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Judicial Review of Administrative Orders: A More Active Function for Indiana Courts?
By Kent Hull
WHACK-A-MOLE

ESI Whack-a-Mole: Don’t Let It Clobber You
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I’ve previously written and spoken about suggested, and sometimes implemented, changes to our traditional rules structure, often offered as solutions to the access to justice gap. These innovations, as proponents call them, include allowing nonlawyer ownership interests in law firms and licensing nonlawyers to perform certain tasks currently considered the practice of law.

Are these truly viable solutions for ensuring broader access to justice or, as many fear, do they risk eroding the foundations of our profession? As the collective voice of the legal profession, we need to better identify who we are, not just what we do, as we consider these and likely other experiments. Doing so will better enable us to articulate what it is about who we are that makes us uniquely qualified to serve in particular ways and, on the other side, what may appropriately be delegated to nonlawyers.

Unfortunately, research that has attempted to narrow down the so-called lawyer personality illustrates that many of our common traits may not always serve us well in our profession. To be successful practitioners, advisors, and peacemakers, we must recognize who we are to pivot toward who we should be.¹

A 2002 study² of personality traits common to successful lawyers found skepticism ranked the highest of lawyers’ most-commonly shared traits. We also tended to score higher than the average Jane in urgency and autonomy, but lower in sociability and resilience.

Those scoring high in skepticism can be cynical, judgmental, and argumentative. They tend not to give others the benefit of the doubt. The urgent trait makes us impatient and we therefore approach everything with a sense of immediacy (even when it’s not necessary). We are less mindful and contemplative. Autonomous people prize their independence and are effective self-starters, but they hate being told what to do.

Low scorers in sociability prefer human interactions that lean more intellectual than emotional. Even though lawyers present as (sometimes overly) confident and even fearless, our low scores in resilience mean we tend to be defensive, especially when criticized (even just a little), showing we’re a little insecure.
As problem solvers, we should be able to see the big picture and address immediate issues. We should instinctively know which is which.

Finally, we must be responsible and initiate tasks as self-starters, needing little supervision while knowing when to ask for help and guidance.

But when you score high in skepticism and low in sociability, you may need to work a little harder at being a good communicator. Sure, many of us are good writers and speakers, but are we listening actively? Are we tuning into a witness’ non-verbal cues or are our noses buried in our notes? Can you maintain a level of self-control when opposing counsel is berating you or tact when explaining to your client that her expectations are unrealistic?

You might be incredibly talented in research and analytical skills, but that sense of urgency might result in not spending enough time gathering facts or effectively determining your client’s ultimate goals. I can load myself up to the rafters with tasks and juggle them like I perform with Cirque du Soleil, but if I don’t set professional boundaries, honor my commitments, and make a priority
of being on time, my clients and colleagues will lose faith in me quickly. And I’ll eventually end up ugly crying in a fetal position for no apparent reason.

Lawyer, know thyself.

Let’s stop thinking like lawyers and start thinking like human beings who happen to be lawyers sharing a planet with other human beings.

A lot of what we will ultimately need to do in a case requires connecting with others with whom we may have few shared experiences. You won’t earn a person’s trust if you don’t take the time to let them tell their story (even if most of it ultimately means nothing from a case perspective) or understand their ultimate goals (which may have nothing to do with the range of relief available to them). If you’re curious and respectful, you’ll learn a lot more and might give the client a positive experience in which they achieve their goal but actually “lose” the case. Many times, they just want to be heard.

To communicate well, we need to be perceptive and show a little compassion; let’s exercise tact and self-control, maybe even a little grace. Human nature responds better to kindness than vitriol, especially when being asked to reveal information or compromise a position.

Successful lawyers overcome these challenges, adapt to the unexpected and unknown, and diligently pursue improvements—not only in the obvious skills we hone through CLE, but also in the human traits we can cultivate through introspection, reflection, and experiences beyond the courtroom and conference room.

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FOOTNOTES:

1. Please understand, dear friends, that I am painting with a brush broader than Dwayne “The Rock” Johnson’s shoulders. These are generalities that may apply to some of us, or none of us, but that at least some research has indicated is relatively common among lawyers as a group.


PROCRASTINATION STATION: END-OF-YEAR CLE REQUIREMENTS

It’s December—the home stretch, with the holidays and the end of the year in sight. But, unfortunately, that also means the deadline for annual CLE requirements looms ever closer, reminding you (again) that you may have procrastinated a bit too much.

If you’re short a few hours, don’t worry! As an ISBA member, you have access to a large collection of virtual, on-demand CLE covering a variety of topics. The Indiana Supreme Court also removed limits on distance education credits earlier this year, so this can be a one-stop shop for all your last-minute CLE needs.

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If you can’t find what you’re looking for, you can also check out our full On-Demand CLE Library at www.inbar.org/ondemand. The library contains nearly 100 on-demand CLE courses, many of which are free or reduced for ISBA members.

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- Substantive and procedural law
- Leadership and professional development
- Business of law
- Technology, cybersecurity, and risk management
- Diversity, equity, inclusion, and justice
- Professional and ethical responsibilities
- Legislation and advocacy
- Well-being

Each of our on-demand CLE offerings are now tagged under one of these core competency areas, and you can search through the library based on these topics.

**END-OF-YEAR CLE FAQ**

What else might you need to know in your mad dash to finish your CLE requirements? Check out some of these frequently asked questions.

How do I check how many CLE hours I have?
Sign into the Indiana Courts Portal (at https://portal.courts.in.gov) to check your current transcript and CLE reports.

How late can I complete my CLE and still have it reported?
No matter where you are in your three-year cycle, the deadline for meeting your annual CLE requirements is Dec. 31.

If you’re viewing ISBA’s on-demand CLE, that means you can watch a CLE up until Dec. 31. As long as you watch the recording and complete the electronic CLE reporting form by the end of Dec. 31, the course will count towards your 2022 requirements—even if it hasn’t been reported by the ISBA yet. The ISBA office will be closed Dec. 23 through Jan. 2, but once we return, we’ll report your credit to the Indiana Office of Admissions & Continuing Education as the date that your electronic CLE report shows.

Is there a limit to the number of virtual CLE I do?
Not anymore! As of June 6, 2022, the Indiana Supreme Court removed the limits on how many hours attorneys and judicial officers may complete via distance education courses. So feel free to line up your schedule with on-demand courses.

Something else?
Have a specific question or concern you can’t find an answer to? You can contact the ISBA CLE department at cle@inbar.org.

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JUDICIAL REVIEW OF ADMINISTRATIVE ORDERS: A MORE ACTIVE FUNCTION FOR INDIANA COURTS?
In *ResCare Health Servs., Inc. v. Indiana Family & Soc. Servs. Admin.*, 1 the Indiana Supreme Court addressed two recurring questions in litigation challenging state agency administrative adjudications: can a petitioner for judicial review (1) seek a remedy (in this case a declaratory judgment) beyond reversal and remand of the agency decision; and, if so, (2) how should that claim be pleaded? These seemingly legalistic questions have broad implications for litigation strategy. While upholding the Indiana Family and Social Service’s (FSSA) denial of Medicaid reimbursement sought by a residential facility, the decision creates uncertainties in suing state agencies.

