

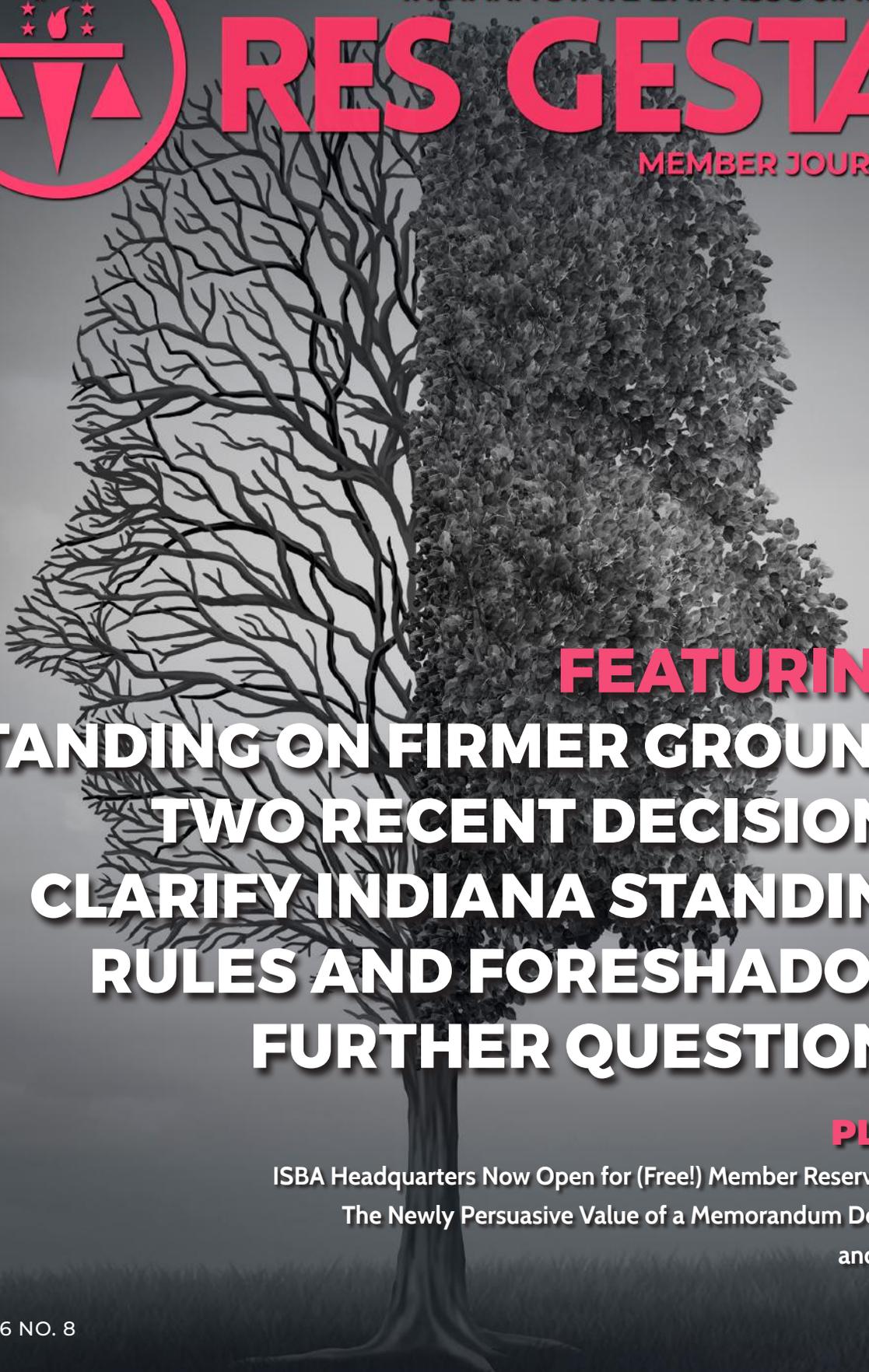
APRIL 2023

INDIANA STATE BAR ASSOCIATION



# RES GESTÆ

MEMBER JOURNAL



**FEATURING:**  
**STANDING ON FIRMER GROUND:  
TWO RECENT DECISIONS  
CLARIFY INDIANA STANDING  
RULES AND FORESHADOW  
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VOL. 66 NO. 8

APRIL 2023



## COVER STORY

12

### STANDING ON FIRMER GROUND

*Standing on Firmer Ground: Two Recent Decisions Clarify Indiana Standing Rules and Foreshadow Further Questions*

By Kian Hudson

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# President's Perspective

## EVERY DAY IS LAW DAY WHEN YOU'RE A LAWYER

By Amy Noe Dudas

### PRESIDENT'S PERSPECTIVE

**M**ay 1 is Law Day, so let's talk about the Rule of Law.

President Dwight D. Eisenhower established Law Day in 1958 as "a day of national dedication to the principles of government under law."<sup>1</sup> As lawyers, we should observe and celebrate this day as one that underlies the fundamental core of our professional being. In fact, the rules that govern whether we get to be lawyers and continue practicing seem to mandate it.

As I pointed out last month, Rule 12 of the Indiana Rules of Admission to the Bar and the Discipline of Attorneys requires all applicants to the Indiana bar demonstrate "good moral character" and "fitness to practice law."

Good moral character is about being honest, trustworthy, and fair. It includes having respect for other people's rights and, most importantly to this discussion, for the judicial process. Abuse of legal process and violation of a court order are but two considerations in determining character and fitness.<sup>2</sup> Character and fitness interviewers are looking for evidence the applicant "has adequate knowledge of the standards and ideals of the profession."<sup>3</sup>

We all took an oath to, among many other things, support the United States and Indiana

Constitutions as well as to respect courts and judicial officers.<sup>4</sup>

But it's the Preamble to the Indiana Rules of Professional Responsibility that really makes it clear the "standards and ideals of the profession" referenced above include, first and foremost, upholding and protecting the rule of law. We have a "special responsibility for the quality of justice." After all, "legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority." And ensuring ongoing public participation and support is *a really big part of our job*, what the Preamble calls our "professional calling."<sup>5</sup>

Not only that, maintaining the independence of our profession is crucial to preserving the rule of law, as it enables us to challenge abuses of legal authority, as we are called to do while, at the same time, protecting and preserving our systems of justice. It is too dangerous to leave the rule of law up to anyone who is *not* bound by these mandates. After all, "lawyers play a vital role in the preservation of society."<sup>6</sup>

### LAWYERS PLAY A VITAL ROLE IN THE PRESERVATION OF SOCIETY, Y'ALL.

So, how are we doing?





Each year, the World Justice Project (WJP) ranks 140 countries' adherence to the rule of law in its *Rule of Law Index*, using policy outcomes as its measures, rather than the written law itself. WJP asserts the rule of law is "foundational to peace, justice, respect for human rights, effective democracy, and sustainable development."<sup>7</sup>

The index measures two core principles made up of four factors each. The first principle is limitations

(!!) 27 (2021). In 2021, the United States' adherence to the rule of law was ranked lower than Portugal, Uruguay, Latvia, the Czech Republic, Korea, Hong Kong, Lithuania, and Singapore, to name a few. (Denmark, by the way, has topped the list every year since 2015. Good for the Danes.) For 2022's Index, we've inched up past Portugal to get to 26 again.<sup>12</sup>

There are some notable dips in our adherence to the rule of law over the past seven years. When it comes

**"Not only that, maintaining the independence of our profession is crucial to preserving the rule of law, as it enables us to challenge abuses of legal authority, as we are called to do while, at the same time, protecting and preserving our systems of justice."**

on power, both by the state and by individuals and private entities.<sup>8</sup> Factors include constraints on government powers, absence of corruption, open government, and fundamental rights.<sup>9</sup> The second principle is "whether the state limits the actions of members of society and fulfills its basic duties towards its population so that the public interest is served, people are protected from violence, and all members of society have access to dispute settlement and grievance mechanisms."<sup>10</sup> Factors here include order and security, regulatory enforcement, civil justice, and criminal justice.<sup>11</sup>

The United States ranks 26 out of 140 countries. Here's how we've done since 2015: 19 (2015); 18 (2016); 19 (2017-18); 20 (2019); 21 (2020); and

to holding government officials accountable, the U.S. dropped from 13 in 2016 to 28 in 2022. In terms of respecting fundamental rights (as recognized in the United Nations Universal Declaration of Human Rights), the U.S. enjoyed a high of 21 in 2016 and a shocking low of 42 in 2021 (we've clawed our way back up to 37). We ranked 26 in ensuring the security of persons and property in 2015 and fell all the way to 38 in 2021 (31 in 2022). How do we do as far as the accessibility and affordability of the civil justice system? We ranked 14 in 2015 but dropped to 41 in 2021 (we've rebounded a bit to 36).<sup>13</sup> It's not just us, though; rankings dropped in 61% of the countries surveyed from 2021 to 2022.

So, colleagues, are we holding up our end of the bargain when it comes to

our vital role in the preservation of society? Some argue this trend has been brought about by an increasing interest in autocratic-leaning political philosophies, which are, of course, not conducive to maintaining a democratic republic such as ours. It's been noted that "[a]n essential test for democracies is not whether [extremist demagogues] emerge but whether [we] work to prevent them from gaining power in the first place..."<sup>14</sup>

Lawyers serve as an important check and balance on those in power, and Law Day should remind us we were admitted to practice law based on our demonstrated knowledge of the standards and

ideals of this profession, we took an oath to support our federal and state systems of government, and we are duty-bound to challenge government overreach while protecting and preserving the rule of law.

Crucially, find a respectful way to help your friends and neighbors sort through all the noise. 🙏

**FOOTNOTES:**

1. American Bar Association, *History of Law Day*, American Bar Association (Feb. 18, 2023), <https://bit.ly/3Z2i9ze>.
2. Ind. Admission and Discipline Rule 12(2).

3. Admis. Disc. R. 12(4).
4. Admis. Disc. R. 22.
5. Ind. Professional Conduct Rule Preamble
6. *Id.*
7. World Justice Project, *Rule of Law Index 8* (2022).
8. *Id.* at 13.
9. *Id.* at 15.
10. *Id.* at 13.
11. *Id.* at 15.
12. World Justice Project, *WJP Rule of Law Index* (Feb. 18, 2023), <https://bit.ly/418WXJs>.
13. *Id.*
14. Steven Levitsky & Daniel Ziblatt, *How Democracies Die* 7 (2019).

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By Res Gestae Staff



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# **STANDING ON FIRMER GROUND:**

## **TWO RECENT DECISIONS CLARIFY INDIANA STANDING RULES AND FORESHADOW FURTHER QUESTIONS**



**By Kian Hudson**

Someone violated a legal rule, and the law gives you a cause of action to sue for the violation. Do you have all you need to get into court?

