr. N.D. Ill. Dec. 13, 2021)

The debtor was an officer, director, and owner of a company that bought and sold produce. The company and its owner were subject to the Perishable Agricultural Commodities Act (PACA). The company did not pay a supplier $50,000 for produce. The supplier sued in federal court under PACA and obtained a default judgment against the company. The supplier did not obtain default judgment against the owner because the owner had filed a chapter 7 petition.

Supplier filed a complaint in the debtor's bankruptcy action seeking a declaration that the debt owed was a non-dischargeable debt owed by the owner-debtor under Section 523(a)(4). The debtor filed a motion for summary judgment. Section 523(a)(4) provides a debt is non-dischargeable if it was a debt "for fraud or defalcation while acting in a fiduciary capacity," and the debtor argued he was not acting in a fiduciary capacity.

Bankruptcy Judge LaShonda A. Hunt of Chicago agreed with the debtor and granted the debtor's motion. She noted Seventh Circuit precedent provides that the existence of a fiduciary relationship must be strictly and narrowly construed. For someone to be a fiduciary in the Seventh Circuit, there must be a segregation of funds, and PACA did not prohibit comingling of funds. Even though PACA creates a floating "trust," the name is not determinative and the statue primarily acts as a collection device rather than creating a traditional trust relationship. There is split of authority on this issue (both among the bankruptcy judges of Chicago and nationally), and Judge Hunt's opinion represents the minority view. However, Judge Hunt differentiated the instant case from cases out of other circuits by noting that she relied on Seventh Circuit-specific case law.

Official Committee of Unsecured Creditors of Gregg Appliance Inc. v. D&H Distributing Co. (In re HHGregg Inc.), 17-5082 (Bankr. S.D. Ind. Jan. 13, 2022)

Chief Bankruptcy Judge Jeffery J. Graham of Indianapolis held that a supplier may not have the ordinary course defense if the evidence shows that the debtor "prioritized paying [the preference defendant] over other creditors."

The debtor was a 220-store appliance and electronics retailer, and its same-store sales began declining about three years before the chapter 11 filing. The supplier was one of the debtor's primary providers of consumer electronics. Before the debtor filed bankruptcy, the debtor was current on all invoices to the supplier. The supplier continued to supply the debtor even when other suppliers discontinued doing so, however, the supplier reduced the debtor's credit limit and payment terms. The creditors' committee sued the supplier for about $4.7 million in preferences received in the three months before the filing, and the supplier asserted the "ordinary course" defense.

After trial, Judge Graham found the supplier failed to prove the "ordinary course" defense by a preponderance of the evidence. Judge Graham noted the supplier "consistently" sought payment by communicating "frequently" with the debtor's senior management; the supplier threatened to withhold shipments even though the supplier never actually did so; debtor's employees "advocated" for payment to the supplier because they "valued their relationship" with the supplier; and the supplier "significantly" reduced the debtor's credit "at a time when the Debtor's business with [the supplier] was at an all-time high." Judge Graham held the debtor "prioritized paying [the supplier] over other creditors. And this is what Congress meant to remedy when drafting Section 547(b)." Judge Graham gave the debtor a judgment for a net preference of about $3.5 million, given the supplier's $1.2 million offset for new value.

According to Bill Rochelle, this seems a bit incongruous because the supplier is in effect being punished for providing badly needed goods when other suppliers would not. Moreover, Section 547 was designed to encourage suppliers to deal with companies in financial distress, but this decision seems to encourage suppliers to cut off doing business with a struggling company rather than hounding the company for payment.

Developments in the City of Chicago's Parking Ticket Saga:

City of Chicago v. Mance (In re Mance), 21-1355 (7th Cir. April 21, 2022)

Judge David F. Hamilton of the Seventh Circuit held the City of Chicago's $12,000 lien on an impounded vehicle worth $3,000 was a judicial lien and therefore was a lien the debtor could avoid.

Debtor filed chapter 7 and sought to have the lien discharged. The city objected and argued the lien was a statutory lien which is not dischargeable. The bankruptcy court, however, rejected the City's argument and held the lien was a judicial lien because it was inextricably linked to prior quasi-judicial proceedings. The district court affirmed, and the City appealed to the Seventh Circuit. Judge Hamilton looked to the statutory definitions of judicial lien and statutory lien in Sections 101(36) and (53). A judicial lien "means [a] lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." A statutory lien "means [a] lien arising solely by force of a statute on specified circumstances or conditions . . . but does not include security interest or judicial lien, whether or not such interest or lien is provided by or is dependent on a statute and whether or not such interest or lien is made fully effective by statute."