**THE IMMEDIATE CASE**

ResCare Health Services (ResCare), a provider of residential care for Medicaid recipients with intellectual disabilities, sued FSSA because the agency refused to reimburse ResCare for disputed pharmacy charges for over-the-counter medicines, like allergy relief tablets, prescribed to the residents.2 The OTC medicines were not included on the FSSA’s Over-the-Counter Drug Formulary of pre-approved medicines and dosages pharmacies use for payment by Medicaid. When FSSA refused to pay the pharmacy serving ResCare residents, the pharmacy billed ResCare approximately $40,000.3

ResCare challenged the agency’s refusal, exhausting FSSA’s administrative adjudication process unsuccessfully, then sued, under Indiana’s Administrative Orders and Procedures Act (AOPA),4 for judicial review of the FSSA order.5 ResCare requested the Marion Superior Court to reverse the FSSA decision and to issue a declaratory judgment that ResCare was entitled to reimbursement for the pharmacy charges. In the agency adjudication, ResCare had requested the FSSA administrative law judge to issue a declaratory judgment; after ResCare completed the administrative process, the Tax Court ruled in an unrelated case that only courts, not agencies, may render declaratory judgments.6

The reviewing court affirmed FSSA’s decision and refused to issue a declaratory judgment because “the request was insufficiently pleaded and ResCare’s patients needed to be added to the litigation.” Without addressing the sufficiency of the pleadings, the Court of Appeals affirmed, agreeing that the residents were necessary parties.7 The Supreme Court reversed and directed
the trial court “to consider the declaratory judgment request on the merits” without requiring ResCare to sue the residents.9

ORDERS AND RULES—A BRIEF HISTORY

Delegating responsibilities to executive-branch agencies, and assuring accountability for their actions, were topics in the first United States Congress and early state legislatures. The term “administrative law” appeared in an 1853 opinion by Attorney General Caleb Cushing, but the modern era of administrative law began during the New Deal-post World War II years, with states following the federal example in creating and authorizing agencies to address complex social and economic problems. The federal Administrative Procedure Act of 1946 established “a new, basic and comprehensive regulation of procedures in many agencies,” while states adopted comparable statutes.10 The new federal agencies met challenges to their legitimacy.11

A central objection was that agencies, directed by unelected officials, promulgated rules which defined rights and responsibilities, adjudicated alleged violations of those rules, and then imposed penalties to enforce the rules and orders, all subject only to judicial review of uncertain scope.12 Critics considered the “administrative law state” violative of the Constitution’s separation of powers and especially opposed congressional delegation of broad authority to agencies which, they contended, risked arbitrary enforcement of the laws.13

Defenders responded that a society protecting the public from financial and stock market fraud, providing Social Security benefits to millions of people, and policing the uses of atomic energy, required agencies with sufficient authority to implement complex laws."
of the United States reinforced the independence of federal agencies from both Congress and the courts by announcing the *Chevron*\(^1\) doctrine. “[C]onsiderable weight” must be “accorded to an executive department’s construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations.”\(^2\) That doctrine remained fundamental until the 2022 decision in *West Virginia v. Environmental Protection Agency*,\(^3\) holding that, in the Clean Air Act, Congress had not “empower[ed]” the EPA to decide the “major question” of whether “restructuring the Nation’s overall mix of electricity generation... from 38% coal to 27% coal by 2030” constituted “the ‘best system of emission reduction’” required by the law.\(^4\) Chief Justice Roberts’s majority opinion recognized *Chevron* deference only as a precedent underlying more recent opinions.\(^5\) The majority’s insistence upon “‘clear congressional authorization’ for the authority [agencies] claim[ed]” is now the essential requirement for upholding legislative delegation.\(^6\)

**THE MYSTERIES OF JUDICIAL REVIEW OF AGENCY ORDERS IN INDIANA**

Indiana administrative law has mirrored the national debate about the power and accountability of agencies. An opinion by Indiana Supreme Court Justice Geoffrey G. Slaughter reflected concerns expressed by such critics of *Chevron* as Justice Clarence Thomas in federal litigation.\(^7\)

Articulated in his concurrence with the Court’s denial of transfer in *Indiana Dept’ of Nat. Res. v. Prosser*, Justice Slaughter argued that, under the AOPA, “[W]hat qualifies as ‘substantial’ evidence” in an agency’s adjudication and to which a reviewing court must defer “is not substantial at all—requiring nothing more than a mere ‘scintilla’ of evidence.”\(^8\) He expressed his “deep concerns” with prevailing law, both as codified in the AOPA and in cases following.\(^9\) Agencies find the fact and interpret controlling statutes. Courts then defer to the agency actions with neither judge nor jury finding facts, providing no “fresh, plenary interpretation to the agency’s determination of law or to its application of law to the facts.”\(^10\)

He would, in “a future case, where the issues are raised and the arguments developed... be open to entertaining legal challenges to this system for adjudicating the legal disputes that our legislature assigns agencies to resolve in the first instance, subject only to a highly circumscribed right of judicial review as set forth in AOPA.”\(^11\) In short, he appears ready, as was the Supreme Court in *West Virginia v. EPA* at the federal level, to re-examine administrative law precedent settled for decades.\(^12\)
In his lone Prosser concurrence, Justice Slaughter’s disposition to consider overturning cases upon which Indiana agencies and the parties regulated by them have long relied challenges the “administrative state” just as have earlier critics. However, his fellow justices might question, as he has in at least one other context, how they could affect that challenge without encroaching upon the powers of the General Assembly and the governor.  

An early Indiana case, Warren v. Indiana Tel. Co., affirmed denial of a worker’s compensation claim by the former Industrial Board under a statute allowing direct review of board decisions by the former appellate court on the “same terms and conditions as govern appeals in ordinary civil actions,” thereby giving the board quasi-judicial status.  

The Indiana Supreme Court granted transfer because of “matters presented [which] challenge us to consider some very serious and important questions, [including] the place of the Supreme Court in the judicial system of the state; the power of the General Assembly with respect to administrative agencies; the constitutional guaranties of due course of law for injury done to the person; and the inviolate right to trial by jury in civil cases.”

In affirming the board’s rejection of the worker’s claim, the Court upheld the board’s procedures denying jury trial, allowing quasi-judicial fact-finding, and admitting testimony inadmissible in court. However, the Court established an aggrieved party’s right to judicial review of a final order, through either a statutory procedure or, if necessary, through the Court’s inherent authority to issue an appropriate writ. Parties to board adjudications could not, under the Indiana Constitution, be denied review by the Supreme Court “because the Legislature has not provided a means for bringing it here.”

Justice Felix Frankfurter once observed, in a case reversing a murder conviction, “The history of American freedom is, in no small measure, the history of procedure.” The Warren precedent—whatever reservations the Court might have had about the risks of excessive power granted to state agencies—rests on confidence that judicial review of administrative actions will be sufficient oversight to prevent abuse.

A premise of Indiana administrative law is that, because agencies have no common law or inherent authority beyond that conferred
by statute, any actions exceeding statutory powers are void. While that principle theoretically restricted agencies, courts limited judicial review of agency orders strictly to the procedures established by the legislature.  

Indiana courts have thereby reinforced the independence of agencies not only by adopting a variation of the *Chevron* doctrine, but through rulings which transformed disputes about the procedures initiating judicial review into questions of subject matter jurisdiction. Verification of Petitions for Review of agency action under the AOPA by attorneys was first held to be a jurisdictional error not correctable by amendment until later cases allowed attorney verification (without corrective legislation).  

Trial courts were denied discretion to permit untimely or improperly verified petitions (deemed jurisdictional defects) until later cases allowed discretion (again without corrective legislation).  

Finally, a confused struggle to articulate a “bright line rule” on filing of the agency record resulted in a draconian decision to require jurisdictional dismissal if a petitioner does not timely file the agency record with the reviewing court or obtain a timely extension of the AOPA deadline. In *Indiana Family & Soc. Servs. Admin. v. Meyer,* a four-member bench (Justice Sullivan not participating) seemed to agree that untimely filing of the agency record was a jurisdictional failure requiring dismissal. Yet they could not agree on the precise content of that ‘record.’ Justice Boehm, joined by Justice Rucker, was satisfied that selected documents filed with the petition for review constituted “[t]he record as it stood at the time of FSSA’s motion to dismiss [and] was therefore sufficient to resolve” the issue presented. Chief Justice Shepard, joined by Justice Dickson, considered those documents only a “minimalist record,” not the “certified record” required by the AOPA.  