For many years, the answer in federal court has been clear: Not quite. Since at least 1975, the U.S. Supreme Court has held that, because Article III of the U.S. Constitution extends the federal judicial power only to certain “cases” and “controversies,” every plaintiff invoking the jurisdiction of federal courts must establish “standing” by showing “some threatened or actual injury resulting from the putatively illegal action.”<sup>1</sup> The Court’s 1992 decision in *Lujan v. Defenders of Wildlife*<sup>2</sup> sets out the well-established tripartite framework for making this demonstration: A federal-court plaintiff must show (1) an “injury in fact” (which in turn requires the injury be “concrete, particularized, and actual or imminent”); (2) “that the injury was likely caused by the defendant;” and (3) “that the injury would likely be redressed by judicial relief.”<sup>3</sup> And the Court’s recent decision in *TransUnion v. Ramirez* confirms federal courts must dismiss any suit that fails to satisfy these three threshold requirements—even if Congress has granted the plaintiff an express statutory cause of action.<sup>4</sup>

The degree to which these sorts of requirements apply in Indiana state courts, however, has long been considerably less certain. As the Indiana Supreme Court has repeatedly observed, “the Indiana Constitution does not contain” the “U.S. Constitution’s Article III ‘case or controversy’ requirement,” and the Court has for that reason declined to incorporate federal standing requirements wholesale into Indiana law.<sup>5</sup> And though the Court has held the Indiana Constitution’s “explicit separation of powers clause fulfills a similar function,” it has left open many questions concerning where Indiana’s standing rules parallel—and where they depart—from federal law.<sup>6</sup> For many years, for example, Indiana law has diverged from federal law in recognizing what the Indiana Supreme Court has referred to as “taxpayer standing” and “public standing”—but it has not explained precisely how these doctrines differ from federal law or even whether the two doctrines are distinct.<sup>7</sup>

There is good news for Hoosier courts and litigants, however: The Indiana Supreme Court’s 2022 decisions in *Solarize Indiana Inc. v. Southern Indiana Gas & Electric Co.*<sup>8</sup> and *City of Gary v. Nicholson*<sup>9</sup> have recently

answered two major questions concerning these issues. And even where the decisions do not resolve existing uncertainty in Indiana law, they clarify the questions that remain.

### ANSWERED QUESTIONS

Most importantly, *Solarize* and *Nicholson* establish that Indiana follows the federal rule, reiterated in *TransUnion*, that “standing requires a concrete injury even in the context of a statutory violation” and even where there is a legislative “cause of action.”<sup>10</sup> As *Nicholson* puts it, a plaintiff’s possession of a “statutory cause of action. . . does not mean the person has necessarily sustained an injury essential to obtaining judicial relief.”<sup>11</sup> That is, a statute by itself

will “not confer standing without an injury-in-fact requirement.”<sup>12</sup> The Indiana Court of Appeals has already begun applying this rule, recognizing an “allegation of injury to the party invoking standing is a constitutionally irreducible minimum requirement.”<sup>13</sup>

This rule sharpens the sometimes-obscure distinction between

constitutional and statutory “standing.” While the Indiana Supreme Court has for many years held that constitutional separation-of-powers principles require plaintiffs to establish standing, it has also used “standing” to refer to statutory rules that prescribe who may sue for statutory violations and who may seek judicial review of administrative decisions.<sup>14</sup> For that

**"And though the Court has held the Indiana Constitution's 'explicit separation of powers clause fulfills a similar function,' it has left open many questions concerning where Indiana's standing rules parallel—and where they depart—from federal law."**



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reason, it had not always been clear whether statutory “standing” rules *replace* constitutional requirements or instead merely *supplement* them.

In the recent *Holcomb v. City of Bloomington* case, for example, the city brought a constitutional challenge to a state annexation law, and Governor Holcomb argued constitutional standing rules barred the city from bringing the “declaratory judgment action against him because he [did] not enforce” the law and thus had not caused any injury the city may have suffered.<sup>15</sup> The Court rejected this argument, and Justice Goff’s opinion announcing the judgment (joined by Chief Justice Rush) concluded the “case does not turn on broad principles of standing.”<sup>16</sup> Rather, Justice Goff concluded, it was sufficient the city met the requirements of Indiana’s declaratory judgment statute, which merely requires a plaintiff

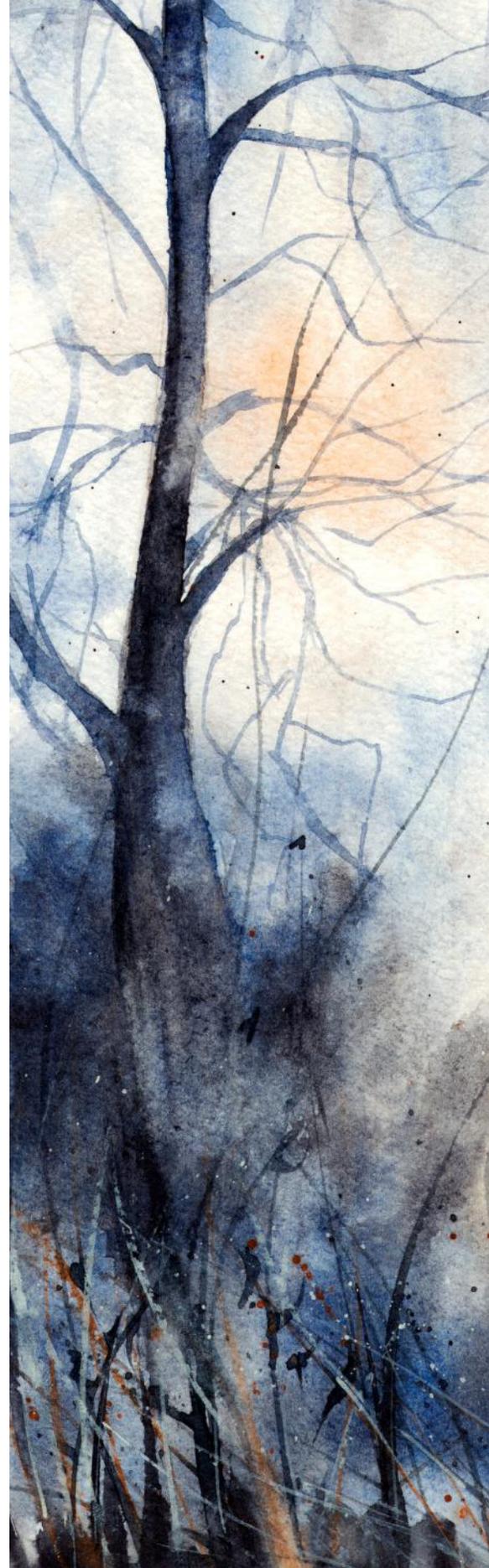
show “that the ‘ripening seeds’ of a controversy exist and that the plaintiff has ‘a substantial present interest in the relief sought.’”<sup>17</sup> *Solarize* and *Nicholson* now confirm, however, that plaintiffs must always meet the minimum *constitutional* standing requirements—even if they satisfy other requirements set out by the applicable statute.

As the Court put it in *Solarize*, “the legislature cannot expand—or restrict—beyond constitutional limits the class of persons who possess standing.”<sup>18</sup> The question there was whether an organization that promoted solar power could seek judicial review of an Indiana Utility Regulatory Commission order setting the rates at which an Indiana utility would purchase electricity, including solar power. The Court explained Indiana’s “common-law standing rule, which derives from our state constitution’s separation-of-powers clause,” requires plaintiffs “to demonstrate ‘a personal stake in the outcome of the litigation and. . . show that they have suffered or were in immediate danger of suffering a direct injury as a result of the complained-of conduct.’”<sup>19</sup> The Court further noted “in certain circumstances, the legislature has established standing requirements,”<sup>20</sup> and it explained the statute applicable in *Solarize* “conveys the same meaning as the common-law rule.”<sup>21</sup> It accordingly applied that rule to bar judicial review, explaining the would-be challenger had “not shown a personal stake” in the rate order or “a demonstrable injury,” and had “not established that any injury or potential injury was the direct result of the [Commission’s] decision.”<sup>22</sup>

The Court reaffirmed this point a few months later in *Nicholson*,

which rejected an attempt to enforce Indiana’s “sanctuary city” statute—which authorizes any “person lawfully domiciled in Indiana” to “bring an action to compel” compliance.<sup>23</sup> The plaintiffs acknowledged they had “alleged no injury” and “argue[d] instead that lack of injury [was] ‘irrelevant’” on the grounds they had “statutory and public standing.”<sup>24</sup> In a unanimous opinion authored by Justice Slaughter, the Court squarely rejected this argument. It explained *Solarize*, “[a]s the Supreme Court did in *Lujan*,... held a statute can confer a party with standing but *only* if the statute requires an injury.”<sup>25</sup> And because the “sanctuary city” statute “has no injury requirement” it “cannot meet our constitutional requirements for conferring standing.”<sup>26</sup> The plaintiffs were thus left with their “public standing” argument, which the Court quickly dispatched: The plaintiffs alleged no injury, and while the “public-standing doctrine is unsettled in Indiana, at a minimum it requires some type of injury.”<sup>27</sup>

This brings us to the second question these decisions answer—to what extent, if at all, are taxpayer standing and public standing distinct doctrines? This question was raised in 2019 by Justice Massa’s lead opinion (joined by Justice Goff) in *Horner v. Curry*, where he observed the Court had sometimes distinguished the two doctrines and sometimes conflated them, with the resulting “doctrinal obfuscation” leading “to some confusion among our courts on the precise contours of standing.”<sup>28</sup> Justice Massa ultimately concluded the doctrines are distinct, on the ground that taxpayer standing “has at least some ‘connection to an injury-in-fact, however tenuous it may be,’” while public standing—



to the extent it is recognized at all—“typically ‘has no basis in, and cannot be traced to, a particularized injury-in-fact.’”<sup>29</sup>

As noted, however, *Nicholson* confirms that even public standing, like taxpayer standing, “requires some type of injury.”<sup>30</sup> *Nicholson* thus offers the beginning of a path out of the taxpayer/public standing morass. It now appears both taxpayer and public standing are consistent with “ordinary” standing rules in requiring an actual injury—though perhaps the doctrines recognize injuries somewhat less “concrete” than otherwise permitted. Both doctrines’ principal departure from such rules instead seems to lie in their jettisoning of the “particularized injury” requirement: Unlike federal standing law, these

doctrines permit plaintiffs to sue even where their injury is shared by all or most other members of the public.<sup>31</sup>

Yet even on this score many of the Indiana cases applying these doctrines are arguably *consistent* with federal standing doctrine. To the extent plaintiffs’ injuries are shared with other residents of a political subdivision, rather than all residents of the entire state, there is a reasonable argument that their injuries *are* particularized.<sup>32</sup> There is, for example, a fairly extensive history of state-court “mandamus actions against local and discrete authorities, brought by residents of the locality in question,” and some scholars have argued these actions do not necessarily contradict modern federal standing doctrine;

after all, “members of a municipal corporation have interests in the corporation’s conduct that are not shared by members of the public at large.”<sup>33</sup>

## REMAINING ISSUES

In short, while *Solarize* and *Nicholson* clarify important standing issues, there are still plenty of outstanding questions. For example, does public standing exist as a separate doctrine at all? That is, can plaintiffs seeking to vindicate public rights *outside* the tax context establish standing by demonstrating *non-particularized* injuries? And to what extent do either or both doctrines permit “less concrete” injuries than standing doctrine normally requires?