Judge Hamilton held the distinctive definition of statutory lien excluded the lien on the car. He noted the complex quasi-judicial procedures the city was required to undertake before impounding the car. Thus, he concluded the lien was a judicial lien. In contrast, a mechanic's lien arises automatically by statute when the debtor fails to make a payment. While the Third Circuit held a New Jersey statute created a statutory lien, Judge Hamilton noted there was a "critical difference" between the New Jersey statute and the statute involved in this case and the respective procedures made the statutes "markedly different." Judge Hamilton upheld the lower courts and ruled that the lien was judicial because it did "not arise solely by statute."

Cordova v. City of Chicago (In re Cordova), 19-00684 (Bankr. N.D. Ill. Dec. 6, 2021)

In *City of Chicago v. Fulton*, 141 S. Ct. 585 (2021), the United States Supreme Court held the City of Chicago did not violate the automatic stay under Section 362(a)(3) by refusing to return impounded vehicles immediately after the owners filed chapter 13 petitions. The Supreme Court explained "the mere retention of estate property" is not a violation of Section 362(a)(3). However, *Fulton* left open the question of whether the city's actions or inaction might have violated subsections (a)(4), (a)(6), or (a)(7) of Section 362(a).

Cordova is a putative class action filed by chapter 13 debtors who allege the retention of their cars by the city violated subsections (a)(3), (a)(4), (a)(6), or (a)(7) of Section 362(a) and Section 542(a). The class action was put on hold while *Fulton* made its way through the court system. However, after the *Fulton* decision, the city filed a motion to dismiss the class action.

Bankruptcy Judge Timothy A. Barnes denied the motion to dismiss the entire complaint, but he did dismiss the class's claim for punitive damages. Judge Barnes explained the Supreme Court made clear in its ruling on *Fulton* that the decision was limited to section 362(a)(3). He interpreted Justice Sotomayor's dissent to indicate "*Fulton* does not expressly nor impliedly

foreclose the Plaintiffs' claims under sections 362(a)(4), (6), and (7), as a matter of law." Judge Barnes also wrote: "*Fulton* also left open the possibility that inaction combined with other facts might nonetheless violate the automatic stay."

Subsection (a)(4) prohibits "an act" to enforce a lien, and subsection (a)(6) prohibits "an act" to collect a claim against a debtor. Judge Barnes ruled the complaint made "plausible claims" for violations of subsections (a)(4) and (a)(6) because the complaint alleged the city had demanded "upfront" payments before releasing the cars and retained the cars to perfect a lien. Judge Barnes dismissed the plaintiffs' subsection (a)(7) claim because mere possession is not sufficient to establish a "setoff" prohibited by subsection (a)(7). However, he gave the plaintiffs the opportunity to replead the claim. Judge Barnes did dismiss the plaintiffs' claim for punitive damages because Section 106(a)(3) prohibits monetary recovery for punitive damages from a governmental unit.

OTHER CIRCUITS

Court of Appeals

Cook v. U.S. (In re Yahweh Center Inc.), 20-1685 (4th Cir. March 8, 2022)

There is a widening circuit split over whether the government may waive sovereign immunity with respect to Section 544(b)(1) suits. The Ninth Circuit has held waiver of sovereign immunity under Section 106(a)(1) allows a trustee to file a derivative suit against the IRS for receipt of a state law fraudulent transfer under Section 544(b)(1). However, the Seventh Circuit has held the waiver of immunity does not extend to Section 544(b)(1) suits because any actual creditor would have been barred from suing by the government's sovereign immunity. The issue is also currently pending before the Tenth Circuit.

In the instant case, the Fourth Circuit sided with the Ninth Circuit and held the IRS has no sovereign immunity protection to preclude an avoidance action under Section 544(b)(1). Here, a corporate debtor failed to pay state and local income taxes for several years. The IRS assessed taxes, penalties, and interest, some of which were paid by the debtor. The IRS also asserted tax liens. The debtor filed chapter 11 bankruptcy, and the IRS filed a claim for secured, unsecured priority, and unsecured general claims. The trustee then sued the IRS under Section 544(b)(1) to avoid the unpaid tax penalties on the theory the payments were constructively fraudulent transfers. The bankruptcy court found a waiver of sovereign immunity, and the district court affirmed.

Judge Marvin Quattlebaum held the waiver of sovereign immunity in Section 106(a) "forecloses the government's position that sovereign immunity bars any action by an unsecured creditor under" state law. Thus, the filing of a claim by the IRS waived sovereign immunity under Section 106(b). Judge Quattlebaum reasoned that because the IRS had filed a claim, "the government would have waived sovereign immunity if an unsecured creditor were to file a claim

against it. Nonetheless, Judge Quattlebaum held the tax penalties paid by the debtor were not avoidable as constructively fraudulent transfers.