Almost five years later, a unanimous Court speaking through Justice Rucker “[r]esolv[ed] a long-standing lack of consensus on the subject..., [holding] that a petitioner seeking judicial review of an agency action must file with the trial court the agency record as defined by the [AOPA]. Failure to do so results in dismissal of the petition.” Four years later, in an unpublished Court of Appeals memorandum opinion, Judge Kirsch concurred, nevertheless stating, “When the delay is minimal, and when no prejudice results, courts should chastise the tardy filer [of the record] but should then decide the case on the merits or on the lack thereof.”  

The General Assembly could have resolved these questions quickly by amendments clearly defining verification, by granting trial courts discretion to allow amended pleadings and by assigning responsibility for filing records to the agencies (which prepare the records from documents and material they possess) themselves. Instead, uncertainties easily correctable by statutory amendments fomented years of litigation. Court decisions, including the Indiana Supreme Court’s denial of transfer in cases presenting the procedural/jurisdictional holdings, and the General Assembly’s indifference, contributed to the concentration

*Continued on page 34...*
ESI WHACK-A-MOLE – DON’T LET IT CLOBBER YOU

By Keith Chval, Esq.

As too many a litigator can attest, the heartburn from losing a round of “ESI Whack-a-Mole” is a whole lot worse than what you get from eating the ketchup covered cardboard masquerading as “pizza” at your local cheesy kids arcade playground. Nay, a case of heartburn is getting off easy in comparison to the agita from losing at this 21st century litigation game.

It’s the maddening game investigators and litigators are subjected to, where they repeatedly strike a mighty blow of their electronically stored information (ESI)/electronic evidence (EE) discovery thumper spot-on to where they know they saw the critical email show its face a second ago only to miss every time and ultimately discover it was lurking down a hole where they’d never before seen a hint of it.

At the end of the day, they’re left feeling more like the varmint hiding in the hole while the judge winds up to whack them with the thumper that only weeks before they were so confidently swinging themselves.

WHAT’S THE DEAL? WHY SO DIFFICULT?

How can it be that highly competent and conscientious investigators and litigators from across the land are getting whacked by this game? Technology.

Without getting too far into the circuitry, let’s just say that things have changed dramatically from 1985 when I was a newly minted IU grad selling computers for NCR and “dumb” terminals ruled the day to today with the intervening events of Al Gore
inventing the Internet and Motorola rolling out its first “brick” mobile phones.

Now, potentially discoverable and valuable electronic information and evidence can exist in a myriad of different repositories, often times with foggy awareness regarding the actual location of the physical repository, and almost always existing in more than one place at the same time.

So, what’s a 21st century litigator to do?

**COMPLYING WITH A DUTY, OR GOING TO BATTLE?**

Clarity on your objective in seeking to identify where ESI or EE resides is going to largely determine what path you go down in the process of locating, preserving, and collecting ESI/EE.

At the onset, ask yourself whether you are “merely” seeking to comply with your preservation and discovery duties with respect to the impending ESI/EE exercise, or are you preparing to go to battle where you need to dig into the electronic evidence to prove or contest who did what, when, where, why, and how?

In the first instance, you’re looking at a “vanilla” eDiscovery matter where what you’re after is the kind of straightforward ESI openly resting in peaceful fields. In the latter, in addition to this ESI, you’re also after the EE lurking in the crevices of operating system records, the dark corners of data fragments on a storage drive, or the depths of a cell phone, just to name a few.

Accordingly, the discussion below will break out into first an outline of where one wants to look for ESI when seeking to comply with discovery obligations, followed by the same with respect to likely targets in the hunt for smoking gun EE.

**WHERE TO LOOK FOR ESI WHEN COMPLIANCE IS THE OBJECTIVE**

As noted by Todd Kaiser, Shareholder in Ogletree Deakins’ Indianapolis office, “‘Reasonableness’ is the word of the day when it comes to assessing to what lengths litigants must go in identifying and preserving or collecting ESI to be in compliance with their discovery obligations.”

In that vein, Table One highlights the go-to primary locations from where to preserve and collect potentially responsive ESI of the most prevalent types (e.g., contracts, spreadsheets, email, etc.).

While Table One provides a quick reference for the default locations from where to preserve and collect the respective class of ESI, virtually every matter, and even individual custodians within a matter, can be counted on to have its own twists.

For this reason, it is critical that counsel become fully engaged to understand how your client’s systems are configured and the “work-arounds” that individuals may have made that thwart the best laid configurations of their enterprise.

For the “Enterprise Operations/Matters” category of ESI (IV), conferring with opposing is critical for identifying what specifically in relation to these items is being sought. Most commonly, opposing will be happy to receive reports run from these systems as opposed to a dump of the raw data en masse.

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**Table One. “Go-To Primary Locations to Preserve and Collect ESI.”**

<table>
<thead>
<tr>
<th>ESI TYPE</th>
<th>WHERE TO COLLECT</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>I. Office Type Files</strong>&lt;br&gt;(Word, Excel, PPT, etc.)</td>
<td>1. Local Laptop/Desktop&lt;br&gt;2. Network Share or Home Folder&lt;br&gt;3. Cloud Utility (e.g., Dropbox)&lt;br&gt;NOTE: subject to configuration and end-user practices</td>
</tr>
<tr>
<td><strong>II. Email Communications</strong></td>
<td>1. Where Hosted&lt;br&gt; a) In-house Exchange server, or&lt;br&gt; b) Web/Cloud (e.g.: M365, Gmail)&lt;br&gt;2. Laptop/Desktop&lt;br&gt; a) Depending on config.&lt;br&gt; b) Secondary/complementary&lt;br&gt;NOTE: NOT from mobile devices</td>
</tr>
<tr>
<td><strong>II. Email Communications</strong></td>
<td>1. Mobile Device (native &amp; apps)&lt;br&gt;2. Back-ups (secondary/complementary)</td>
</tr>
<tr>
<td><strong>IV. Enterprise Operations/Matters</strong>&lt;br&gt;Examples: Financials (e.g.: QuickBooks), Project Management, CRM, HR Manual/Docs, etc.</td>
<td>1. Responsible Party's Storage (per I above)&lt;br&gt;2. Corporate Repository&lt;br&gt;3. Respective App/Program&lt;br&gt; a) Located in-house or w/third party&lt;br&gt; b) Typically in reports generated by app/program</td>
</tr>
</tbody>
</table>
which will also avoid raising a myriad of issues for your client associated with such a mass production. For responsive financial data for instance, a Profit and Loss statement for a particular period (or periods) as generated by QuickBooks as opposed to the raw QuickBooks database is likely going to meet everyone’s needs.

However, at the same time, it may be necessary, and certainly would be prudent, to have your client generate a back-up of the data of whichever respective system at the time that your client’s duty to preserve attaches (and perhaps at ongoing intervals during the litigation). If back-ups created on dates relevant to the litigation exist, they should also be secured and properly preserved.

Also note, in many cases these applications, or at least the data that is created and stored by them, are resident on third party systems. Do not expect this to be a shield from preserving and collecting in response to a discovery demand. “In the past, some counsel may have tried to argue that client data stored on a third-party vendor’s system was beyond the reach of discovery. Today those arguments are not persuasive because any such third-party resident data would likely be considered within the ‘possession and control’ of the party and subject to discovery,” noted Mark Criniti, Partner with SouthBank Legal in South Bend.

**GETTING AFTER THE EE WHEN GOING TO BATTLE**

Now, shift your paradigm. Instead of your objective being to do just enough to comply with your discovery obligations through least-burdensome reasonable and defensible means, now you want to aggressively search for every piece of electronic evidence ammunition that you can arm yourself with as you head into battle. Winner takes all.