More generally, to what extent do Indiana’s standing rules incorporate a “concreteness” requirement in the first place? As *Solarize* explains, Indiana standing rules resemble federal doctrine in demanding the plaintiff “have a *personal* stake in the outcome of the litigation and... show that they *have suffered* or were in *immediate danger* of suffering a *direct injury* as a result of the complained-of conduct.”<sup>34</sup> This language seems to impose something like the particularity and actual/imminent elements of federal law’s injury-in-fact requirement, as well as federal law’s causation requirement. But it leaves unclear the extent to which Indiana follows federal law in imposing a “concrete-harm requirement”—a requirement the federal appellate courts have recently and repeatedly applied to reject harms for which Congress created express causes of action.<sup>35</sup>

Further, beyond injury-in-fact and causation, to what extent do

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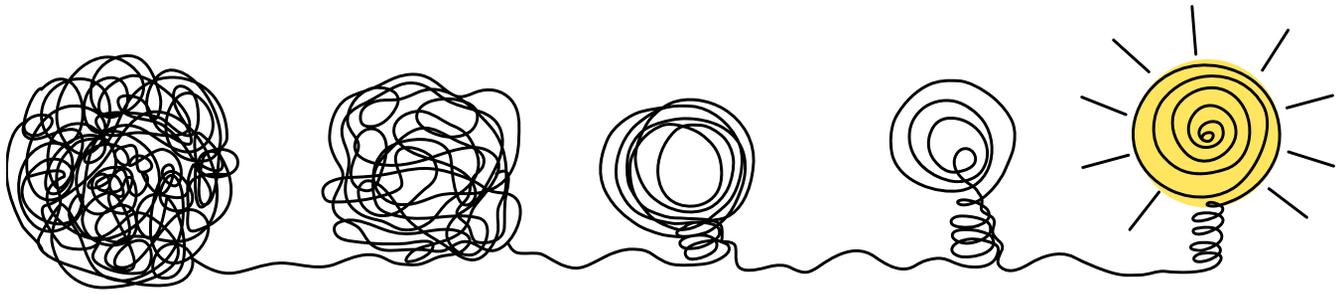
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Indiana standing rules include a redressability requirement? The Court did not need to resolve this question in *Solarize*, but the majority and dissenting opinions briefly addressed it, taking contradictory positions. Chief Justice Rush's four-justice majority opinion apparently took the view that Indiana standing rules do *not* require redressability, on the ground that "redressability" arises from the U.S. Constitution's Article III 'case or controversy' requirement."<sup>36</sup> Justice Slaughter's dissent, meanwhile,

Finally, consider whether Indiana's constitutional standing rules are "jurisdictional" such that a plaintiff's standing can be questioned at any time, including by the court *sua sponte*. Federal law gives a settled "yes," to this question: While constitutional standing rules limit the jurisdiction of federal courts and therefore obligate courts at every stage to ensure the plaintiff's standing, *statutory* "standing" arguments have "nothing to do" with jurisdiction and thus *can* be waived and forfeited.<sup>40</sup>

a court decide the substantive issues of a dispute"—a characterization that arguably implies courts must *always* assure themselves of standing.<sup>41</sup> Yet *Solarize* also seems to suggest standing is subject to waiver: In explaining why the Court addressed standing even though the issue was first raised at oral argument, the decision notes the ordinary rule "that a party generally waives an issue that was not raised below," and—without mentioning jurisdiction—concludes the issue was not waived because following oral argument the Court "asked for briefing on standing and the parties provided it."<sup>42</sup>

The Court will soon have opportunities to address these lingering questions—questions that, while technical, have real, practical significance. Indeed, as Justice Massa observed in *Horner*, they "implicate[] the constitutional foundations on which our system of government lies."<sup>43</sup> By requiring plaintiffs to point to a real injury caused by the defendant and redressable by the court, standing doctrine confines courts to their constitutional role—"resolving concrete disputes between private litigants"—"while leaving questions of public policy to the legislature and the executive."<sup>44</sup> Hoosiers can be confident the Court

**"Nicholson thus offers the beginning of a path out of the taxpayer/public standing morass. It now appears both taxpayer and public standing are consistent with 'ordinary' standing rules in requiring an actual injury—though perhaps the doctrines recognize injuries somewhat less 'concrete' than otherwise permitted."**

argued the Court should "insist that a party seeking to invoke the judicial power stands to benefit from a favorable judgment."<sup>37</sup> And the Indiana Court of Appeals seems conflicted as well: Some decisions discuss standing without mentioning redressability,<sup>38</sup> while others expressly require that "there must be some redressable injury."<sup>39</sup>

Indiana law, however, is not so clear. As noted, Indiana courts have not always neatly distinguished between constitutional and statutory standing, which has in turn led to a lack of clarity regarding whether either or both issues are subject to waiver and forfeiture. *Solarize*, for example, recognizes standing is a "threshold issue" that "determines whether a litigant is entitled to have

**Continued on page 36...**

# ISBA ENGAGES IN NATIONAL CONVERSATION ABOUT INDEPENDENCE OF THE LEGAL PROFESSION

By Steve Hoar

*Pictured is the Indiana delegation to the 2023 Midyear Meeting of the ABA House of Delegates with the Chief Justice of Indiana, Loretta Rush, who addressed the House in her role as President of the Conference of Chief Justices. From left to right are Amy Noe Dudas, ISBA President and Delegate; Shontrai Irving, ISBA Delegate; Steve Hoar, ISBA Delegate; Hon. Loretta Rush, Chief Justice of Indiana; MaCharri Vorndran-Jones, IndyBar Delegate; Melissa Avery, Indiana State Delegate; Hon. Tom Felts, ISBA President Elect and Delegate; and Elliott Hostetter, ISBA Delegate.*



A great debate is currently underway within the American legal community about the independence of the profession. Your Indiana State Bar Association, through its delegation to the American Bar Association's House of Delegates, is participating in this national conversation.

For over 100 years, beginning with the ABA's Canons of Professional Ethics in 1908, professional independence has been a core value of the legal profession. One way of protecting professional independence is the prohibition of lawyers sharing fees with nonlawyers and nonlawyer ownership interests in law firms.

This prohibition is currently embedded in ABA Model Rule of Professional Conduct 5.4, which states that lawyers shall not, except in certain limited circumstances, share fees with nonlawyers; shall not form partnerships for the practice of law with nonlawyers; and shall not practice law through an entity in which a nonlawyer has an ownership interest. Indiana Rule of Professional Conduct 5.4 is substantially similar to its ABA Model Rule counterpart.

The rationale behind Rule 5.4 is that lawyers have a duty to do what's in the best interest of their clients. If nonlawyers were to have economic interests in law practices, then lawyers' duties to their clients could conflict with what's best for the law firms'

investors. Lawyers are required by the Rules of Professional Conduct to act in their clients' best interests while nonlawyers are not bound by those Rules. Through Rule 5.4, its advocates argue, lawyers maintain their professional independence to always put their clients first, without interference from outside economic considerations.

In contrast to this longstanding principle is a problem of more recent origin: the surge of unrepresented litigants and others who need legal services but are unable to afford them. Statistics from recent studies highlight this crisis of the unrepresented. Eighty percent of low-income Americans, as well as many in the middle class, do not receive adequate assistance in civil legal matters such as debt collection, eviction, foreclosure, and child custody and support. Three-quarters of civil matters have at least one unrepresented party. To provide even one hour of counsel for each civil justice need, every lawyer in America would have to perform 900 hours of pro bono work per year, an obviously unattainable amount.

With the purpose of narrowing this gap in access to justice, some have suggested relaxing Rule 5.4 to allow nonlawyers to form partnerships with lawyers and invest in law firms. The idea is that in the age of Rocket Lawyer and LegalZoom, lawyers need access to capital to be able to invest in technological innovations that will allow them to serve clients more efficiently.

Some states have already taken steps down this path. Arizona repealed its version of Rule 5.4 in 2020. Arizona now licenses "Alternative Business Structures," which are entities that provide legal services and in which

nonlawyers may have an equity stake. Also in 2020, Utah revised its Rule 5.4 and instituted a "regulatory sandbox" through which law firms may be owned by nonlawyers. LegalZoom is an Arizona Alternative Business Structure. Rocket Lawyer is in the Utah Sandbox.

Other states have considered, but rejected, similar proposals. The Florida Supreme Court recently considered a proposal to test nonlawyer ownership of law firms and fee sharing with nonlawyers. In opposition, the Florida State Bar argued that the proposal would compromise the independence of



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the profession and create conflicts of interest between lawyers, who must obey ethical rules, and unregulated nonlawyers, who would be focused on increasing profits. The Florida Supreme Court declined to proceed with the proposal. In California, the State Bar convened a working

**"The Resolution reaffirmed that sharing fees with nonlawyers and nonlawyer ownership of law firms are inconsistent with the core values of the legal profession."**

group to examine the possibility of nonlawyer ownership of law firms and fee sharing. In response, the California State Assembly passed a bill halting the activities of the working group.

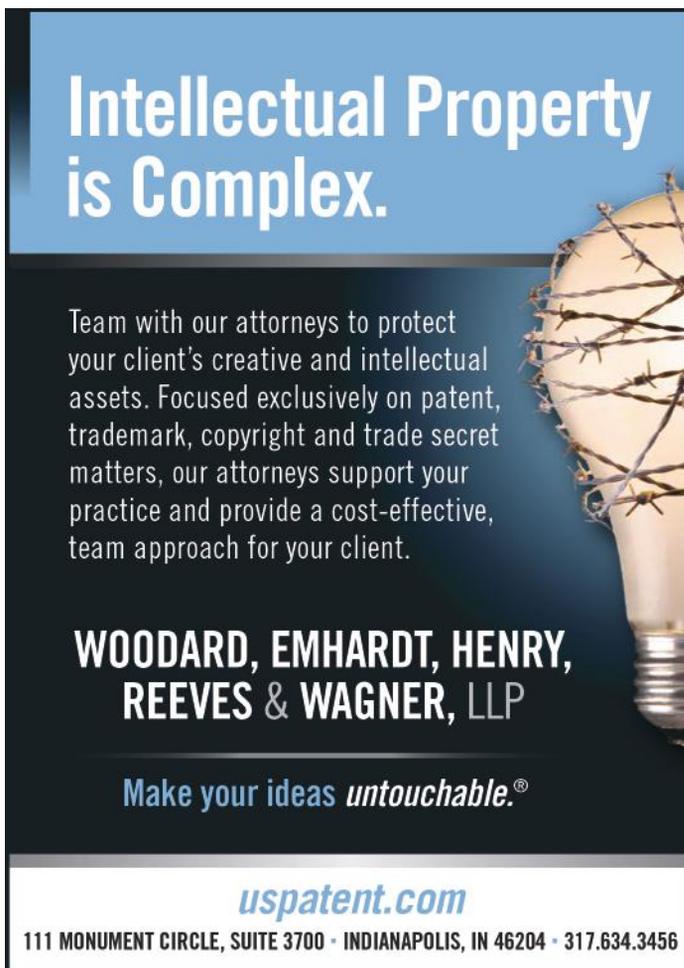
This debate has taken place here in Indiana as well. In 2016, the ISBA House of Delegates considered a proposal to recommend that nonlawyers be allowed to own up to 49% of law firms. A lively debate took place, with many speakers expressing concern about the potential for conflict between the interests of clients and the interests of nonlawyer investors, and about the inapplicability of ethical rules to nonlawyer investors. The ISBA House voted down the proposal.

