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*The Ethics of Attorney Attire*  
By Jon R. Pactor

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# President's Perspective

## STEP UP TO LEADERSHIP

By Tom Felts

### PRESIDENT'S PERSPECTIVE

I love Steve David.

There, I said it.

And I know I'm not alone. I mean, what's not to love?

Steve served our country for 28 years as a JAG officer, including post 9/11 mobilizations in Iraq and Guantanamo Bay, Cuba. He was a trial court judge in Boone County for 15 years. He was a distinguished member of the Indiana Supreme Court for 12 years. He has been an active member of the Indiana State Bar Association, serving in many capacities including helping to establish the Leadership Development Academy. He is now a senior judge and working in a law firm on numerous legal matters and establishing a growing reputation as an effective mediator. I love all these accomplishments and others I know I have missed. But there is one thing I love about Steve more than anything else: He is a leader.

I admire his leadership methods and have tried to emulate many of them. He leads by example in that he will never ask someone else to do a task he would not do himself. He leads by consensus and collaboration as opposed to "my way or the highway." He leads by his effort, being the hardest worker in the group, the first to arrive and last to leave. He leads with compassion, enthusiasm, humor, and humility, being genuine and relatable, treating everyone, no matter their station in life, with the same respect and attention.



There has always been that leadership question: Is someone a natural leader or can leadership skills be taught? Are Steve's leadership skills, for example, innate qualities from birth or has he learned them along the way? My two cents: We need both natural leaders and learned leaders to make an impact on our law firms and offices, our bar association, and our community.

There have been thousands of books written about leadership and I have read quite a few of them. There are two I can particularly recommend: *Lincoln on Leadership: Executive Strategies for Tough Times* by Donald T. Phillips and *Creating Magic: 10 Common Sense Leadership Strategies from a Life at Disney* by Lee Cockerell.

Among Lincoln's strategies were his expertise at being a master communicator, articulating his thoughts and ideas clearly and persuasively. He used storytelling and humor to connect with people and was an active listener who showed a genuine interest in the concerns and perspectives of others. He engaged in dialogues with both allies and adversaries to help him build consensus and navigate through difficult situations. He also demonstrated a deep sense of empathy and compassion, connecting with people on a personal level and seeking to understand their motivations and concerns.

Cockerell's leadership ideas came over a century later and demonstrate the same

**"We need both natural leaders and learned leaders to make an impact on our law firms and offices, our bar association, and our community."**

"personal" sense in a more modern vein. He was adamant that those he led must always feel they were heard, relying on effective, clear, and responsive communication channels to provide timely responses to inquiries. He paid attention to "the little things," encouraging professionalism in all interactions and upholding high standards of ethics, integrity, and conduct. He always strove to ensure that all activities met or exceeded expectations, paying attention to the small details and to feedback from those under his direction.

Here is your 2023–24 ISBA Leadership Team and their thoughts on ISBA leadership:

**MIKE JASAITIS** (president-elect): "It's such a privilege to serve our

bar under the leadership of ISBA president Judge Felts. I look forward to giving back to the profession that has provided so much to so many. Via collaboration, we can effectuate positive change for our membership."

**JOHN MALEY** (vice president): "For me, ISBA leadership is a privileged opportunity to serve our profession and the cause of justice throughout Indiana, from small towns like my hometown of Richmond where my father proudly practiced in my favorite Indiana courthouse, to larger cities like Indianapolis where I am based. For the upcoming year I hope to bring my perspectives from federal and state litigation across the country, as well as my experiences in leading pro bono services in Richmond. I love lawyers and this

honored profession and seek to give back more than it has given me."

**APRIL KEATON** (secretary): "To me, an ISBA leader seeks to learn and to address their members' needs. In addressing these needs, an ISBA leader relies upon and develops relationships throughout the ISBA community. I hope that my leadership expresses these capabilities."

**STEPHANIE STEELE** (treasurer): "I've always enjoyed being a part of the ISBA and it's my opportunity to give back. Being on the ISBA leadership team means being a voice for its members. I'm honored to serve."

**JACQUELYN PILLAR** (counsel to the president): "I am active in the ISBA because we, collectively, help each other be better attorneys and better people. Being a leader in the ISBA means that I get to help great people accomplish big ideas by working collaboratively toward goals that enrich our communities (no matter how you define that term). There's a leadership quote that I heard years ago: 'It's not about the role. It's about