Your calculus here for determining the scope of your efforts is going to be something more along the lines of weighing the pay-off from deploying the potential EE smoking gun versus the probability of finding it under the rock(s) being considered and the cost of turning those rocks over to get to it. While engaging in digital forensics can be expensive, it can also pay off hugely. Or not.

Given the virtually limitless array of EE that might be available, to provide what I hope will be practical and useful information here, I will highlight in Table Two several of the most commonly deployed artifacts of EE that Protek has been called upon to recover and examine and identify the source(s) where they might be expected to be found.

Beyond those outlined in Table Two, a universe of others presently exists, and with each development in technology, still more are being created. Do NOT limit your imagination, and never be shy about asking your expert of any possibility that happens to cross your mind. You will be amazed by what you come up with.

In the very beginning of my time prosecuting cybercrimes in the Illinois AG’s office, I had an uber talented, pioneering forensic examiner who I was blessed to have assigned to my unit. After working together for some time, he said to me, “You know, Captain Technology, every 5 second ‘what if’ thought that you have turns into a 5 hour forensics odyssey for me.” Understood. And our unit also happened to enjoy a 100% conviction rate over the 8 years that I was there.

Use your imagination. Ask the question(s).

**THE ESI/EE CARDINAL RULE**

Do. No. Harm. Although the scope of this piece is not ESI/EE preservation in its entirety, no discussion regarding any facet of ESI/EE should go by without at least passing reference to THE Cardinal Rule, which in this realm refers to the absolutely critical importance of
preservation. With any other phase or activity related to eDiscovery or Digital Forensics, there’s always at least a chance to recover from a misstep. Always a chance for a do-over, even if there’s a bit of pain associated with it. Not so with preservation. Fail to do it quickly, fail to do it properly, and it’s game over. No do-overs. But, get it right and you’ve laid the foundation for a successful eDiscovery or Digital Investigation/Forensics endeavor.

**NO MORE GUESSING, WHACK THAT MOLE!**

From the above discussion, you’re sufficiently equipped to step up to the ESI/EE Whack-a-Mole game with the mallet firmly in hand and ready to take an educated swing at the varmint. Good at least until Microsoft, Google, Al Gore, or some other such player rolls out the next iteration of devices or enterprise computing that repositions the gameboard. Until then, go forth confidently with your knowledge and be humbly prepared to ask questions along the way.

Keith Chval, Esq, is the President of Protek, a Midwest-based Digital Forensics, eDiscovery, and Cyber Security firm that he co-founded in 2005. A former county and state prosecutor, he’s been at the forefront of the cyber field including forming and supervising one of the country’s first vertical cybercrimes units and co-designing and teaching one of the nation’s first law school electronic evidence, computer forensics, and eDiscovery classes.

### Table Two. “Most Commonly Deployed Artifacts of EE.”

<table>
<thead>
<tr>
<th>INVESTIGATIVE/LITIGATION OBJECTIVE</th>
<th>FORENSIC ARTIFACT(S) &amp; SOURCE(S)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>I. Use/Access of Information</strong></td>
<td>a. Laptop/Desktop&lt;sup&gt;1&lt;/sup&gt; &lt;br&gt; i. File metadata (Created, Modified, etc.) &lt;br&gt; ii. OS records (e.g., “Most Recently Used”) &lt;br&gt; iii. Explorer/Browser history &lt;br&gt; b. Mobile Device &lt;br&gt; i. Browsing history &lt;br&gt; ii. Apps of interest &lt;br&gt; c. USB Storage Devices (aka, thumb drives) &lt;br&gt; i. OS records of use on lap/desktops &lt;br&gt; ii. OS records of files on USB devices &lt;br&gt; iii. Content of device &lt;br&gt; d. Network Logs &lt;br&gt; i. Access to areas and data of interest &lt;br&gt; ii. User activity once accessed</td>
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<td><strong>II. Communications</strong></td>
<td>a. Laptop/Desktop&lt;sup&gt;1&lt;/sup&gt; &lt;br&gt; i. Corp domain mail client (e.g., Outlook) &lt;br&gt; ii. Personal webmail account records &lt;br&gt; b. Email Host (e.g., Exchange, M365, Gmail) &lt;br&gt; c. Mobile Device &lt;br&gt; i. Text Messaging &lt;br&gt; ii. Email (with caveats) &lt;br&gt; iii. Voice (logs; voicemail) &lt;br&gt; d. Enterprise Mobile Device Management Utility</td>
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<td><strong>III. Spoliation</strong> (aka “Consciousness of Guilt”)</td>
<td>a. Laptop/Desktop&lt;sup&gt;1&lt;/sup&gt; &lt;br&gt; i. O/S Records &lt;br&gt; a. Installation of wiping utility &lt;br&gt; b. Use of utility &lt;br&gt; ii. Browser history (searches; sites visited) &lt;br&gt; iii. Data patterns (characteristic) &lt;br&gt; b. Mobile Device &lt;br&gt; i. On the device itself &lt;br&gt; ii. Device used to effect on others &lt;br&gt; c. External Storage Device</td>
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<td><strong>IV. Location/Travel</strong></td>
<td>a. Mobile Device&lt;sup&gt;1&lt;/sup&gt; &lt;br&gt; i. O/S records &lt;br&gt; ii. Apps (e.g., Waze; camera) &lt;br&gt; b. Image Files (EXIF Geotag metadata) &lt;br&gt; c. Google Location Info &lt;br&gt; d. Cell Tower Records (devices accessing) &lt;br&gt; e. Vehicle Infotainment System &lt;br&gt; f. WiFi &amp; Bluetooth (devices connected) &lt;br&gt; g. IoT Devices (e.g., fitness trackers)</td>
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<td><strong>V. Document Authenticity</strong></td>
<td>a. Laptop/Desktop&lt;sup&gt;1&lt;/sup&gt; &lt;br&gt; i. O/S records (e.g., indicia of prior versions) &lt;br&gt; ii. Unallocated space (deleted priors/drafts) &lt;br&gt; iii. Apps used to fabricate &lt;br&gt; b. USB Device (used to transport while creating) &lt;br&gt; c. File Analysis &lt;br&gt; i. Metadata (timing; owner/author; etc.) &lt;br&gt; ii. App version vs. date of alleged creation &lt;br&gt; d. (Don’t overlook “real world” evidence)</td>
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CASES ADDRESS STALKING, COMFORT ANIMALS, AND MORE

The Indiana Supreme Court issued no opinions in criminal cases in September, but the Court of Appeals decided cases addressing free speech challenges to stalking, comfort animals at trial, sentencing in child molesting cases, and the timeliness of a probation revocation petition.

STALKING CONVICTION UPHELD OVER FREE SPEECH CHALLENGES

A stalking conviction requires “a knowing or an intentional course of conduct involving repeated or continuing harassment of another person that would cause a reasonable person to feel terrorized, frightened, intimidated, or threatened and that actually causes the victim to feel terrorized, frightened, intimidated, or threatened” but excludes “statutorily or constitutionally protected activity.” Ind. Code § 35-45-10-1.

In Ellis v. State, 194 N.E.3d 1205, 1215 (Ind. Ct. App. 2022), the defendant engaged in a variety of activities over several years against a former police officer who she believed should not have taken her to jail after a disturbance at church. She was convicted of a single count of stalking but argued that her conduct was protected under free speech.
First, the Court of Appeals rejected a First Amendment challenge because the conduct was a true threat, which requires proof of “two necessary elements: that the speaker intend his communications to put his targets in fear for their safety, and that the communications were likely to actually cause such fear in a reasonable person similarly situated to the target.” \textit{Id.} at 1217.