Auriga Polymers Inc. v. PMCMK2 LLC, 20-14646 (11th Cir. July 18, 2022)

The debtor was a large carpet and hard surface flooring manufacturer and distributor. The debtor filed chapter 11, and the bankruptcy court approved a plan that involved transferring all of the debtor's assets to a liquidating trust. Creditor delivered a large amount of goods to the debtor for which it had been partially paid during the preference period. Within twenty days after the debtor filed its chapter 11 petition, the creditor delivered an additional $700k in goods to it. The debtor confirmed a chapter 11 plan providing for payment in full of the creditor's 20-day shipments. However, the liquidating trustee sued the creditor for preference over the creditor's claim for the goods delivered within twenty days after debtor filed its petition.

Section 547(c)(4), the "new value defense," precludes recovery of an otherwise preferential transfer made:

> to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor—
>
> (A) not secured by an otherwise unavoidable security interest; and
> (B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor.

Judge Barbara Lagoa of the Eleventh Circuit saw the issue as: Would the eventual payment for the 20-day administrative claim be "an otherwise unavoidable transfer" under Section 547(c)(4)(8) and thereby reduce the new value defense? She noted "most courts . . . have concluded that new value advanced after the petition date does not increase a creditor's new value defense." Thus, Judge Lagoa analogized: "If the statute does not allow post-petition extensions of new value to become part of a creditor's new value defense, then logically it does not allow post-petition payments to affect the preference analysis." Consequently, she held only pre-petition transfers will affect a creditor's subsequent new value defense.

In practical terms, as Bill Rochelle notes, this opinion and a similar one issued by the Third Circuit "mean that shipments of goods within 20 days of filing serve double duty for a creditor: (1) The creditor has an administrative claim; and (2) the administrative claim will not offset the new value defense." However, Rochelle asks: "When the Bankruptcy Code overall aims to achieve equality of distribution, why would the statute allow a creditor to realize value twice from the same transfer?"

Law Offices of Francis J. O'Reilly v. Selene Finance LP (In re DiBattista), 20-4067 (2d Cir. May 17, 2022)

Judge Richard Sullivan of the Second Circuit held a debtor is entitled to recover attorneys' fees for successfully prosecuting appeals from a bankruptcy court's order holding a creditor in

contempt of a discharge injunction. This opinion is likely to reduce the number of creditors who appeal from contempt citations.

The debtor filed chapter 7 bankruptcy and obtained a discharge. However, the debtor's mortgage lender violated the discharge injunction by making erroneous reports to credit agencies and attempting to collect delinquent mortgage payments that had been discharged. The bankruptcy judge found the mortgage lender in contempt and assessed $9,000 in attorney fees and $17,000 in damages. The mortgage lender appealed to the district court, and the district court affirmed the bankruptcy court but remanded for clarification regarding whether the $17,000 award was for compensatory or punitive damages. On remand, the debtor requested attorney fees associated with the appeal to the district court. The bankruptcy court affirmed the $17,000 award as for compensatory damages but denied the request for appellate attorney fees. The district court affirmed the bankruptcy court.

The Second Circuit reversed the district court's denial of debtor's appellate attorney fees. Judge Sullivan noted the appeal would not have been necessary had the mortgage lender abided by the discharge injunction in the first place. Judge Sullivan also noted that attorney fees may also exceed the damage award such that "the failure to compensate the victim of contempt with appellate fees could leave the victim worse off for seeking to enforce a discharge order and would, at the very least, discount any compensatory damages award." Bill Rochelle notes this case lies in tension with another Second Circuit case decided last year, *PHH Mortgage Corp. v. Sensenich (In re Gravel)*, 6 F.4th 503 (2d Cir. Aug. 2, 2021), which held a debtor may only recover compensatory damages and a bankruptcy court may not impose contempt sanctions for a violation of Bankruptcy Rule 3002.1.

Federacion de Maestros de Puerto Rico v. Financial Oversight and Management Board for Puerto Rico (In re Financial Oversight and Management Board for Puerto Rico), 22-1080 (1st Cir. April 26, 2022)

Facing intolerable liability for public workers' unfunded pension benefits, Puerto Rico enacted legislation in 2013 freezing accruals under the existing defined benefit plan and giving rights under a defined contribution plan to current and future workers. However, the Puerto Rico Supreme Court invalidated the law and held existing workers could continue accruing benefits under the defined benefit plan. In 2016, Congress enacted the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) to allow Puerto Rico to obtain bankruptcy relief. PROMESA incorporated large swaths of chapter 9 law written to govern municipal bankruptcies.

In accordance with PROMESA, Puerto Rico developed a debt-adjustment plan, but the plan got rid of public school teachers' rights to continue accruing retirement benefits under the island's defined benefit pension plan. The teachers objected to the plan, but the district court overruled their objection and confirmed the plan. The First Circuit affirmed. Circuit Judge William Kayatta explained that by the plain text of PROMESA, it preempted local, Puerto Rican law. He held PROMESA preempted Commonwealth law insofar as the law purports to dictate (contrary

to the Plan) the adjustment of the Commonwealth's financial obligations to participants in its pension plans.