At its last Annual Meeting, the ABA House of Delegates took up the issue in the form of Resolution 402. The Resolution reaffirmed that sharing fees with nonlawyers and nonlawyer ownership of law firms are inconsistent with the core values of the legal profession. The proponents of Resolution 402 believed such a reaffirmation was necessary because there had been some initiatives within the ABA that encouraged nonlawyer involvement in the provision of legal services, to the detriment of the independence of the profession. Notably, Resolution 402 also stated that it did not diminish existing ABA policy, established in a 2020 House of Delegates resolution, encouraging U.S. jurisdictions to consider innovative approaches to the access to justice crisis. The ABA House passed Resolution 402.

Resolution 402 is but the latest installment in the debate about professional independence and innovation in the practice of law. As the access to justice gap persists and technology advances, the debate will undoubtedly continue. Your ISBA delegation stands ready to engage in the debate, taking into careful consideration the interests of Indiana lawyers, the legal profession, and the administration of justice. 

*Indiana's Delegation to the ABA House of Delegates is led by Melissa Avery, the Indiana State Delegate. ISBA Delegates are Amy Noe Dudas, Hon. Tom Felts, Steve Hoar, Elliott Hostetter, and Shontrai Irving.*

*Steve Hoar is a partner with the Evansville law firm Kahn, Dees, Donovan & Kahn, LLP, where he focuses on business litigation. In addition to serving as a delegate for the ISBA in the ABA House of Delegates, Steve also chairs the ISBA's Membership Committee.*



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# THE NEWLY PERSUASIVE VALUE OF A MEMORANDUM DECISION

By Kyle Gillaspie



A common question among practitioners is whether they may cite memorandum decisions issued by the Court of Appeals of Indiana. The answer to that question is controlled by Appellate Rule 65. Prior to January 1, 2023, Appellate Rule 65(D) provided that memorandum decisions “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.”

For years, citation of memorandum decisions was rare because those decisions were not widely available. But that changed in 2006 when the Court of Appeals began posting its memorandum decisions on its website. At that same time, memorandum decisions also became available on websites like Westlaw and LexisNexis. Thereafter, citations to memorandum decisions increased. When counsel cited a memorandum decision, the Court of Appeals would generally admonish counsel that the citation was a violation of Appellate Rule 65(D) and warn that such citations would be stricken. *See Gonzalez v. Evans*, 15 N.E.3d 628, 639 n.7 (Ind. Ct. App. 2014), *trans. denied*.

However, effective January 1, 2023, Appellate Rule 65 was amended. The amended rule now states that “a memorandum decision issued on or after January 1, 2023, may be cited for persuasive value to any court by any litigant.” Ind. Appellate Rule 65(D)(2).

This is a significant change from the previous version of the rule which essentially barred citation of memorandum decisions. Now, any party may cite to any court a memorandum decision issued by the Court of Appeals on or after January 1, 2023, for its persuasive value.

Although the door has been opened to allow a party to cite memorandum decisions, there are several things to keep in mind. First, Appellate Rule 65(D)(2) only allows citation of memorandum decisions issued on or after January 1, 2023. Memorandum decisions issued before that date are “not binding precedent for any court and must not be cited to any court except to establish res judicata, collateral estoppel, or law of the case.” *Id.*

If you do cite to a memorandum decision issued on or after January 1, 2023, and are not trying to establish res judicata, collateral estoppel, or law of the case, keep in mind that the decision can only be cited for its persuasive value. Consequently, although the court might find the memorandum decision influential, it is not bound to follow its lead because it is not binding precedent.

Also, the new version of Rule 65 tells us that “there is no duty to cite a memorandum decision except to establish res judicata, collateral estoppel, or law of the case.” *Id.* For some, this may come as a relief. The majority of the decisions issued by the Court of Appeals are memorandum decisions. Staying up

to date on all the Court of Appeals’ rulings in its memorandum decisions is no small task. Rule 65 seems to recognize this and indicates that there is no penalty for not citing a memorandum decision.

Lastly, if you do cite a memorandum decision, be sure that you cite it properly. Citation of memorandum decisions is controlled by Bluebook Rule 10.8.1. That rule provides that when citing to an unreported case that is available on a widely used electronic database like Westlaw or LexisNexis, the following information should be provided: (1) the case name; (2) docket number; (3) database identifier; (4) court name; and (5) full date of the most recent major disposition of the case. For pinpoint citing, the rule provides that “[s]creen or page numbers, if the database assigns them, should be preceded by an asterisk; paragraph numbers, if assigned, should be preceded by a paragraph symbol.” So, for example, a proper citation to a memorandum decision would look like this: *In re R.M.*, No. 22A-JT-1104, 2022 WL 17492104, at \*3 (Ind. Ct. App. Dec. 8, 2022).

The amendment of Appellate Rule 65 is significant for both practitioners and the courts of this state. Practitioners now know that in addition to being able to cite memorandum decisions to establish res judicata, collateral estoppel, and law of the case, they can also now cite memorandum decision issued on or after January 1, 2023, for their persuasive value. And the courts must now wrestle with determining how much persuasive value to assign to the Court of Appeals’ memorandum decisions. It will be interesting to observe what impact these changes have on the legal landscape over the coming months. 

**"Now, any party may cite to any court a memorandum decision issued by the Court of Appeals on or after January 1, 2023, for its persuasive value."**

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# SUDDEN HEAT, EXPERT TESTIMONY: JANUARY 2023 CASES

Besides an opinion addressing sudden heat, the Indiana Supreme Court amended the Rules of Appellate Procedure in a notable way to start the new year. The Court of Appeals issues about 2,000 opinions a year, 80% of which are unpublished decisions. For decades, these decisions could not be cited in any court. However, on January 1, 2023, Appellate Rule 65 was amended to state that "*a memorandum decision issued on or after January 1, 2023, may be cited for persuasive value to any court by any litigant*." But there is no duty to cite a memorandum decision except to establish *res judicata*, collateral estoppel, or the law of the case." It's a potentially significant change, although it's important to remember the only citable memorandum decisions are those decided on or after January 1, 2023.

January's cases from the Court of Appeals addressed the admissibility of an expert's testimony on PTSD to support a self-defense claim and the limits on discoverability of an expert's report under the Trial Rules.

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## MURDER CONVICTION AND LWOP SENTENCE AFFIRMED AFTER STATE DISPROVED SUDDEN HEAT

In *Carmack v. State*, 200 N.E.3d 452 (Ind. 2023), Carmack and her husband were raising a blended family of seven children with Carmack homeschooling the children, including her stepdaughter S.C., while her husband's work as a truck driver kept him away for extended periods. During one of her husband's absences, Carmack called him to report that S.C. had stolen, broken apart, and redistributed the parts of

her stepsister’s charm bracelet. The husband asked Carmack to delay disciplining the child until his return the next day and, although she seemed reluctant, she agreed to do so. *Id.* at 456. Later that night, Carmack contacted her husband again to tell him S.C. was missing and had likely run away. Carmack eventually confessed to strangling S.C. and hiding her body. She was charged and convicted of murder and received a sentence of life without parole. *Id.* at 458.

On appeal from her conviction and sentence, the Indiana Supreme Court rejected Carmack’s argument the state failed to disprove she acted in sudden heat when she killed S.C. The Court declined to adopt a per se rule that frustration with a child’s behavior can *never* trigger sudden heat mitigating murder to manslaughter, as it noted two states have done.<sup>1</sup> However, here the Court found a “manifest lack of adequate provocation,” and characterized S.C.’s behavior as “fit[ting] generally within the expected parenting experience” and that her actions did “not even

raise an eyebrow for adequate provocation under Indiana law.” *Id.* at 462. Even if there had been adequate provocation, there was also a sustained cooling-off period to foreclose a finding of sudden heat. Carmack did not kill S.C. immediately upon discovering her misbehavior and her decision to contact her husband before acting was a deliberate break in the chain of alleged provocation. The jury could have reasonably found Carmack had ample time to consider her actions. *Id.* at 463.

### COURT OF APPEALS CASES

#### EXPERT TESTIMONY ON PTSD INADMISSIBLE TO SUPPORT SELF-DEFENSE CLAIM NOT RAISED UNDER EFFECTS OF BATTERY STATUTE

After a confrontation sparked by a road rage incident escalated, a disabled veteran with a high level of combat exposure shot a man who died at the scene. *Passarelli v. State*, 201 N.E.3d 271 (Ind. Ct. App. 2023). In preparation for his murder trial, Passarelli was evaluated by

a licensed clinical psychologist specializing in psychological trauma. Passarelli had served as a medic and experienced combat exposure in Iraq, and the psychologist reviewed his military, medical, and psychological records. *Id.* at 275. Passarelli sought to introduce the expert’s testimony to support the objective component of his self-defense claim. That is, whether an individual similarly situated (who suffers from PTSD and had been trained to respond to threats with deadly accuracy) would believe a threat was imminent, and deadly force was necessary to protect himself.

On interlocutory appeal, the Court of Appeals affirmed the trial court’s finding the expert’s testimony was inadmissible. Passarelli relied on *Higginson v. State*, 183 N.E.3d 340 (Ind. Ct. App. 2022), which held PTSD evidence admissible to support a self-defense claim under the effects of battery statute. The court distinguished *Higginson* as permitting PTSD testimony specifically under the statute and not in every case where self-defense is raised. The court found under self-defense, the objective standard is of an ordinary “reasonable person,” not whether a person with PTSD like Passarelli would respond as he did. Judge Brown dissented and would permit the expert to testify to what a person who suffers from PTSD like Passarelli might believe in the situation (but not testify as to the ultimate issue of reasonable force) because “the jury should be entrusted to assess Dr. Mundt’s testimony.” *Id.* at 280.

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In a rape prosecution, the state's DNA analyst generated a profile from Akinribade DNA sample and compared it with DNA profiles produced from the alleged victim's sexual assault kit, then compiled a report of her findings. *Akinribade v. State*, 22A-CR-1757. Akinribade obtained a copy of the report and retained an expert who prepared a seven-page "Consultation Summary." Slip op. at 2. During his deposition of the state's analyst, Akinribade handed her the consultation summary's third page, which was entered into the record, and questioned her about it. Following the deposition, the state requested disclosure of the entire summary, which the trial court granted without a hearing. Akinribade then filed a motion to reconsider, acknowledging that although the state is "entitled to reports and identities of any expert witnesses" intended to be called as witnesses at a trial or hearing, he did not intend to call any expert witnesses other than the state's analyst and so his expert's consultation summary was protected by the work-product privilege. *Id.* at 5. At a hearing on the motion to reconsider, the state argued Akinribade waived the privilege with respect to the entire summary by introducing the single page into evidence during the deposition of the state's DNA analyst.