While, in isolation, a post threatening to smack someone in the face with a can of Twisted Tea or mimicking a gun with one’s hand may not cause a reasonable person to fear for the person’s safety, when that behavior is combined with frequent, animated yelling, cursing, and honking directed at the victim at locations throughout town and combined with public insults targeting the victim by name, it constitutes an unprotected true threat.

\textit{Id.}

It also rejected a challenge under Article 1, Section 9, of the Indiana Constitution. First, the speech was “not unambiguously political” because the defendant merely “directed profane insults toward Stoffel, expressed a desire to see Stoffel battered, and mimicked shooting him. She never explicitly laid out her alleged criticisms to Stoffel.” \textit{Id.} at 1218. Even if the speech had been pure political expression, the appellate court held it was not protected because the defendant inflicted “harm analogous to that which would sustain tort liability against the speaker.” \textit{Id.} Specifically, tracking down the victim “to yell and publicly heap abuse upon him on an almost daily basis” for over a decade was intentional infliction of emotional distress because it was “so extreme in degree as to go beyond all possible bounds of decency and should be regarded as atrocious and utterly intolerable in a civilized society.” \textit{Id.}

\textbf{NO PREJUDICE FROM PRESENCE OF COMFORT ANIMAL AT TRIAL}

A 2019 statute allows a child under 16 testifying in a criminal matter “a comfort item or comfort animal . . . in the courtroom with the child during the child's testimony unless the court finds that the defendant's constitutional right to a fair trial will be unduly prejudiced.” Ind. Code § 35-40-5-13.

In \textit{Izaguirre v. State}, 194 N.E.3d 1224, 1226 (Ind. Ct. App. 2022), the Court of Appeals addressed whether the defendant was prejudiced by a support dog sitting near a child as she testified in a child molesting trial. The trial court told the jury that “Indiana law permits a child under the age of sixteen to have an animal accompany the child during the child’s testimony here in court. [Child] has chosen to take advantage of that provision of the law and will have a comfort animal present during her testimony.” \textit{Id.} Moreover, the trial court instructed the jury not only about the presumption of innocence and the state’s burden of proof, but also sympathy for the child: “Neither sympathy nor prejudice for or against either the victim or the Defendant in this case should be allowed to influence you in whatever verdict you may find.” \textit{Id.}

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Based on these instructions and the “very damning” evidence presented by the state, the Court of Appeals affirmed the convictions because the defendant could not “demonstrate he was prejudiced by the trial court’s decision to allow Child to testify with a support animal.” Id. at 1227.

SIXTH AMENDMENT IMPLICATIONS OF VICTIM’S AGE OF CHILD MOLESTING SENTENCE


Child molesting is a Level 1 felony when it involves sexual intercourse or other sexual conduct with a child under 14 years of age. The sentencing range for a Level 1 felony is 20 to 40 years, but Indiana Code Section 35-50-2-4(c) provides for a sentencing range of 20 to 50 years when “the victim is less than twelve (12) years of age.” Id. at *6 (quoting Ind. Code § 35-31.5-2-72(1)). The statute “appears to be an anomaly in this State’s sentencing scheme because it provides different sentencing ranges for the same level of offense based upon certain facts”; moreover, it “does not explain how those facts are to be determined or the required standard of proof.” Id.

The charging information alleged the victim was “under fourteen,” but the evidence at trial included incidents that occurred both before and after he turned 12. The trial court made a finding at sentencing that the child was under the age of 12 at the time of the offense—but the jury was never asked to make that determination. Because the trial court’s finding “expose[d] the defendant to a greater punishment than that authorized by the jury’s guilty verdict” it violated the Sixth Amendment under Apprendi v. New Jersey, 530 U.S. 466 (2000), which held “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Id. at 490, 494.

The Court of Appeals reversed and remanded for a new sentencing hearing at which “the State: (1) may elect to prove before a jury that B.E. was molested when he was under the age of twelve; or (2) have Holmgren resentenced” under the statute providing for a 20-to-40-year range. Holmgren at *7.

INDIANA COURT NOT BOUND BY FEDERAL COURT’S GRANT OF MOTION TO SUPPRESS

In Parker v. State, No. 21A-CR-1643, 2022 WL 4372595, at *3 (Ind. Ct. App. Sept. 22, 2022), the Court of Appeals affirmed a trial court’s refusal “to give preclusive effect to the federal district court’s decision granting [the Defendant’s] motion to suppress in the federal case.” Although the defendant established the first two elements—“(1) a final judgment on the merits in a court of competent jurisdiction [and] (2) identity of the issues”—he could not prove the third: “the party to be estopped was either a party or had privity of a party in the prior action.” Id. at *4. Rather, “[t]here must be an identity of parties or their privies and mutuality of estoppel for another ruling to have preclusive effect in a

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Some lawyers may be able to tell the end of the year is upon us because they can finally breathe again after ragweed season is over. Others can tell it’s the end of the year because the school bus starts picking up the kiddos in the dark or because their Aunt Polly’s knee starts squeaking, indicating that winter weather is on its way. For us, we can tell we are about to wrap up another year because we are being asked to speak at two or three ethics CLEs a week.

Regarding topics, we are often asked to speak about “all of the ethics updates from the past year.” The problem with that request is the Rules of Professional Conduct haven’t changed much since we became attorneys. However, bar associations and regulatory authorities find new points of emphasis to write about in their advisory opinions. Here are three lessons from recently published ethics opinions.
First, we should note that every Hoosier lawyer should take a moment to read the Disciplinary Commission’s Advisory Opinions. The advisory opinions are “nonbinding” and issued “in response to a prospective or hypothetical questions regarding the application of the ethics rules applicable to Indiana judges and lawyers.” (Advisory Opinion #1-22 at p. 5). The opinions are easy to find with a quick Google search; they are easy reads; and they give you an idea of what the Disciplinary Commission is thinking.

Opinion #1-22 discusses a lawyer’s comments on public and pending matters. More specifically, it looks at Rules 1.6, 3.6 and 3.8 to discuss what a lawyer should and should not say. The first time we read Rule 3.6 of the Indiana Rules of Professional Conduct, it was 1998. Social media did not exist and when we were trying to picture a lawyer violating this rule, we had visions of F. Lee Bailey and Johnnie Cochran talking to reporters in the O.J. case.

The commission’s opinion, however, makes it clear that these rules apply not only to the comments a lawyer makes on national news, but also the comments the lawyer makes on social media. The specific issue the commission addresses is “Can a lawyer’s pretrial publicity or extrajudicial comments on social media platforms about a pending legal dispute in which the lawyer is participating (or has participated) have ethical implications?” (Emphasis added.)

The quick lessons from this advisory opinion are: (1) Rule 1.6 is broad and a “lawyer shall not reveal information relating to the representation of a client.” Before a lawyer speaks publicly (in social media or otherwise) about a client matter, there needs to be an exception to the rule of confidentiality. Usually, client consent will provide that exception. (2) Before speaking publicly about a pending case, the lawyer should make certain he or she is preserving “the impartiality of the justice system.” Therefore, lawyers are advised to not communicate about inadmissible matters, a witness’s credibility, or matters outside the public domain. (3) Attorneys are allowed to “make extrajudicial statements that a reasonable attorney would conclude is necessary to combat negative publicity not initiated by the client.” (Opinion at page 2) But don’t get too excited as Lesson #2 will likely still apply. Unfortunately, the more boring the lawyer is in his or her public statements, the more likely it is that the lawyer will stay out of trouble.

"Unfortunately, the more boring the lawyer is in his or her public statements, the more likely it is that the lawyer will stay out of trouble."