Financial Oversight & Management Board for Puerto Rico v. Centro de Periodismo Investigativo Inc., 21-1301 (1st Cir. May 17, 2022)

Circuit Judge O. Rogeriee Thompson held PROMESA waived sovereign immunity as to the Financial Oversight and Management Board for Puerto Rico. In 2017 and again in 2019, nonprofit media organizations filed lawsuits in the PROMESA court seeking an order compelling the Oversight Board to disclose information and communications regarding its proceedings. The Board filed a motion to dismiss the suits on the basis that the suits were barred by sovereign immunity. The district court denied the motion to dismiss and ordered production of the documents and other information. The First Circuit granted a stay pending appeal and agreed to review the ruling under the collateral order doctrine.

Judge Thompson noted Puerto Rico has long been treated like a state for sovereign immunity purposes. However, he inferred from Section 106 of PROMESA that Congress abrogated sovereign immunity. Section 106 states that "any action against the . . . Board, [or] . . . otherwise arising out of [PROMESA] . . . shall be brought [in the district court for the district of Puerto Rico]." Judge Thompson reasoned that because Congress "unequivocally stated" the Board could be sued in federal court for actions arising out PROMESA, Congress must have contemplated plaintiffs could obtain relief from the Board.

However, Circuit Judge Sandra Lynch wrote a dissent. She noted Supreme Court authority that abrogation "must be clearly and unequivocally stated," and she found "[a]bsolutely nothing in the text of Section 106 that] sets forth an intent to abrogate Eleventh Amendment immunity." Therefore, she would have held that sovereign immunity was not abrogated.

District Courts

Diocese of Rochester v. AB 100 Doe (In re Diocese of Rochester), 22-02075 (W.D.N.Y. May 23, 2022)

Bankruptcy Judge Paul Warren of Rochester, New York, held sexual abuse claimants can sue non-debtor Catholic entities in state court despite the chapter 11 filing by the Diocese of Rochester. The diocese filed for bankruptcy in 2019 because of the multitude of claims and lawsuits it was facing alleging sexual abuse by clergy. Only the diocese itself asserted it was bankrupt. Other Catholic entities within the boundaries of the diocese, like parishes and schools, did not file chapter 11. With no agreement on a consensual plan, the diocese threatened to pursue confirmation of a nonconsensual plan. If the nonconsensual plan was confirmed, then the largest creditor class, the alleged abuse victims, would be forced to receive compensation in accordance with the nonconsensual plan. Thus, the creditor class started to threaten filing suits in state court against the non-debtor Catholic entities.

The diocese filed an adversary proceeding asking the bankruptcy court to rule that the automatic stay precludes lawsuits against non-debtor Catholic entities in the diocese. However, Judge Warren rejected the idea that the automatic stay in Section 362(a)(1) or (a)(6) barred lawsuits against non-debtors. Judge Warren also rejected the diocese's motion for a preliminary injunction barring suit against the non-debtor Catholic entities.

In LeGrand, 19-21198 (Bankr. E.D. Cal. March 29, 2022)

The creditor had a judgment of $21,000 against the debtor and turned the judgment over to a law firm for collection. The law firm served papers on the debtor's employer seeking to garnish the debtor's wages. The debtor filed chapter 7 bankruptcy, but the law firm did not withdraw the garnishment order. Even after receiving the discharge order, the law firm refused to withdraw the garnishment order. The debtor's lawyer faxed a letter to the law firm seeking return of the garnished funds and withdrawal of the garnishment, but the law firm ignored the letter. The law firm also ignored repeated telephone calls and messages from the debtor's lawyer. The debtor then served a contempt citation on both the law firm and the creditor. Bankruptcy Judge Christopher Klein of Sacramento, California, imposed $25,000 in punitive damages and $9,000 in actual damages jointly and severally against the law firm and its client. However, the law firm and client agreed the law firm would be solely responsible for paying the contempt sanction award.

Judge Klein also issued an order sua sponte directing the creditor and its law firm to show cause why they had not violated Rule 9011 which prohibits parties from misrepresenting the facts and law. Judge Klein found violations of Rule 9011 but exercised his discretion to not sanction the creditor. He noted the law firm failed to comply with the creditor's written guidelines, and the creditor asked the law firm to withdraw the garnishment order once it learned of the bankruptcy petition. Judge Klein also declined to impose further sanctions against the law firm for the violations of Rule 9011 because significant sanctions had already been imposed on the firm.