On interlocutory appeal, in a split decision, the Court of Appeals held Akinribade waived any objection to the disclosure of the single page of the summary he introduced into evidence at the deposition, but the state failed to make the requisite threshold showing of either substantial need or exceptional circumstances to justify disclosing

the remaining pages of the summary under Indiana Trial Rule 26(B). The majority did not reach the question of whether Akinribade waived the work-product privilege under Indiana Evidence Rule 502, noting that "the issue before us is the discoverability of an expert's report during discovery which is governed by the Trial Rules," not the Evidence Rules. Slip op. at 8. Judge May dissented, believing Akinribade waived work-product privilege when he intentionally introduced a portion of the expert report during a deposition, which opened the door to discovery of all seven pages. *Id.* at 11.

#### **CONSENT FROM HOSPITALIZED SUSPECT WAITING FOR TREATMENT DID NOT VIOLATE IMPLIED CONSENT LAW OR CONSTITUTION**

In *Isley v. State*, 21A-CR-2837, a split panel affirmed the denial of a motion to suppress blood-draw results and medical records showing Isley's intoxication after a fatal car accident, rejecting her arguments under the federal and state constitutions and Indiana's implied consent statutes. Police questioned Isley at the accident scene, and she admitted to drinking alcohol. At the hospital, police asked her to sign a consent form to release her medical records, "for these guys," but did not specify they were referring to the prosecutor's office. Slip op. at 2. A nurse incorrectly told Isley the form granted permission to draw her blood but then asked for her oral permission to draw blood and Isley consented. Police then read the already-signed form to her and asked for her oral agreement to draw the blood, which she gave. *Id.* at 3.

In its analysis under the Fourth Amendment, the majority concluded Isley consented to the blood draw "multiple times both in writing and orally" and that at no point in the interaction "did she show any sign of disagreement or unwillingness to provide her consent." *Id.* The court also rejected Isley's claim the blood draw violated the implied consent law because she was not informed of the civil penalties for refusing a test. The court found IC 9-30-7-5 is triggered in accident cases involving serious injury or death and has no requirement to be informed of civil penalties. *Id.* at 5. The court applied the factors set out in *Litchfield v. State*, 824 N.E.2d 356 (Ind. 2005), to conclude that the blood draw and release of Isley's medical records was reasonable under the totality of the circumstances. In a lengthy footnote, the majority noted it was unclear whether consent to search serves as a blanket exception to Article 1, Section 11's warrant requirement, and that it had analyzed the case under *Litchfield* because both parties had done so. *Id.* at 7. Judge May wrote a concurring opinion noting disagreement with applying the *Litchfield* analysis because Isley did not challenge the scope of her consent. *Id.* at 15. 

#### **FOOTNOTE:**

1. Citing *State v. Brown*, 836 S.W.2d 530 (Tenn.1992); *State v. Taylor*, 452 N.W.2d 605 (Iowa 1990).

# SOCIAL MEDIA AND CONFIDENTIALITY

By Cari Sheehan

Social media is accessible 24 hours a day, 7 days a week and moves at the speed of light. It is an amazing innovation that connects people across the world. However, it can be an ethical nightmare for attorneys. Attorneys must remember the Rules of Professional Conduct (RPC) apply to social media, and the lines between “private” and “professional” content are easily blurred and often non-existent.

The top three attorney ethical risks on social media include: (1) violating RPC 1.6 (current clients) and RPC 1.9 (former clients) by revealing confidential information; (2) engaging in *ex parte* communications with judges, jurors, or other parties; and (3) violating RPC 7.1 - 7.5 regarding attorney advertising. Attorneys should always use caution with engaging in activities, personally or professionally, on social media.<sup>1</sup>

## RPC 1.6 AND RPC 1.9

An attorney’s duty of confidentiality extends to current and former clients and is broader than the attorney-client privilege. The attorney-client privilege protects the communications between the attorney and client directly. Confidentiality protects everything else that touches and concerns the representation of clients, whatever the source (e.g., evidence, notes, witness statements, and/or other investigations).

RPC 1.6 applies to current clients and provides an attorney may not reveal information relating to a client’s representation unless the client gives informed consent confirmed in writing.<sup>2</sup> RPC 1.6(b) provides exceptions to confidentiality, which include to prevent certain death or substantial bodily harm, to prevent fraud that is certain to result in substantial injury to the financial interests of another, to secure legal advice regarding compliance with the RPC, to establish a defense on behalf of an

attorney regarding a controversy with a client, and to comply with the law or order of the court.<sup>3</sup>

One of the biggest misconceptions regarding confidentiality is that information about a client contained on the public docket or part of public record is not confidential and “free game” for an attorney to discuss with third parties. This is not accurate. There is no confidentiality exception under Rule 1.6(b) regarding public information. So, where does this misconception come from? Attorneys tend to confuse RPC 1.6 (relating to current clients) with RPC 1.9 (relating to former clients).<sup>4</sup>

Under RPC 1.9 there is an additional exception for generally available information, which allows an attorney to discuss a former client’s confidential information if it has become generally known to the public.<sup>5</sup> The generally known exception only applies to former clients, not current clients, and is very limited in application.<sup>6</sup> It applies: (1) only to the use, and not the disclosure or revelation, of former-client information; and (2) only if the information has become (a) widely recognized by members of the public in the relevant geographic area; or (b) widely recognized in the former client’s industry, profession, or trade.<sup>7</sup> Information is not generally known simply because it has been discussed in open court, or available in public court records, libraries or other public documents.<sup>8</sup> The information has to be so widespread a person could ask anyone on the street if they have heard, or know, about the information.<sup>9</sup>

## RPC 1.6 AND RPC 1.9: SOCIAL MEDIA

There are three main areas on social media in which client confidentiality can be violated: (1) posting “wins” and talking about clients; (2) responding to negative attorney comments and reviews; (3) using confidential client information as a weapon.

## Personal and Professional Social Media Webpages

Attorneys should not post comments about cases or clients without the clients' confirmed consent in writing. When an attorney wins a big case, or helps a client, their first thought is normally to post about it on social media to advertise the win and attract new business. However, an attorney should first obtain client consent confirmed in writing authorizing the attorney to post about the win, even if the win is public record.<sup>10</sup>

Hypotheticals are allowed so long as the target audience cannot ascertain the identity, or situation, of the client from the facts set forth in the hypothetical.<sup>11</sup> It is difficult to ensure everyone on the internet cannot ascertain the identity of a client, or situation, in a hypothetical because the internet is comprised of known and unknown connections. Once something is posted online a person has no control over who can see it, if it gets forwarded, if it gets copied, or if it goes viral by other means. Attorneys should always remember that nothing is ever private online.

## Specific Platforms and Confidentiality Considerations

**Blogs:** Blogs tend to be emotional outlets with a "stream of consciousness" style of writing. Most attorneys forget the RPC apply to blogs, even blogs marked "private." An attorney cannot post about cases or clients without the clients' consent confirmed in writing.<sup>12</sup>

**Twitter:** Tweets are short messages, often sent without thinking about the ramifications. For instance, a partner in a British law firm posted a series of tweets about a client's

court win. The win was against the parents of a disabled child who were seeking special education funding.<sup>13</sup> The client fired the law firm stating it was "tone-deaf to human decency" and it breached confidentiality.<sup>14</sup>

**Facebook/LinkedIn:** These are platforms are used to post successes and are generally viewed as 'private' not 'public' by most attorneys. However, the RPC still apply and attorneys cannot post about clients or cases without obtaining the necessary client consent confirmed in writing.<sup>15</sup>

**TikTok/YouTube:** These are recording and/or commercial based platforms. The RPC regarding confidentiality apply to these platforms, and attorneys must be careful to not give real client examples (absent client consent, confirmed in writing) when trying to educate the public or get new business.<sup>16</sup>

**Instagram/Snapchat:** These are photograph based platforms. Violations on these platforms are less frequent since they are not primarily written platforms. Attorneys should not post pictures of client confidential information, themselves at a client's business location, or with a client without the client's consent confirmed in writing.<sup>17</sup>

## Responding to Negative Comments

If an attorney gets a negative comment and/or review online the first thing most attorneys want to do is respond with their side of the story to set the record straight. This is the last thing an attorney in this situation should do. When an attorney responds in this fashion, they are at a high risk of violating



RPC 1.6 and/or RPC 1.9 regarding client confidentiality.<sup>18</sup>

Providing a response to a negative online comment or review does not fall under RPC 1.6(b)(5) regarding establishing a defense to a disciplinary complaint and/or malpractice claim.<sup>19</sup> The ABA, and most jurisdictions, have opined that no exception under RPC 1.6(b) applies because a comment is not a proceeding or controversy, and the attorney is not establishing a defense to defend against the same.<sup>20</sup>

So how can an attorney respond to a negative comment and/or review and comply with RPC 1.6? An attorney's response needs to be proportionate and restrained to not reveal confidential information about the current or former client. If confidential client information is revealed it can lead to disciplinary actions ranging from public reprimand to disbarment.<sup>21</sup>

There are 3 responses an attorney can choose that would comply with the rules:<sup>22</sup>

1. Due to my ethical obligations, I am prevented from providing a detailed response;
2. I have reviewed the comment/claim and would be happy to discuss this with you via telephone if you want to give me a call at [provide contact information]; or
3. I have reviewed the comment/claim and will be reaching out to you shortly to discuss and resolve this issue.

Another option for attorneys is to contact the search engine/website/platform and request they remove the comment and/or review.<sup>23</sup> However, an attorney cannot provide details or disclose

confidential information in making the request.

An attorney could also counterbalance the negative review with positive reviews.<sup>24</sup> The more positive reviews will outweigh the negative reviews when someone searches for the attorney. However, be cautious if using this approach because the more attention a post is given the more it moves up within the Google algorithm. The less attention given to a post the lower it drops in the search results.

### Using Client Confidential Information as a Weapon

An attorney cannot use client confidential information to pressure their clients to post positive attorney reviews online through any platforms.<sup>25</sup> Confidentiality is absolute and only the client can waive the privilege, voluntarily and knowingly. The attorney cannot threaten or pressure the client to waive the privilege.