2. PRO SE LAWYERS SPEAKING TO REPRESENTED PEOPLE—ABA OPINION 502

“Hot off the press” is an ABA opinion that speaks to whether a lawyer can “get around” (our words, not theirs) Rule 4.2 and communicate with a represented party without the consent of the represented party’s counsel, simply because the lawyer is pro se. In short, the answer is “no.” See Formal Opinion 502: Communication with a Represented Person by a Pro Se Lawyer. In essence, the opinion concludes that when a “lawyer is engaged in self-representation,” the lawyer is “representing a client” and is, therefore, “subject to Model Rule 4.2’s prohibition.” (Opinion at page 6).

Interestingly, this is the second time Rule 4.2 has been highlighted in the last year. As you know, Rule 4.2 prohibits communication with a represented person about the “subject of the representation.” Last year, the Indiana Supreme Court gave guidance on what constitutes “the subject of representation.” In re P.M., 166 N.E.3d 345 (Ind. 2021).

In P.M., the respondent represented husband in post-dissolution litigation about his marriage to his first wife. Second wife’s deposition was scheduled in another matter relating to criminal charges from a domestic dispute. Respondent knew second wife was represented by counsel in the dissolution matter, but the respondent did not inform the second wife’s attorney about the deposition, thinking the “subject of the representation” was the criminal case. However, the dissolution
matter and the criminal matter overlapped. “At the deposition Respondent . . . elicited incriminating testimony from Second Wife and testimony about subjects relevant to the dissolution case, and Respondent later contacted the prosecutor and provided her with a copy of Second Wife's deposition.” In re P.M., 166 N.E.3d at 346. The Court rejected the respondent’s argument that the “matter” referenced in Rule 4.2 should be read narrowly to mean only the specific lawsuit in which the deposition was taken. Id.

From this, we can glean the following quick lessons: (1) Lawyers representing themselves are still “representing a client” and must still seek consent of the represented parties’ counsel (not the party) before speaking to the represented party; and (2) before a lawyer speaks to a represented person, that lawyer should consider the “subject” needed to be discussed. Based on P.M., if a lawyer knows a witness is represented on the subject matter the lawyer wishes to discuss, the lawyer needs the consent of the witness' counsel, regardless of what piece of litigation the lawyer is communicating about.

3. MISUSE OF NOTARIES AND A NOTE ABOUT CONTINUING TO WORK FROM HOME -DISCIPLINARY COMMISSION ADVISORY OPINION # 1-21

In Advisory Opinion 1-21, the commission reminded us, “A lawyer who ratifies a nonlawyer assistant's conduct and is in a position of managerial authority, or who directly supervises the nonlawyer assistant, can be subject to discipline for the nonlawyer assistant's/notary's failure to properly notarize a document.” (Opinion at p. 1). The commission cautioned: “A supervising lawyer could violate the rules by having knowledge and failing to take remedial action when a nonlawyer assistant/notary habitually has notarized affidavits prior to the principal's signature.” (Opinion at p. 2).

Our assumption is the commission would not have brought this to our attention unless there had been recent issues with the misuse of notaries. We are also guessing these issues stem from the fact that we are not at the office and not in the presence of our staff when documents are notarized. Depending on who you ask, the pandemic may or may not be over. Regardless, many lawyers are simply refusing to return to the office. We are told that in some offices, you are more likely to see tumbleweed rolling down the hall than you are to see an associate lawyer.

In 2020, we would have taken this moment to talk about protecting client confidentiality and maintaining competency when outside the office. We would have also reminded you to supervise nonlawyer staff through regular communication while working at home. However, in 2022, we want to take this moment to talk about making mistakes and panicking while working at home.

For those of you who have never made a mistake, we would like to tell you (1) congratulations on being
perfect and (2) mistakes are never fun. When we realize we made a mistake in the office, we tend to walk down the hall and talk to the first attorney colleague we see face-to-face. We then talk about/freak out about the mistake. But when you’re working remotely, you can’t do that. Instead, you are more likely to discuss/freak out with your best friend in the office over email or text.

Unfortunately, just because those communications are with a trusted lawyer, does not mean the communications are with a friend in the office over email. You’re working remotely, you can’t panic in writing. Often you find you panic. If that can’t be done, don’t panic. When we realize we made a mistake in the office, we tend to panic in writing. Often you find you didn’t make a mistake after all, or the mistake is easily fixed.

The communications occurred with attorneys the law firm had designated as in-house counsel to represent the firm.) If you are freaking out to a random buddy from your office, these communications will likely not be privileged, and those panicked writings may end up as exhibits in malpractice suits.

So, the quick lesson from the above is (1) supervise your staff in everything they do; (2) train your staff to never misuse a notary regardless of the inconvenience; and (3) when you make a mistake, don’t panic. If that can’t be done, don’t panic in writing. Often you find you didn’t make a mistake after all, or the mistake is easily fixed.

James J. Bell works at the Paganelli Law Group and practices in the areas of criminal defense and attorney discipline defense. He also defends judges in ethics inquiries and attorneys in civil cases. In the past, he served as chair of the Indiana State Bar Association’s Legal Ethics Committee and Criminal Justice Section. His Uber rating was recently lowered to 4.90 and he has no idea why.

Christopher F. Goff also works at the Paganelli Law Group and concentrates his practice on criminal defense, representing businesses in civil litigation and providing professional discipline and ethics defense. He is a regular contributor to Indiana State Bar Association publications.

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This article highlights three Indiana Supreme Court civil transfer grants and two Indiana Court of Appeals opinions issued in September 2022. The Indiana Supreme Court did not issue any civil opinions that month. The full text of all Indiana appellate court decisions, including those issued not-for-publication, are available via Fastcase at www.inbar.org or the Indiana Courts website, www.in.gov/judiciary/opinions.

SUPREME COURT TRANSFER GRANTS

IS IT A SECOND BITE AT THE APPLE IF YOU CUT THE APPLE IN TWO?

In Davidson v. State, 187 N.E.3d 283 (Ind. Ct. App. 2022), the Court of Appeals reversed the trial court’s dismissal of negligence claims where the trial court had barred the claims due to defensive collateral estoppel and improper claim splitting. The plaintiff had suffered severe injuries as a passenger in a semi-truck that collided with a highway overpass bridge. The plaintiff-passenger first won a judgment against the truck driver’s employer; the trial concluded the driver’s negligence was a proximate cause of the collision. In a later, separate action, the plaintiff-passenger sued different defendants—the state, INDOT, and other entities involved in road construction—alleging negligence in the nearby highway construction.

Defensive collateral estoppel may be asserted against a party who had a prior opportunity to litigate an issue and lost. The Court of Appeals held the negligence claims were not barred by defensive collateral estoppel because “each of the actions requires proof of an actor’s negligence and liability that the other does not,” as the driver’s employer and the defendants in the second action are “separate entities with separate interests.” Id. at 286. Moreover, the plaintiff won in the first action.

CHECK YOUR INBOX: AN ARBITRATION CLAUSE MAY BE BURIED IN A LINK IN YOUR EMAIL

In another episode of “Don’t forget to read the fine print,” Decker v. Star Financial Group., Inc., 187 N.E.3d 937 (Ind. Ct. App. 2022) involved a plaintiff class action against a bank for overdraft fee practices. The trial
court had granted the bank’s motion to compel arbitration against the plaintiff-accountholders based on the accounts’ terms and conditions. However, the bank had inserted an arbitration provision into the terms and conditions about six months before the class action began. The terms and conditions stated the bank would give reasonable notice in writing for any changes to the agreement, but what constituted reasonable notice remained undefined in the agreement.

Viewing the additional terms as a modification to the contract that requires all the elements of contract formation, the court’s framework required reasonable notice for the accountholders to have assented to the addition of the arbitration clause. With reasonable notice left undefined, the court applied the due process standard: notice reasonably calculated to reach the intended audience.