INDIANA STATE COURTS

Residences at Ivy Quad Unit Owners Assoc., Inc. v. Ivy Quad Dev., LLC, 179 N.E.3d 977 (Ind. 2022)

Ivy Quad is a sixty-plus-unit residential condominium complex in South Bend. In the fall of 2017, residents began to notice cracking concrete and water infiltration. The HOA hired an engineering firm, and the firm issued a report identifying a wide range of construction and design defects. The HOA filed suit against several parties involved in building the complex, alleging breach of the implied warranty of habitability and negligence. The defendant's filed a motion to dismiss the complaint, and the trial court granted the motion as to four of the defendants. The Court of Appeals accepted interlocutory appeal and reversed. The Supreme Court then granted transfer. Two of the defendants argued the implied warranty of habitability claim did not apply to them because they were not "builder-vendors." However, the Supreme Court rejected this

argument because the HOA's complaint sufficiently alleged the two parties took part in "the design, construction, development and sale of Ivy Quad." The Supreme Court also held the HOA's tort claims were not prohibited by the economic loss doctrine because the HOA did not solely allege pure economic losses.

Horizon Bank v. Huizar, 178 N.E.3d 326 (Ind. Ct. App. 2021)

Huizar bought a 2015 Ford Explorer for his wife. However, Huizar fell behind in payments, and Horizon contracted with Caputo and Armond to repossess the car. Caputo and Armond went to Huizar's house, but Huizar refused to let them take the car. Armond climbed into the unlocked car and locked the doors. He would not let the Huizars retrieve their personal property until they handed over the keys to the car. The Huizars eventually gave Caputo and Armond the keys and they took the car. Horizon sold the car at auction.

Huizar then sued Horizon alleging violations of the Deceptive Consumer Sales Act and the Indiana Uniform Commercial Code. The trial court ruled for Huizar but granted Horizon some relief following a motion to correct error. The trial court found Horizon breached the peace in violation of Indiana Code section 26-1-9.1-609. This provision provides that after default a secured party may attempt to repossess the property without judicial process as long as it does not breach the peace. If the defaulting party or someone in possession of the chattel refuses to give up the property, the secured party must immediately desist and seek remedy in court. The Court of Appeals held the trial court did not abuse its discretion in finding Horizon breached the peace. The trial court also concluded that by breaching the peace, Horizon failed to act in a commercially reasonable manner as required by the Indiana Uniform Commercial Code, and the court of appeals agreed. The Huizars received as damages ten percent of the amount financed, plus the finance charge, minus the debt deficiency. The Huizars were not entitled to emotional damages under the DCSA.

HOT TOPIC: NON-CONSENSUAL THIRD-PARTY RELEASES

In re Purdue Pharma LP, 21-07532 (S.D.N.Y. Dec. 16, 2021)

Judge Colleen McMahon of the United States District Court for the Southern District of New York vacated confirmation of Purdue Pharma's chapter 11 plan because the court concluded it had no statutory power to impose non-consensual releases of creditors' direct claims against non-debtors. Bill Rochelle described the decision as "perhaps the most outstanding and remarkable bankruptcy opinion of the decade."

Purdue Pharma is a privately-held company that was owned and controlled by the Sackler family until shortly before the company filed for bankruptcy. Purdue made billions in profits from selling Oxycontin. In 2007, Purdue pled guilty to one felony count of falsely marketing the opioid, and four company executives pled guilty to misdemeanor charges of misbranding.

However, Purdue continued to aggressively market the opioid, which helped to fuel the nationwide opioid epidemic that continues to wreak havoc across the nation.

By 2014, lawsuits against Purdue and the Sackler family members were mounting. Discovery led to allegations that some of the Sacklers set sales targets for the opioid that were higher than those recommended by company executives. The Sackler's also started distributing significant sums of the company's money to themselves around this time, a "sharp departure" from the company's past practice. In 2019, facing a "veritable tsunami of litigation," Purdue filed chapter 11 bankruptcy. The bankruptcy court then issued an injunction barring suits against the Sackler family, their trusts and other officers, directors, or employees. While the bankruptcy petition was pending, the company also pled guilty to violating the terms of its 2007 plea agreement.

In mediation, the Sacklers agreed to contribute $4.325 billion towards Purdue's chapter 11 plan. However, the contribution was conditioned upon ending the lawsuits against the family for all time. Purdue's creditors overwhelming approved the plan, and the bankruptcy court ultimately confirmed the plan but did so "with obvious reluctance." The US Trustee, several states, and pro se creditors filed an appeal of the confirmation order.