### CONCLUSION

Attorneys should be vigilant in all social media endeavors. The informality and impulsiveness of social media platforms can easily cause attorneys to drop their guard and forget to apply the RPC. Attorneys should always remember if they cannot do it in-person, they cannot do it online. ☹️

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*practice and procedure and torts. In practice, Sheehan is a part-time conflict attorney at Scopelitis Garvin Light Hanson & Feary advising on ethical issues. She is a well-respected seminar and continuing legal education speaker covering a range of ethical issues across various platforms both locally and on a national level. Similarly, Sheehan authors a business ethics column in conjunction with the Hamilton County Business Journal about the benefits and pitfalls of business ethics.*

### FOOTNOTES:

1. Other primary risks include, but are not limited to, inadvertently providing legal advice, and creating an unwanted attorney-client relationship and violating RPC 5.5 by engaging in the unauthorized practice of law.
2. See Ind. Rule Prof. Conduct 1.6 (2023); ABA Formal Opinion 480 (March 6, 2018); *In Re Goebel*, 703 N.E.2d 1045 (Ind. 1998).
3. Ind. Rule Prof. Conduct 1.6(b) (2023).
4. Ind. Rule Prof. Conduct 1.6 (2023); Ind. Rule Prof. Conduct 1.9 (2023).
5. Ind. Rule Prof. Conduct 1.6 (2023); ABA Formal Opinion 480 (March 6, 2018) (regarding confidentiality in blogs); *In Re Goebel*, 703 N.E.2d 1045 (Ind. 1998).
6. Ind. Rule Prof. Conduct 1.9 (2023); ABA Formal Opinion 479 (Dec. 15, 2017) (regarding the “generally known” exception under RPC 1.9).
7. ABA Formal Opinion 479 (Dec. 15, 2017).
8. *Id.*
9. *Id.*
10. Ind. Advisory Opinion #1-20 (July 2020).
11. Ind. Rule Prof. Conduct 1.6, comment 4 (2023). Client consent not needed if use a hypothetical that does not

- violate the confidentiality.
12. ABA Formal Opinion 480 (March 6, 2018); *Illinois Disciplinary Board v. Pescheck, No. M.R. 23794* (Ill. May 18, 2020) (issuing a 60-day suspension to attorney Pescheck when she revealed confidential client information on her personal blog identifying the client by their DOC Number and talking about the client’s convictions and how the client knowingly made a misrepresentation to the court).
  13. Martha Neil, *Client Drop Firm After Lawyer Uses Twitter to Celebrate ‘Win’ Against Parents of Disabled Children* (June 15, 2016) at <https://www.abajournal.com>.
  14. *Id.*
  15. Ind. Rule Prof. Conduct 1.6(b) (2023), there is no exception to confidentiality for friends and family.
  16. There are other considerations as well, such as, creating an unwanted attorney-client relationship or engaging in the unauthorized practice of law.
  17. Ind. Rule Prof. Conduct 1.6 (2023).
  18. A client or former client does not waive privilege just by posting a negative comment and/or review online. See generally ABA Formal Opinion 496 (Jan. 13, 2021)
  19. Ind. Rule Prof. Conduct 1.6(b) (5) (2023).
  20. ABA Formal Opinion 496 (Jan. 13, 2021).
  21. *People v. Isaac*, No. 15DJ099, 2016 WL 6124510 (Colo. OPD Sept. 22, 2016)(providing that attorney Isaac’s response to a former client’s negative online review revealing criminal charges against the client, that the client wrote a bad check, and that the client committed other unrelated felonies was a violation of confidentiality and attorney Isaac was suspended for six months from the practice of law); *In re Tsamis*,

Commission No. 2013PR00095 (Ill. 2014)(issuing a public reprimand to attorney Tsamis for a responding to a negative client review in the following manner, “I dislike it very much when my clients lose, but I cannot invent positive facts for clients when they are not there. I feel badly for him, but his own actions in beating up a female co-worker are what caused the consequences he is now so upset about.”); *People v. Underhill*, 15DJ040 (Colo. 2015) (issuing an 18-month suspension for an attorney posting confidential information and sensitive information online about clients).

22. ABA Formal Opinion 496 (Jan. 13, 2021).
23. *Id.*
24. *Id.*
25. *In re David Steele*, No. 49S00-DI-527 (Ind. 2015) (stating that Steele, by his own description, was “actively manipul[at]ing his] AVVO reviews by monetarily incentivizing positive reviews and punishing clients who wr[ote] negative reviews by publicly exposing confidential information about them” and including numerous false statements in responses to the negative reviews).

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By Adrienne Meiring



# CRITICIZING A JUDGE: WHERE'S THE ETHICAL LINE?

Poised before a computer, you are faced with a formidable task. Your client has requested that you file a motion for change of judge... for bias. You see indications the judge may be making decisions for reasons other than the law: stray, derogatory remarks about your client and quick rulings on pretrial matters that are contrary to the law. Also, you just learned that your client was accused (but exonerated) of a property crime against the judge's family 10 years ago.

As you begin drafting the motion, you wrestle with competing obligations to be an effective advocate for your client while not unfairly criticizing a judge. Fortunately, a trio of cases—*Matter of Wilkins*,<sup>1</sup> *Matter of Dixon*,<sup>2</sup> and most recently, *Matter of Smith*,<sup>3</sup> provide an ethical blueprint for maintaining compliance with the ethical rules when it becomes necessary to criticize a judge's actions in a pleading or appellate brief.

## POLICY BEHIND RULE 8.2(A)

Indiana Professional Conduct Rule 8.2(a) requires:

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.<sup>4</sup>

Comment 1 to the rule acknowledges the importance of attorneys providing honest assessments about the fitness of those holding or seeking judicial office but recognizes that false statements by a lawyer about a judge's integrity can unfairly undermine public confidence in the administration of justice.<sup>5</sup> Rule 8.2 strikes a balance between these competing interests by only prohibiting attorney statements about a judge that are false or made with reckless disregard as to the statements' falsity.

## AVOID HYPERBOLE

For the lawyer seeking to strike the proper balance when necessary to criticize a judge's impartiality to protect a client's due process rights, the essential question

becomes: “How can I avoid claims that I made statements with ‘reckless disregard’ to the truth?” *Matter of Wilkins* provides the first key to this equation. In *Wilkins*, the Indiana Supreme Court found a lawyer violated Rule 8.2(a) by stating in a footnote in an appellate brief seeking rehearing:

Indeed, the [Court of Appeals] Opinion is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for [Appellee], and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision).<sup>6</sup>

*Wilkins* petitioned for rehearing of his disciplinary sanction on First Amendment grounds.<sup>7</sup> Declining to grant the lawyer’s petition on those grounds, the Court emphasized, while lawyers “are completely free to criticize the decisions of judges... they are not free to make recklessly false claims about a judge’s integrity.”<sup>8</sup>

Turning to the offending statement, the Court pointed out the language in *Wilkins*’ footnote went beyond arguing the Court of Appeals decision was factually or legally inaccurate (noting such an approach would be permissible advocacy).<sup>9</sup> Rather, the problematic aspects were *Wilkins*’ attempt to impute bias and favoritism to the judges authoring the opinion and the implication the judges manufactured a rationale to justify a pre-conceived desired outcome.<sup>10</sup> The Court reasoned such statements go beyond mere advocacy and clearly impugn the integrity of a judge in violation of Rule 8.2(a).<sup>11</sup>

The lasting message from *Wilkins* is that statements impugning a judge’s

integrity that are mired in hyperbole will be viewed with a critical eye under the Rules of Professional Conduct.

### **HAVE A “GOOD FAITH PROFESSIONAL ADVOCACY” ARGUMENT**

In 2013, in *Matter of Dixon*, the Court provided another important key for remaining ethically compliant when criticizing a judge through professional advocacy.<sup>12</sup> The matter arose after Dixon made critical statements in a motion for change of judge in a criminal case in which Dixon’s clients were alleged to have engaged in criminal conduct during a pro-life protest at a private university.<sup>13</sup> Dixon asserted in the motion the trial judge was

biased because of her husband’s relationship with the university and her husband’s writings and advocacy reflecting a pro-choice stance.<sup>14</sup> At issue were four statements in which Dixon suggested the trial judge failed to follow the law because she “was biased in favor of the abortuary.”<sup>15</sup>

As a matter of first impression, the Court had to determine whether a subjective or objective test applies when evaluating the truth or falsity of such statements.<sup>16</sup> Joining the majority view of other jurisdictions, the Court adopted an objective test: Was the lawyer’s basis for making the statement objectively unreasonable considering its nature and context, including the extent to which the lawyer supported the statement with accurate facts.<sup>17</sup>

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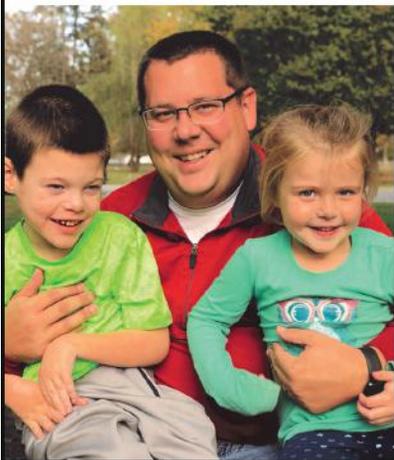
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The Court noted a motion for change of judge due to personal bias is inherently a sensitive matter, but it also implicates a client's fundamental due process right to an impartial judge.<sup>18</sup> The Court reasoned an attorney's advocacy should not be chilled in such situations by an overly restrictive interpretation of Rule 8.2(a) and announced it would impose the least restrictive standard to statements made when an attorney is engaged in "good faith professional advocacy in a legal proceeding requiring critical assessment of a judge or a judge's decision."<sup>19</sup>

Applying this standard, the Court determined Dixon's statements did not violate Rule 8.2(a). Although

of "a random pot-shot than relevant argument."<sup>22</sup>

### CITE TO SUPPORTING EVIDENCE

While *Dixon* provides substantial guidance on when critical statements about a judge will be ethically permissible, a recent disciplinary case reminds lawyers the "professional advocacy" safe harbor to Rule 8.2(a) is not limitless. *Matter of Smith* arose from Smith's intemperate remarks attacking the integrity of the trial judge in an appellate brief that sought to overturn the trial judge's grant of an injunction against Smith's client.<sup>23</sup> In one statement, Smith alleged the trial judge "demonstrated extreme bias and prejudice" against Smith's

### "The lasting message from *Wilkins* is that statements impugning a judge's integrity that are mired in hyperbole will be viewed with a critical eye under the Rules of Professional Conduct."

the Court acknowledged some of the statements were similar in tone and quality to the statement found objectionable in *Wilkins*, the Court distinguished the two matters by noting Dixon, unlike *Wilkins*, supported his averments against the trial judge with 40 pages of factual recitation in his motion for recusal.<sup>20</sup> Further, the Court clarified that Dixon's statements were not only relevant to but also were required for the relief sought under the Rules of Criminal Procedure, which require an allegation (and evidence) of actual bias.<sup>21</sup> In contrast, the Court viewed *Wilkins'* statement as more

client by "intentionally orchestrating hearings so as to deprive [Smith's client] of opportunities to be heard."<sup>24</sup>

Smith argued the commission had failed to prove nine such statements were made with reckless falsity, citing to *Dixon's* pronouncement that attorneys need wide latitude to engage in effective advocacy on behalf of their clients.<sup>25</sup> The Court disagreed, noting this "wide latitude" is not a blank check. *Dixon* also provides that "good faith professional advocacy" is a

**Continued on page 38...**

By Curtis T. Jones and  
Dakota C. Slaughter

# UTILITY CREDITS, REAL ESTATE, AND MORE JANUARY CASES

This article highlights an Indiana Supreme Court civil opinion and one appellate decision where the Court has granted transfer, along with four Indiana Court of Appeals opinions issued in January 2023.

## INDIANA SUPREME COURT

### NEW METHOD TO CALCULATE UTILITY CREDITS AFFIRMED

In *Indiana Office of Utility Consumer Counselor v. Southern Indiana Gas and Electric Company*, 2023 WL 31036, at \*4 (Ind. January 4, 2023), the Indiana Supreme Court affirmed the Indiana Utility Regulatory Commission's (Commission) decision approving Vectren's method for determining its customers' credits. Some Hoosiers generate their own electricity by using devices, such as solar panels or windmills. These devices sometimes fail to generate sufficient electricity to cover all the customer's needs, so these Hoosiers must still receive electricity from a public utility. To compensate these customers for any excess exported electricity, these public utilities must calculate any potential credit in conformance with Indiana Code § 8-1-40-5.