Although the lead plaintiff-accountholders had elected to receive electronic account statements, they never read the arbitration clause. To view the added arbitration clause, they would have had to have: (1) logged in to their account (as directed by their monthly email notice of an available statement), (2) found the 14-page monthly statement, and (3) scrolled to the last two pages for the update to the terms and conditions. Those final pages of the monthly statement were the only indication of any changes to the terms and conditions—the email notice made no mention of them. Yet, once on page 13, the notice of the new terms appeared in bold, capital letters. The Court of Appeals concluded the accountholders were not provided with reasonable notice and reversed the trial court’s grant of the motion to compel arbitration. Judge Crone dissented, faulting the accountholders for failing to read the entirety of the monthly statement. The Indiana Supreme Court granted transfer on September 1, 2022. 194 N.E.3d 594 (Ind. 2022).

IT CAN’T HURT TO ASK: DEBTOR HAS ORDER VACATED DURING ONGOING APPEAL OF THAT SAME ORDER

Conroad Associates, L.P. v. Castleton Corner Owners Association, Inc., 187 N.E.3d 885 (Ind. Ct. App. 2022) presents a complex procedural purgatory. Stemming first from an incident where a commercial building had been flooded with sewage, the building owner won a judgment against the owners association for breach of contract and negligence in connection with the incident. A series of appeals followed.

The association first appealed the trial court’s judgment. In the meantime, the trial court held proceedings supplemental to the execution of the judgment and issued an order. The association appealed that order and declared bankruptcy. Next, the result from the first appeal: the Court of Appeals affirmed the association’s liability. Castleton Corner Owners Ass’n, Inc. v. Conroad Assocs., L.P., 159 N.E.3d 604 (Ind. Ct. App. 2020), trans. not sought. With the bankruptcy stay in place, the association asked the trial court to vacate the proceedings supplemental order, even with the pending appeal on that order. The bankruptcy court lifted the automatic stay, the trial court vacated the original proceedings supplemental order and entered a new order. The building owner appealed, creating the third appeal in the case.

The building owner argued the new order was void because: (1) the trial court lacked subject matter jurisdiction over the original proceedings supplemental order during the pending appeal of that order, and (2) the association
violated the bankruptcy stay by asking the trial court to vacate that order. The Court of Appeals disagreed. First, the court held “the trial court retained subject matter jurisdiction on the limited question of the manner in which the judgment on the underlying liability should have been enforced.” Id. at 898. Second, the court held that even if the association’s motion to vacate the original order did violate the bankruptcy stay, the trial court’s new order was not void because it was entered after the lifting of the stay. Id. at 899. The Indiana Supreme Court granted transfer on September 1, 2022. 194 N.E.3d 594 (Ind. 2022).

**INDIANA COURT OF APPEALS**

**A ‘WIND-WIND’ SITUATION: SCHOOL CORPORATION’S CONTRACT FOR A WIND TURBINE NOT AN “INVESTMENT”**

*Performance Services, Inc. v. Randolph Eastern School Corporation,* No. 22A-CP-361, 2022 WL 4295425 (Ind. Ct. App. Sept. 19, 2022) (Mathias, J.) — A public school corporation contracted with an engineering firm for the construction and operation of a wind turbine on third-party property. The school corporation planned to use the wind turbine for educational purposes: The contract provided for the school corporation’s access to the turbine and its data. When the school corporation refused to pay the engineering firm as agreed, the school corporation sought to have the contract judicially declared void.

The trial court declared the contract void and granted summary judgment for the school corporation, concluding it reflected an “investment” beyond its statutory authority as a political subdivision, pursuant to Indiana Code §§ 20-26-3-7(1) and 36-1-3-8(a)(11). However, “invest” remains undefined as a statutory term. The engineering firm appealed.

The Court of Appeals reversed, reasoning the contract did not indicate the school corporation was to financially profit from the relationship, contrary to the plain meaning of investment. Judge Brown dissented. He considered the contract an “investment,” relying, in part, on the potential revenue or credits the school corporation would receive to offset its energy costs from the sale of the turbine’s generated power.

**WHEN BARK TURNS TO BITE: YOUR DOG’S BREED MAY CREATE CONSTRUCTIVE KNOWLEDGE OF DANGEROUS PROPENSITIES**

*Daniels v. Drake,* No. 22A-CT-68, 2022 WL 4113105 (Ind. Ct. App. Sept. 9, 2022) — A FedEx delivery driver arrived at a 16-acre rural residence for the first time, where the landowners owned a 2-year-old, 140-pound Great Dane. The dog had free rein to roam the property, but otherwise had limited interaction with visitors. When the delivery driver exited his vehicle to hand over a small package to one of the landowners, the dog barked once and bit the driver in the abdomen, causing three puncture wounds and substantial swelling. The driver sued the landowners to recover for his injuries.

At issue was whether the owners had actual or constructive knowledge of their dog’s dangerous or vicious propensities. The Indiana Supreme Court has explained that even if a dog has never attacked anyone before, a dog owner may still be held liable for injuries the dog causes based on if the dog’s particular breed has dangerous propensities. See Pozanski v. Horvath, 788 N.E.2d 1255, 1259–60 (Ind. 2003). The delivery driver designated evidence from a canine behavioral expert, who asserted that Great Danes become aggressively territorial when left isolated and unrestrained on property. The Court of Appeals reversed the trial court’s grant of summary judgment, concluding that the expert’s affidavit created a genuine issue of material fact as to the dangerous tendencies of Great Danes.

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of agency power Justice Slaughter criticized. Conflicting rulings and legislative inaction, perhaps more than agency overreach, led to results Justice Slaughter considered arbitrary.

**JUDICIAL REVIEW AFTER RESCARE**

The Indiana Supreme Court’s affirmanht of FSSA’s denial of payment to ResCare is “law of the case” and “[will govern] the case throughout all of its subsequent stages, as to all questions which were presented and decided, both directly and indirectly.” The *ResCare* remand directed the trial court “to consider the declaratory judgment request on the merits.” Indiana courts may issue declaratory judgments under both T.R. 57 and the Uniform Declaratory Judgment Act, which provides, “When a proceeding under this chapter involves the determination of an issue of fact, the issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.” But if the AOPA prohibits relitigating the “merits” as determined by an agency “merits” cannot be relitigated, what can the trial court “declare” other than that the FSSA order was correct?

The Supreme Court did not acknowledge that Section 1 of Article 5 of the AOPA is captioned “Exclusive means for judicial review; exceptions[.]” The exceptions listed there are not pertinent to *ResCare*.

The Court did not recognize cases which prohibited declaratory judgment actions as an alternate method to review agency orders, such as its 1999 case holding that claims for declaratory and injunctive relief were “inappropriate” to challenge inverse condemnation because “there exist[ed] an adequate alternative legal remedy.” A 1991 Court of Appeals case held a trial court lacked subject matter jurisdiction to adjudicate pension benefits sought in a declaratory judgment action because that procedure would have circumvented the AOPA remedy for agency review. A 1993 Court of Appeals case upheld dismissal of a declaratory judgment action to determine a group’s qualifications to raise funds in Indiana without exhausting administrative remedies, reasoning the assigned agency had “the expertise to determine [if the group was qualified] and [the agency’s] administrative process [was] adequate and competent to allow the [agency] to answer that question.”

It is unclear if the Indiana Supreme Court was implicitly overruling, distinguishing or simply ignoring these cases. *ResCare* does not consider *King ex rel. Jacob v. Secretary [of FSSA]*, a Court of Appeals decision allowing a Medicaid recipient to bypass the AOPA and sue FSSA, in state court without exhausting remedies, for injunctive and declaratory relief under the federal civil rights statute 42 U.S.C.§1983 and the Americans with Disabilities Act (ADA). Federal precedent established it was “not necessary for a plaintiff to exhaust state administrative and judicial requirements before pursuing a §1983 claim,” the Court of Appeals wrote, impliedly acknowledging that state courts have concurrent jurisdiction with federal courts to hear §1983 and ADA claims.