Judge McMahon held the Bankruptcy Code "does not confer on any court the power to approve the release of non-derivative third-party claims against non-debtors, including specifically" some of the releases in the Purdue plan. Judge McMahon found only one provision in the Bankruptcy Code, Section 524(g), which authorized injunctions barring third-party claims, and then "exclusively in cases involving . . . injuries arising from the . . . sale of asbestos." Looking outside the Second Circuit, Judge McMahon noted a circuit split. She noted the Fifth, Ninth, and Tenth Circuits "reject entirely the notion that a court can authorize non-debtor releases. The Fourth and Eleventh Circuit "have concluded that Section 105(a), without more, authorizes such releases." Judge McMahon also read the Sixth and Seventh Circuits as holding that Sections 105(a) and 1123(b)(6), "read together, codify something that they call a bankruptcy court's 'residual authority'" to impose releases. While the bankruptcy court reasoned its authority derived from a combination of Sections 105(a), 1123(a)(5), (b)(6), and 1129, Judge McMahon rejected this reasoning. She held that because the Code nowhere authorized releases of the type, the statutes also did not confer the necessary statutory power.

Judge McMahon's decision was appealed to the Second Circuit and oral argument was held in late April, 2022. After Judge McMahon's ruling, the Sacklers agreed, among other concessions, to contribute almost $2 billion more toward confirmation of Pharma's proposed Plan, but contingent upon their receiving the third-party releases. While the pertinent States attorneys general withdrew their Plan objections, apparently the U.S. Trustee's Office desires the Second Circuit to rule on the validity of the requested releases.. So, the matter is far from settled. However, the decision has obvious implications for other mass tort bankruptcies, including the Boy Scouts' chapter 11 petition in Delaware.

Bergen Retail Group Inc., 21-167 (E.D. Va. Jan. 13, 2022)

Judge David J. Novak of the Eastern District of Virginia held third-party, non-debtor releases must be approved by the district judge and must comply with the strictures of Federal Rule 23. Judge Novak also goes after forum shopping in his opinion. He noted the routine approval of third-party releases made certain divisions (including the Richmond division) venues of choice in "mega" bankruptcy cases. In a move that does not seem unrelated, the Eastern District of Virginia recently enacted a local rule: For chapter 11 debtors with more than $100 million in liabilities, the case will be assigned randomly to a bankruptcy judge in the district without regard to the division in which the petition was filed.

Bergan Retail Group, Inc. and its affiliates operated 2,800 retail stores nationwide, including Ann Taylor and LOFT stores. Before the debtor filed bankruptcy, a securities class action was initiated against the debtor in New Jersey. However, the debtor filed for bankruptcy before the class was certified. When the debtor filed chapter 11, it had about $1.6 billion in secured debt and around $800 million in unsecured debt.

The debtors sold its businesses in three sales and received $650 million. The chapter 11 plan provided that some secured creditors were repaid and set aside $7.25 million for unsecured creditors. The plan also included an extremely broad release designed to "cover any type of claim that existed or could have been brought against anyone associated with the Debtors as of the effective date of the plan." The bankruptcy court confirmed the plan, and the U.S. Trustee appealed to the district court.

Judge Novak observed that at the confirmation hearing, the bankruptcy court focused mostly on the release of claims against the former CEO and CFO in the class action, but the bankruptcy court nevertheless approved the broad release. Even though the plan allowed creditors and shareholders to "opt out" of the releases, Judge Novak held this was not sufficient. Of the 300,000 opt-out forms sent to members of the putative class in the class action, only 0.6 % opted out. Judge Novak noted the shareholders being asked to release their claims were not given any consideration for their release. He also noted other potential parties affected by the releases were not given the opportunity to opt-out. Judge Novak faulted the bankruptcy court for not engaging in the content-based analysis demanded by *Stern v. Marshall*, 564 U.S. 1058 (2011). He noted the bankruptcy court lacked the authority to adjudicate several of the released claims, including the class suit against the former CEO and CFO. Moreover, the bankruptcy court failed to perform the analysis for third-party releases adopted by the Fourth Circuit in *Behrmann v. Natl. Heritage Found. Inc.*, 663 F.3d 704 (4th Cir. 2011). Judge Novak went on to explain that the procedure for approval for third-party releases in chapter 11 plans should comply with Federal Rule 23, which governs class actions. Also, the creditors who are losing their right to sue should be involved in the negotiation of the plan and must be adequately represented.

Judge Novak held the bankruptcy court erred in adjudicating the *Stern* claims without the knowing and voluntary consent of the releasing parties. He vacated the confirmation order, treated the bankruptcy court's decision as a report and recommendation, and voided the order granting the third-party releases.

HOT TOPIC: STUDENT LOANS

Are private student loans dischargeable? It's Complicated.

See "Are Private Student Loans Dischargeable in Bankruptcy Court? An In-Depth Examination of Each Sub-Section of Section 523(a)(8) of the Bankruptcy Code," a three-part blog post by Dylan Contreas, an associate attorney at Gupta Evans and Ayres in San Diego.

***Brunner* Test Factors To Determine "Undue Hardship":**

To review, the *Brunner* test is the generally accepted standard courts apply to determine whether requiring a debtor to repay the debtor's student loans constitutes an "undue hardship" such that the loans are dischargeable under section 523(a)(8). The debtor must show:

> (1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.