Vectren created a new method that allowed an instantaneous calculation of this credit, which was

challenged by the Indiana Office of Utility Consumer Counselor (OUCC). The Court of Appeals agreed with the OUCC's challenge and reversed the commission's approval. *Ind. Off. Util. Consumer Couns. v. S. Ind. Gas & Elec. Co.*, 183 N.E.3d 1089, 1096 (Ind. Ct. App. 2022), reasoning the statute required a longer period to find the difference between inflow and outflow. The Indiana Supreme Court disagreed and held Vectren's new calculation method satisfied the statute's requirement for how and when the calculation must be made.

### DAMAGES FOR DESTROYED REAL ESTATE

In *Nordin v. Town of Syracuse*, 192 N.E.3d 205, 207 (Ind. Ct. App. 2022), the Court of Appeals reversed the trial court's damage assessment of a destroyed cottage. The trial court had used the measure of damages applicable to permanently damaged land when it awarded the cottage's owner the difference between its pre-damage and post-damage market values. The Court of Appeals held: "When a building [as opposed to land] is permanently damaged—that is, when the cost of repairing the building exceeds the building's pre-damage market value—the proper measure of damages is the full pre-damage market value, without subtracting the post-damage market value." *Id.*

The cottage owner also sought damages for the full cost to repair or rebuild the cottage, which exceeded the

pre-damage market value due to the need to elevate the foundation to comply with a local flood control ordinance. The Court of Appeals held the cottage owners were not entitled to a trial on this claim. Judge Crone issued a separate opinion dissenting to this part of the court's opinion. He wrote: "a jury should be allowed to determine whether the Nordins may recoup any or all of those expenses as damages, in addition to the pre-flooding market value of the Cottage, demolition costs, and any other damages 'proximately caused by the tortfeasor's breach of duty.'" The Indiana Supreme Court granted transfer on January 12, 2023, vacating the Court of Appeal's opinion.

## **SELECT INDIANA COURT OF APPEALS' OPINIONS**

### **EMOTIONAL DISTRESS CLAIM UNDER WRONGFUL DEATH STATUTE**

In a case of first impression, the Court of Appeals held the personal representative of an estate may not assert a claim for emotional distress damages for the benefit of the decedent's minor dependent children or nondependent adult children in a wrongful death action filed under Indiana Code § 34-23-1-1, Indiana's general wrongful death statute (GWDS). *Edna Martin Christian Center, Inc. v. Smith*, 2023 WL 1094705, at \*1 (Ind. Ct. App. January 30, 2023). This case came to the appellate court on an interlocutory appeal after the trial court denied a motion to dismiss the claim for intentional infliction of emotional distress in the underlying wrongful death action. The Court of Appeals found the Indiana Supreme Court's opinion in *Indiana Patient's Compensation Fund v. Patrick*, 929

N.E.2d 190, 191 (Ind. 2010), which held that "damages for emotional distress are not available under the Adult Wrongful Death Statute" instructive. *Id.* at \*4.

### **WRONGFUL DEATH STATUTE'S LIMITATION PERIOD TOLLED DURING COVID-19**

In *Brugh v. Milestone Contractors, LP*, 2023 WL 152016, at \*5 (Ind. Ct. App. January 11, 2023), the Court of Appeals reversed the trial court's order and held the claimant timely substituted herself as the real party of interest considering the Indiana Supreme Court's tolling of time limits in response to the COVID-19 pandemic. Brugh's spouse died in an auto accident on October 9, 2019. Brugh, as the surviving spouse, filed a wrongful death complaint on January 26, 2021, after the Indiana Supreme Court had issued multiple orders concerning the COVID-19 pandemic and Indiana's governor had declared a public health emergency in the state. Indiana Code § 34-23-1-1, Indiana's general wrongful death statute (GWDS), requires any claim under the statute must be filed by the personal representative of an estate within two years. Brugh was appointed to this capacity on January 18, 2022, within the tolled time limits of the statute. However, she did not file a motion to substitute real party in interest before the tolling had run. The Court of Appeals held Brugh had met the conditions of the GWDS by filing her action and becoming the personal representative of the estate within the tolled time limits, and the fact she did not seek to amend the caption until after the tolled two-year time limit had expired was not relevant as an action is determined by its substance, not its caption.

## **PROCEDURE TO SET ASIDE DEFAULT JUDGMENT**

In *Expert Pool Builders, LLC v. Vangundy*, 2023 WL 223388, at \*4 (Ind. Ct. App. January 18, 2023), the Court of Appeals held Expert Pool Builders (EPB) failed to follow the proper procedure to contest the trial court's entry of default judgment. On January 6, 2022, the trial court entered an order setting aside an original default judgment against EPB and gave EPB 30 days to file a responsive pleading to the complaint. EPB failed to timely file a responsive pleading. Plaintiff filed a second motion for default judgment, to which EPB's attorney responded claiming the two attorneys had agreed to not file any responsive pleadings while they explored a resolution. Plaintiff's counsel denied any such conversation had taken place and submitted call records and a supporting affidavit. After a hearing, the trial court entered a second default judgment. EPB then filed a motion to correct error pursuant to Trial Rule 59. The Court of Appeals, relying on *Siebert Oxidermo, Inc. v. Shields*, 446 N.E.2d 332 (Ind. 1983), held that EPB should have filed a motion to set aside a default judgment pursuant to Trial Rule 60(B), and, thus, failed to preserve the issue on appeal. Judge Vaidik dissented, opining that given EPB's opposition to plaintiff's motion for default judgment and presentation of evidence and supporting arguments, a Rule 60(B) motion "was not required and would have been a redundant waste of time and resources."

### **EXPERT MEDICAL TESTIMONY REQUIRED TO SUPPORT INJURIES THAT ARE SUBJECTIVE IN NATURE**

In *Diocese of Fort Wayne South Bend, Inc. v. Gallegos*, 2023 WL 381183, at \*4 (Ind. Ct. App. January 25, 2023), the Court of Appeals, on interlocutory appeal, reversed the trial court's denial of summary judgment on grounds that expert medical testimony is required to support injuries that are subjective in nature. Gallegos alleged a school was liable after allowing her to compete at a swim meet despite knowing she had suffered a concussion during warmups after hitting her head on the diving board. The school supported a motion for summary judgment with an expert report from a neurologist stating Gallegos had suffered prior concussions, and an affidavit opining that Gallegos' injuries were not aggravated by her being allowed

to continue diving after her head injury. Gallegos did not submit any medical or other expert opinion to contradict this evidence. The Court of Appeals held that because Gallegos' injuries were subjective in nature, expert medical testimony was required to prove causation, and, thus, summary judgment should have been granted in the school's favor. ☞

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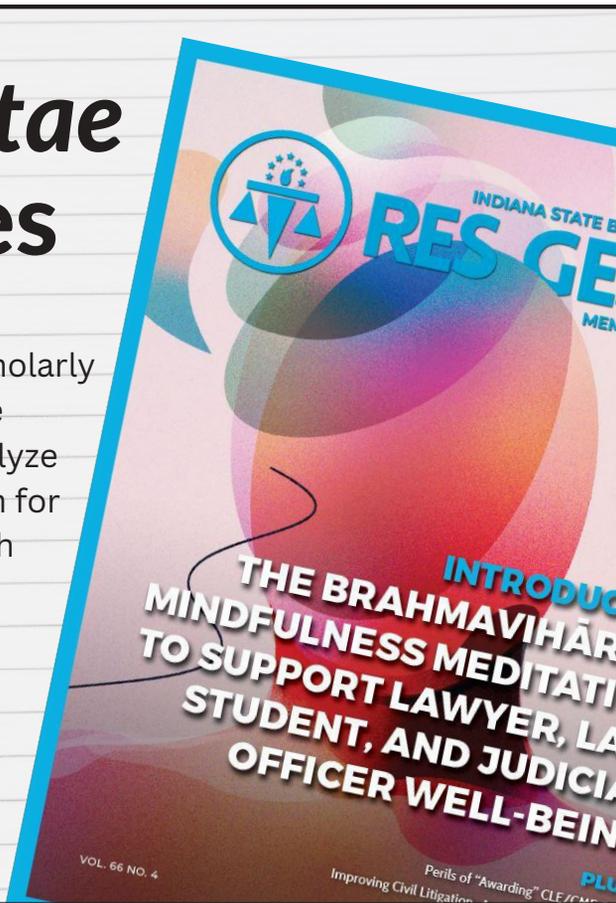
*United States Court of Appeals, Seventh Circuit. Upon graduating and prior to joining Bose McKinney & Evans LLP, Jones served as a judicial law clerk to Justice Theodore R. Boehm on the Indiana Supreme Court. His email is CJones@boselaw.com.*

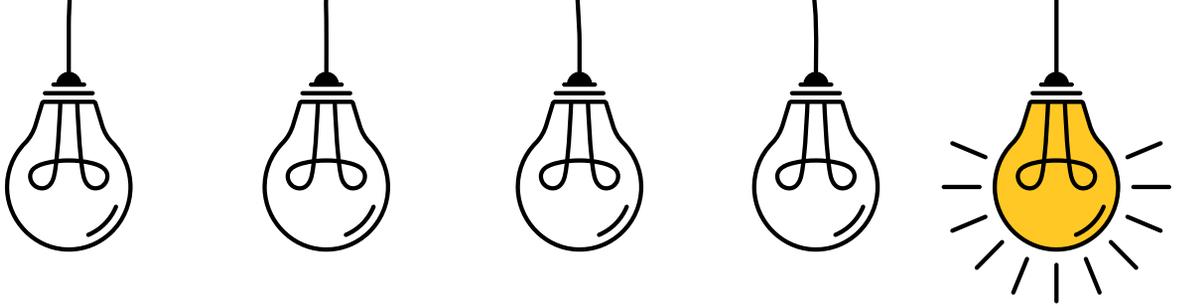
*Dakota C. Slaughter is an associate at Bose McKinney & Evans LLP in the Litigation Group. Slaughter received his J.D. from the University of Alabama School of Law and his MBA from the University of Texas Rio Grande Valley. While in law school, Slaughter served as president of the Student Bar Association, publication chair of the Law & Psychology Review, and a member of the Moot Court Board. His email is DSlaughter@boselaw.com.*

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### Continued from page 17...

will keep these principles in mind as it works to further clarify this important area of law. ☞

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### FOOTNOTES:

1. *Warth v. Seldin*, 422 U.S. 490, 498–99 (1975) (internal quotation marks and citation omitted); *see also Id.* at 501 (explaining that even where Congress “grant[s] an express right of action...Art. III’s requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants.”). Some scholars trace this constitutional rule even further back, such as to *Massachusetts v. Mellon* and *Frothingham v. Mellon*, 262 U.S. 447 (1923), which concluded “[p]roceedings not of a justiciable character are outside the contemplation of the constitutional grant” of authority over cases and controversies. *Id.* at 480; *see, e.g.*, Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 *Stan. L. Rev.* 1371, 1444–45 (1988) (explaining that *Mellon* “raised constitutional considerations that helped lead to a modern conception of standing”).
2. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).
3. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (citing *Lujan*, 504 U.S. at 560–61).
4. *Id.* at 2205 (holding that “Congress may create causes of action. . . [b]ut under Article III, an injury in law is not an injury in fact,” which means “[o]nly those plaintiffs who have been concretely harmed by a defendant’s statutory violation may sue that private defendant over that violation in federal court”).
5. *Solarize Indiana, Inc. v. S. Indiana Gas & Elec. Co.*, 182 N.E.3d 212, 219 n.5 (Ind. 2022) (quoting *In re Lawrance*, 579 N.E.2d 32, 37 (Ind. 1991)); *see also, e.g., Holcomb v. City of Bloomington*, 158 N.E.3d 1250, 1260 (Ind. 2020) (observing that federal “case-or-controversy requirement” does “not apply in Indiana state courts”).
6. *Pence v. State*, 652 N.E.2d 486, 488 (Ind. 1995); *see also, e.g., Horner v. Curry*, 125 N.E.3d 584, 589 (Ind. 2019) (lead op. of Massa, J.) (explaining “the express distribution-of-powers clause in our fundamental law performs a similar function” to the federal Constitution’s Article III, “serving as a principal justification for judicial restraint.” (citations omitted)).
7. *See, e.g., Id.* (noting “confusion among our courts” on this point).
8. *Solarize Indiana, Inc. v. S. Indiana Gas & Elec. Co.*, 182 N.E.3d 212 (Ind. 2022).
9. *City of Gary v. Nicholson*, 190 N.E.3d 349 (Ind. 2022).
10. *TransUnion*, 141 S. Ct. at 2205 (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016)).
11. *Nicholson*, 190 N.E.3d at 351.
12. *Id.*
13. *Lockerbie Glove Co. Town Home Owner’s Ass’n, Inc. v. Indianapolis Historic Pres. Comm’n*, No. 22A-PL-204, 2022 WL 3723511, at \*6 (Ind. Ct. App. Aug. 30, 2022) (citing *Nicholson*, 190 N.E.3d at 351–52 and *TransUnion*, 141 S. Ct. at 2205); *see also Serbon v. City of E. Chicago*, No. 21A-PL-1046, 2022 WL 3348998, at \*6 (Ind. Ct. App. Aug. 15, 2022) (applying *Solarize* and *Nicholson* to hold “the constitutional underpinnings of common-law standing act as a limit regarding those to whom the legislature may confer, or deny, standing”).
14. *See, e.g., Huffman v. Off. of Env’t Adjudication*, 811 N.E.2d 806 (Ind. 2004); *Laborers Loc. Union No. 204 v. Pub. Serv. Co. of Ind.*, 524 N.E.2d 318 (Ind. 1988).
15. *City of Bloomington*, 158 N.E.3d at 1256.
16. *Id.*
17. *Id.* (quoting *Ind. Educ. Emp’t Relations Bd. v. Benton Cmty. Sch. Corp.*, 365 N.E.2d 752, 755 (1977)); *but see Id.* at 1267 (Slaughter, J., dissenting (joined by Massa, J.)) (“Standing requires a plaintiff to prove injury, causation, and redressability in all cases, including actions for declaratory relief.”).
18. *Solarize*, 182 N.E.3d at 216 n.2.
19. *Id.* at 216–17 (ellipsis in original; quoting *Bd. of Comm’rs of Union Cnty. v. McGuinness*, 80 N.E.3d 164, 168 (Ind. 2017)).
20. *Id.*
21. *Id.* at 218 n.4 (quoting *Terre*

- Haute Gas Corp. v. Johnson*, 221 Ind. 499, 45 N.E.2d 484, 486 (1942)).
22. *Id.* at 219–20.
  23. *Nicholson*, 190 N.E.3d at 350 (quoting Ind. Code § 5-2-18.2-5).
  24. *Id.* at 351.
  25. *Id.* (emphasis added).
  26. *Id.* at 351–52.
  27. *Id.* at 352.
  28. *Horner*, 125 N.E.3d at 594 (lead op. of Massa, J.).
  29. *Id.* at 594–95 (quoting M. Ryan Harmanis, Note, *States’ Stances on Public Interest Standing*, 76 Ohio St. L.J. 729, 750 n.134 (2015)); see also *Id.* (noting that public standing “risks pushing the judiciary’s role beyond the boundaries contemplated by our distribution-of-powers doctrine” because it would permit “**any** person, *without* a showing of harm, to enforce a public right or duty” (emphasis in original)).
  30. *Nicholson*, 190 N.E.3d at 352; see also *Horner*, 125 N.E.3d at 596 (lead op. of Massa, J.) (requiring, among other things, that the plaintiff have “some personal stake in the outcome of the controversy”).
  31. Compare *Id.* (applying taxpayer standing to permit challenge to expenditure of state fund “in which all taxpayers have an interest”); *Higgins v. Hale*, 476 N.E.2d 95, 101 (Ind. 1985) (explaining that under public standing “when a case involves enforcement of a public rather than a private right the plaintiff need not have a special interest in the matter”) with *United States v. Richardson*, 418 U.S. 166, 176–77 (1974) (rejecting taxpayer’s standing to challenge the government’s failure to disclose Central Intelligence Agency expenditures because suit rested upon an impermissible “generalized grievance,” and because “the impact on [plaintiff] is plainly undifferentiated and ‘common to all members of the public’” (quoting *Ex parte Levitt*, 302 U.S. 633, 634 (1937))).
  32. See, e.g., *Graves v. City of Muncie*, 264 N.E.2d 607, 609 (1970) (permitting taxpayer challenge to state law that at the time of passage applied only to the City of Muncie); *Dudley v. Sears, Roebuck & Co.*, 109 N.E.2d 620, 623–24 (Ind. App. 1952) (permitting taxpayer challenge to assessment of Marion County auditor against another taxpayer, concluding in “suits involving municipal corporations, taxpayers are frequently permitted to test the illegal conduct of public officers” (internal quotation marks and citation omitted); *Hamilton v. State ex rel. Bates*, 3 Ind. 452, 453 (1852) (permitting taxpayer challenge to order of state board increasing appraisal of land in Marion County). But see *Zoercher v. Agler*, 172 N.E. 186, 189–90 (Ind. 1930) (permitting taxpayer challenge to state law that applied to municipalities across the state); *Embry v. O’Bannon*, 798 N.E.2d 157, 159–60 (Ind. 2003) (permitting taxpayer challenge to statewide “dual-enrollment” process).
  33. Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 Mich. L. Rev. 689, 707–08 (2004) (internal quotation marks and citation omitted); see also *Id.* at 708 n.91 (noting that *Mellon*, 262 U.S. at 486–87, acknowledged “‘the peculiar relation of the [municipal] taxpayer to the corporation,’ which resembles in some ways the relation ‘between stockholder and private corporation,’ and observ[ed] that ‘the relation of a taxpayer of the United States to the Federal Government is very different’”).
  34. *Solarize*, 182 N.E.3d at 216–17 (emphasis added; ellipsis in original; quoting *Bd. of Comm’rs of Union Cnty. v. McGuinness*, 80 N.E.3d 164, 168 (Ind. 2017)).
  35. *TransUnion*, 141 S. Ct. at 2207 (rejecting Fair Credit Reporting Act claim on concreteness grounds); *Pierre v. Midland Credit Mgmt., Inc.*, 29 F.4th 934, 938–39 (7th Cir. 2022) (applying *TransUnion* to reject Fair Debt Collection Practices Act claim on concreteness grounds); *Laufer v. Looper*, 22 F.4th 871, 877 (10th Cir. 2022) (applying *TransUnion* to reject Americans with Disabilities Act claim on concreteness grounds).
  36. *Solarize*, 182 N.E.3d at 219 n.5.
  37. *Id.* at 221 (Slaughter, J., dissenting).
  38. See, e.g., *City of Indianapolis v. Kahlo*, 938 N.E.2d 734, 741 (Ind. Ct. App. 2010).
  39. *Serbon*, 2022 WL 3348998, at \*8; see also, e.g., *Gaddis v. McCullough*, 827 N.E.2d 66, 77 (Ind. Ct. App. 2005) (noting even in the context of the “public standing doctrine ... a redressable injury is still required”) (citing *Embry*, 798 N.E.2d at 159–60); *Schulz v. State*, 731 N.E.2d 1041, 1046 (Ind. Ct. App. 2000) (holding plaintiff lacked standing because it “fail[ed] the redressability requirement”).
  40. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 96–97 & n.2 (1998); see also, e.g., *City of Almaty v. Khrapunov*, 956 F.3d 1129, 1134 (9th Cir. 2020) (“A party waives an argument relating to statutory or prudential standing if the argument was not raised in the district court.”).
  41. *Solarize*, 182 N.E.3d at 216.
  42. *Id.*
  43. *Horner*, 125 N.E.3d at 589 (lead op. of Massa, J.).
  44. *Id.*



**Continued from page 32...**

predicate for application of this “least restrictive standard.”<sup>26</sup> Because Smith offered no evidence to support his assertions, and the record rebutted any indication his assertions were made in good faith, the Court determined his statements violated Rule 8.2(a).<sup>27</sup> The Court also noted Smith never filed a grievance with the Judicial Qualifications Commission about the trial judge’s conduct.<sup>28</sup>

*Smith* serves as a vital reminder and caution for attorneys seeking to promote a client’s legal position on the basis of judicial bias. To maintain their ethical obligations, attorneys need to offer substantive evidence to support statements alleging bias by a judicial officer.

Certainly, any time a lawyer is faced with the strategic decision of whether to file a motion for change of judge due to bias, the attorney must be circumspect and consider the matter carefully. But, for that lawyer poised before the computer, wrestling with these issues, the

trio of cases identified can provide ethical solace about the right path to follow to maintain compliance with Rule 8.2(a) while preserving a client’s right to an impartial judge. ☞

*Adrienne Meiring is the executive director of the Indiana Supreme Court Attorney Disciplinary Commission and counsel to the Indiana Commission on Judicial Qualifications.*

**FOOTNOTES:**

1. 782 N.E.2d 985 (Ind. 2003).
2. 994 N.E.2d 1129 (Ind. 2013).
3. 181 N.E.3d 970 (Ind. 2022).
4. Ind. Prof. Cond. R. 8.2(a) (2022).
5. Ind. Prof. Cond. R. 8.2, cmt 1 (2022).
6. *Matter of Wilkins*, 777 N.E.2d 714, 716 (Ind. 2002).
7. *Wilkins*, 782 N.E.2d at 986.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. 994 N.E.2d at 1136-39.

13. *Id.* at 1131-33.
14. *Id.*
15. *Id.* at 1133. In another statement, Dixon averred, “[The trial judge’s] inability to admit the intellectual and political... consanguinity between her husband’s career mission and Notre Dame’s current mission, calls into profound question her ability to navigate the waters of defendants’ legal defenses...” *Id.* at 1132-33.
16. *Id.* at 1133-34.
17. *Id.* at 1136-37.
18. *Id.* at 1138.
19. *Id.*
20. *Id.* at 1139.
21. *Id.* at 1138-39.
22. *Id.* at 1139.
23. 181 N.E.3d at 971-72.
24. *Id.* at 972, fn. 1.
25. *Id.* at 973.
26. *Id.*
27. *Id.*
28. *Id.* at 973, fn. 2.

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