**CONCLUSION**

*King* may become more important after *ResCare* because of *King’s* timing and structure. *King’s* initial pleading was a Petition for Review of the FSSA order, consolidated with a complaint for prospective declaratory and injunctive relief,
challenging FSSA’s ongoing home health care services.\textsuperscript{52} The §1983 complaint named the secretary of FSSA as defendant because states and their agencies are not “persons” with meaning of §1983, but state officers sued in their official capacities for injunctive relief are “persons.”\textsuperscript{53}

In \textit{King} the inadequacy of past services was secondary to the concern about future services. The FSSA secretary did not seek removal of the case to federal district court as she could have as a defendant sued in state court for violating federal statutes.\textsuperscript{54} While a federal district court could have issued injunctive and declaratory relief prohibiting the FSSA secretary from violating federal law, it could not have exercised supplemental (pendent) jurisdiction of a claim based on state law.\textsuperscript{55} The Eleventh Amendment to the U.S. Constitution prohibits federal courts from ordering state officials to comply with state law.\textsuperscript{56}

The significance of \textit{ResCare}'s remand of the declaratory judgment claim is unclear, especially in view of the Declaratory Judgment Act’s apparent guarantee of a plenary trial on “the determination of an issue of fact...”\textsuperscript{57} A plenary trial on the facts seems unlikely given the AOPA’s prohibition of the reviewing court’s “try[ing] the cause de novo or substitu[ting] its judgment for that of the agency,” with limited exceptions allowed for challenges to the agency’s membership or adjudication procedures.\textsuperscript{58}

A declaratory judgment in the current \textit{ResCare} case will likely be only a precedent approving FSSA’s pharmacy reimbursement policies. The “future case” invited by Justice Slaughter “where the issues are raised and the arguments developed” permitting the Court “to entertain legal challenges to this system” may require litigation following the \textit{King} strategy of seeking injunctive and declaratory relief against future agency actions.\textsuperscript{59} In considering equitable relief, a trial court may then be permitted to try those claims de novo.\textsuperscript{60}

**FOOTNOTES:**

1. 184 N.E.3d 1147 (Ind. 2022).
2. Id. at 1150.
3. Id.
4. The AOPA regulates agency adjudications (such as court-like hearings before administrative law judges) and prescribes a method for judicial review of orders. Adjudication differs from rulemaking—the issuance of regulations—under the Administrative Rules and Procedure Act. Agency rules “car[e] the effect of law when [they] prescrib[e] binding standards of conduct for persons subject to agency authority” and can be challenged through a civil lawsuit under the Trial Rules. See I. C. §§ 4-21.5-3-1—37 (adjudication procedures); §§4-21.5-5.1—16 (judicial review of agency adjudication); I.C. §§4-22-2-0.1 et seq. (rulemaking procedure); \textit{Ward v. Carter}, 90 N.E.3d 660, 661, 665 (Ind. 2018) (Dep’t. of Correction lethal injection policy was not a rule requiring promulgation, with the court affirming a dismissal under T.R. 12(B)(6)).
5. \textit{ResCare}, 184 N.E.3d at 1150.
8. Id.
9. Id. at 1150.
10. 3 USC §§51 et seq. (1946).
11. The contrasting views of two prominent scholars, Roscoe Pound and James M. Landis, are summarized in “Evolution of administrative law as a legal discipline,” in Charles H. Koch, Jr. and Richard Murphy, 1 Admin. L.

12. Koch and Murphy, supra, n. 6; Wong
Yang Sung, 339 U.S. at 41-45, n. 4, n. 6 (discussing the history and purposes of the federal A.P.A.).

13. Koch and Murphy, supra.


17. Id. at 844


19. Id., citing Ernest Gellhorn & Paul Verkuil,


21. W. Virginia, ___ U.S. ___, 213 L. Ed. 2d.

22. Id.

23. Id. (citing Utility Air Regulatory Group v. EPA, 573 U. S. 302, 324).


25. Id. (citations omitted).

26. Id.

27. Id. Justice Thomas has criticized Chevron in Baldwin v. United States, 140 S. Ct. 690 (2020)(dissenting from denial of certiorari).

28. Id.

29. Id. at n. 10.

30. Justice Slaughter, in the Court's CARES Act attachment and garnishment Order, protecting recipient debtors' Stimulus Payments from levy by creditors, dissented because he was “aware of no law—federal or state—exempting these stimulus payments from garnishment and attachment. And the Court cites none.” In re Petition to Indiana Supreme Court to Engage in Emergency Rulemaking to Protect CARES Act Stimulus Payments from Attachment or Garnishment from Creditors, 142 N.E.3d 907 (Ind. 2020).


32. Id.

33. Id. at 408.


38. 927 N.E.2d 367 (Ind. 2010).

39. Id. at 372

40. Id. at 374

41. Teaching Our Posterity Success, Inc. v. Indiana Dept of Educ., 20 N.E.3d 149, 150 (Ind. 2014)


44. ResCare, 184 N.E.3d at 1150

45. I.C. §34-14-1-9

46. I.C. §4-21.5-5-1.

47. Dible v. City of Lafayette, 713 N.E.2d 269, 274 (Ind. 1999)


51. Id.; Snyder v. King, 958 N.E.2d 764, 787 (Ind. 2011)(state courts have concurrent jurisdiction with federal courts over $1983 claims).

52. Id. at 1008

53. Id.

54. “Upon the Verified Complaint, she sought injunctive and declaratory relief, and upon the Verified Petition for Review a remand to the Agency for further proceedings consistent with the rulings of the trial court, as permitted by Ind. Code § 4-21.5-5-1.” Brief of Appellant-Petitioner, 2002 WL 33949213, at 6


57. I. C. § 4-14-1-9

58. I. C. § 4-21.5-5-11

59. Prosser, 139 N.E.3d at 702–703
Continued from page 24...

criminal case.” *Id.* at *5. Put another way, the case involved “two different governments, federal and state, and charges brought under statutes that are unique to each.” *Id.*

**PETITION TO REVOKE PROBATION WAS UNTIMELY**

Under Indiana Code section 35-38-2-3(a), a trial court may revoke a defendant’s probation when a violation occurs during the probationary period and

the petition to revoke probation is filed during the probationary period or before the earlier of the following:

(A) One (1) year after the termination of probation.
(B) Forty-five (45) days after the state receives notice of the violation.

In *Elston v. State*, 194 N.E.3d 148, 150 (Ind. Ct. App. 2022), the defendant was on probation until August 20, 2019. He committed a battery on July 25, and charges were filed on August 9 with an initial hearing held on October 11.

The Court of Appeals held the October 22 petition to revoke was untimely and required dismissal. The 45-day statutory period commenced when “the state” received notice of the violation, “not when the probation department receives notice.” *Id.* “The state” received notice of the July 25 battery no later than August 9 when charges were filed. *Id.*

**FOOTNOTES:**

1. The Court of Appeal rejected a Sixth Amendment challenge to the credit-restricted felon statute, reasoning that credit time “is a bonus created by statute” and thus any deprivation does not “lengthen the fixed term of a prisoner’s sentence.” *Id.*

2. The Court of Appeals also rejected a different challenge under a separate cause number in which the petition to revoke was filed during the probationary period. The trial court did not lose jurisdiction over the defendant when it did not issue a summons on the petition until after the probationary period. The statute quoted above “makes clear that a petition to revoke doesn’t even have to be filed, let alone adjudicated, before the expiration of the probationary period.” *Id.* at 151.
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