Brunner v. N.Y. State Higher Educ. Servs. Corp. (In re Brunner), 831 F.2d 395, 396 (2nd Cir. 1987).

Homaidan v. Sallie Mae, Inc., 20-1981 (2nd Cr. 2021)

The Second Circuit held that private student loans are not excepted from discharge under Section 523(a)(8)(A)(ii) of the Bankruptcy Code, which excepts from discharge "an obligation to repay funds received as an educational benefit, scholarship, or stipend."

The debtor took out $12,000 in private student loans to help fund his education at Emerson College. Debtor filed for bankruptcy shortly after graduating and received a discharge order. After the bankruptcy case was closed, the private student loan servicer demanded repayment. The debtor believed the private student loans were discharged and reopened his bankruptcy proceeding to pursue adversary proceeding against the loan servicer. The district court held the private student loans were not excepted from the discharge.

The loan servicer argued before the Second Circuit that the private student loans constituted an "obligation to repay funds" which the debtor obtained for the purpose of advancing his education, thereby deriving from them an "educational benefit." However, the Second Circuit rejected this reading of the statute because it violated various rules of statutory construction. For one, "an obligation to repay funds received as an educational benefit" is an unconventional way to discuss a loan. Moreover, the word "loan" appears in subsections (i) and (iii). Further, if the Court were to adopt the loan servicer's interpretation of the statute, it would render other portions of the statute superfluous.

Loyle v. U.S. Dept. of Educ. (In re Loyle), 20-5073 (Bankr. D. Kan. Feb. 24, 2022)

The Loyles received a no-asset chapter 7 discharge and reopened their case to discharge student loans they both had incurred that had grown to $435,000. They had 5 kids between the ages of 9 and 18. The husband was a chiropractor and the wife was a high school teacher. Husband incurred debt to become a chiropractor, and he incurred more debt by attending a medical school in the Caribbean. However, while he graduated from medical school, he was barred from practicing medicine in the United States because he did not get accepted into a residency program.

The couple's adjusted gross income was about $120,000, including $5,500 a year in federal tax refunds attributable to child tax credits. The bankruptcy court applied the *Brunner* standard. Regarding the first factor, the bankruptcy court found it was met because the couple's adjusted monthly disposable income was insufficient to cover interest payments on the loan. The bankruptcy court found the second Brunner factor was satisfied because neither husband nor wife were likely to receive increased income. The bankruptcy court also found the third Brunner factor was met because the couple had made $34,000 in payments over the years and took advantage of income-based repayment programs and deferrals.

In determining how much of the loans to discharge, Judge Mitchell L. Herren explained: "Of course, all of the computational gymnastics in this opinion are simply an effort to objectively predict a very unpredictable future for the . . . family." Taking into account surging inflation, unexpected expenses, the need to replace aging cars, and the forthcoming loss of the child tax credits, Judge Herren found that the couple "have monthly disposable income available for student loan payments over the future years in the amount of $1,250" a month. Judge Herren discharged all but $225,000 of the student loan debt and ordered that the remaining sum incur no interest.

Wolfson v. DeVos (In re Wolfson), 19-50717 (Bankr. D. Del. Jan. 14, 2022)

In opinion discharging $100,000 in student loans, Bankruptcy Judge Laurie Silverstein of Delaware noted disagreement with the "judicial gloss" that results "in a test that is far more onerous than the one first articulated in *Brunner*." She explained that allowing lifelong student loan debt to escape discharge absent an onerous standard of undue hardship conflicted with the promise of a "fresh start" that the Bankruptcy Code offers.

The debtor was a 34-year-old unmarried man with no children. He incurred the loan debt to attain an undergraduate degree. The debtor suffered from epileptic seizures, and his post-graduation work consisted of only low-paying, sporadic jobs. He was unemployed at the time of trial, and he had applied for approximately 200 jobs without receiving an offer. He testified he spent about two-three hours a day online looking for jobs. The debtor was reliant on his father for financial support. The debtor filed a chapter 7 petition, received his discharge, then filed a complaint to discharge his student debt.

Regarding the first prong of the *Brunner* test, Judge Silverstein concluded the debtor's income alone was "insufficient to maintain a minimal standard of living." She did not count the "third-party charity" the debtor received from his father as income. Judge Silverstein concluded that the second prong of the *Brunner* test was met because the debtor's loans had matured and the repayment period had already ended. She concluded as a matter of law that the debtor was "unlikely ever to receive income sufficient to pay his student loan debt." Regarding the third prong of the *Brunner* test, Judge Silverstein concluded the debtor had shown good faith attempt to pay the loans by his efforts to find a job even though he had not made any payments on his loans. Judge Silverstein discharged the debt. While the Department of Education initially indicated it intended to appeal to the district court, the Department quickly reversed that decision.

COMING ATTRACTIONS

Update on Boy Scouts Bankruptcy Plan

Bankruptcy Judge Laurie Silverstein "kinda" confirmed the Boy Scouts' proposed chapter 11 plan, unless you are Mormon. The chapter 11 plan includes compensation for approximately 82,200 claims of sexual abuse. The plan included a $250 million sex-abuse settlement with the Church of Jesus Christ of Latter-day Saints, but that portion of the plan was removed after being rejected by Judge Silverstein. The church will now be treated as one of the many other troop sponsors that did not opt out of the plan and did not settle with the Boy Scouts.

Starting in the 1920s until 2019, all Mormon boys were automatically enrolled in the Boy Scouts at age 8. Because the Boy Scouts were so intertwined with the Mormon church, it is hard to distinguish scouting-related abuse claims from other abuse claims because oftentimes the youth and the perpetrator were both church members and involved in scouting. The settlement therefore included releases shielding the church from liability, but Judge Silverstein rejected the settlement because it would have also shielded the church from some sex abuse claims unrelated to scouting.

NexPoint Advisors LP v. Highland Capital Management LP (In re Highland Capital Management LP) 21-10449 (5th Cir. Aug. 19, 2022)

The Fifth Circuit reiterated its categorical preclusion of non-debtor third party releases, but it approved a workaround measure that effectively accomplishes the same thing.

The chapter 11 debtor was a Dallas-based investment firm which managed billion-dollar publicly traded investment portfolios. The CEO stepped down and the creditors' committee appointed three independent directors to serve as "quasi-trustee." The former CEO was quite litigious. He filed numerous objections, appeals, requests for writs of mandamus, etc. to try to frustrate the bankruptcy proceedings. The former CEO was eventually barred from filing any further claims without first receiving permission from the bankruptcy court, and the debtor's chapter 11 plan was confirmed by the bankruptcy court. The plan included an exculpation provision shielding

the debtor and others from lawsuits. The provision was designed to be enforced by injunction and a gatekeeper (i.e., litigation cannot be commenced without Court approval) provision. The gatekeeper provision prohibited the former CEO or others from filing any additional claims against the debtor and its employees, the new CEO, the debtor's sole general partner, the independent directors, the creditor's committee, the successor entities and oversight board, professionals retained in the case, and all related persons, without first seeking the court's permission. The former CEO and others appealed.

Circuit Judge Stuart Kyle Duncan initially held the appeal was not equitably moot even though the plan had been consummated. Judge Duncan also ruled the provisions exculpating the debtor, the creditor's committee and its members for conduct within the scope of their duties, and the independent directors could stay. However, Judge Duncan excised the exculpation provisions protecting the debtor's employees, the new CEO, the general partner, the trust created by the plan, the professionals for the debtor and the committee, the plan's oversight board, and related persons as unauthorized non-debtor third party releases. However, Judge Duncan noted the injunction and gatekeeper provisions prohibiting suit against such entities without the bankruptcy court's permission were lawful given the bankruptcy court's gatekeeping function. Judge Duncan also noted several of the excised parties were protected from suit by previous orders issued in the case which became final.

3M Earplug MDL Injunction Order/Aereo Technologies Bankruptcy

A class of over 200,000 veterans is pursuing multidistrict litigation against 3M alleging its military earplugs caused hearing loss. United States District Court Judge M. Casey Rodgers of Pensacola, Florida is overseeing the multidistrict litigation ("MDL"), and she recently issued an order and findings unfavorable to 3M, barring and enjoining 3M from attacking her rulings in any other forum.

Aearo is a wholly-owned subsidiary of 3M. The company is headquartered in Indianapolis and developed early prototypes of the earplugs, but it was a non-operating subsidiary until 3M recently revived it on the eve of filing for bankruptcy. After 3M transferred certain liabilities (including the veterans' claims) to Aearo through a funding agreement, Aearo filed for bankruptcy in Indianapolis, and the case is currently pending before Chief Bankruptcy Judge Jeffrey Graham. 3M and Aearo believe resolving the veterans' claims in the bankruptcy court will lead to a more efficient and equitable resolution of the veterans' claims than the MDL. Therefore, Aearo requested the bankruptcy court stay further litigation against 3M respecting such claims while Aearo proceeds through bankruptcy. However, the veterans objected and wished to continue the MDL litigation. Judge Rodgers' order could have meant 3M faced the prospect of contempt if it attempted to relitigate—or provide funds to Aearo to relitigate—the MDL judge's orders in the Aearo Technologies LLC bankruptcy. The effect of this order, most definitely, confused the legal community. However, on August 26, 2022, Judge Graham denied Aearo's request for stay, indicating for various reasons the MDL litigation could continue outside bankruptcy. Aearo indicated it will appeal the court's ruling.

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