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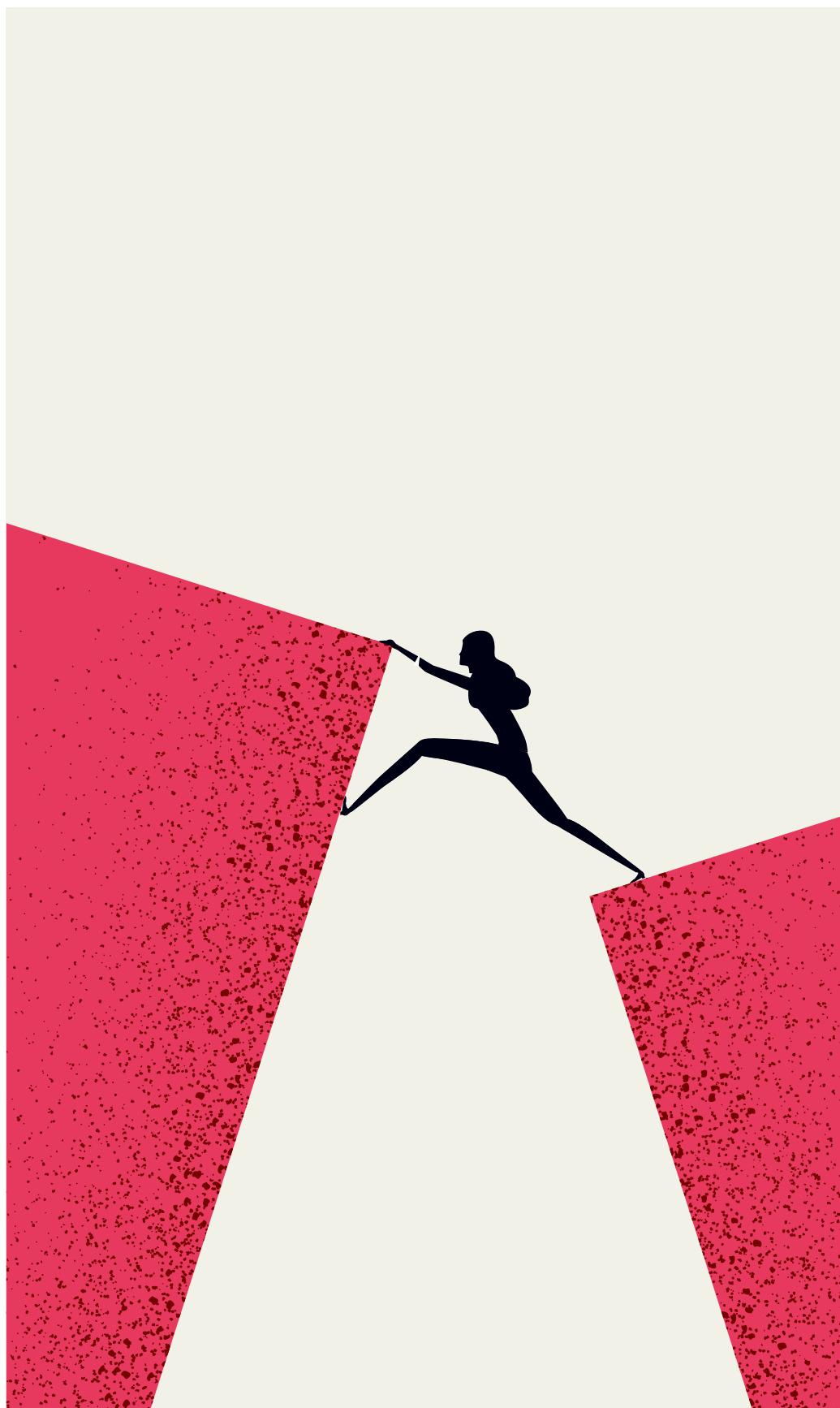
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**"The ISBA provides many opportunities for leadership, both for lawyers who are experienced leaders and for lawyers seeking their initial leadership roles."**

the goal.' If my willingness to help and volunteer makes one person's job easier, one person's life better, or encourages others to do the same thing, my volunteerism has been worth it. For the coming year, I am so excited to help advance the ISBA's vision and to get more people involved with our ISBA community."

The ISBA provides many opportunities for leadership, both for lawyers who are experienced leaders and for lawyers seeking their initial leadership roles. If you are a committee or section member, let your staff liaison know you are interested in a leadership opportunity. If you're a younger or newly admitted lawyer who wants to discover or enhance your leadership skills, apply for the next Leadership Development Academy class. If you're interested in bar association leadership, talk with Joe Skeel or me.

We need leaders now more than ever! Hopefully the principles of Lincoln and Cockerell and the words of your ISBA leadership team will inspire you to step forward. And if you need even more persuasion, I know I can count on my friend Steve David to reach out and motivate you to say "yes." Without a doubt, shortly thereafter, you (like all of us) will love him too. ☺





# YOUR END-OF-YEAR CLE REQUIREMENTS

**W**e're nearing the end of the year, which means it's yet again time to check up on your CLE requirements. Indiana attorneys are required by the Indiana Office of Admissions and Continuing Education (ACE) to complete 6 hours of approved CLE per year, totaling 36 hours with 3 hours of Ethics over their three-year educational cycle. (For more details, check Admission and Discipline Rule 29. If you have any questions about your specific CLE requirements, please contact ACE at 317.232.2552.)

Still need some CLE hours to meet those requirements? Not to worry, ISBA is here to help.

## YOUR CLE SOLUTIONS

We know how important flexible, accessible, and quality CLE options are. So, if you can't attend an in-person CLE, take advantage of these opportunities to earn CLE credits on your terms.

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Visit [www.inbar.org/memberCLE](http://www.inbar.org/memberCLE), log in to your ISBA member account, and explore more than 30 free on-demand CLE courses. These programs cover everything from best practices for helping your clients to thought-provoking discussions on ethics and diversity, like our *Open Conversations* programs.

2. **On-demand CLE library:** For an even broader selection of CLE courses, visit the full On-Demand CLE library at [www.inbar.org/ondemand](http://www.inbar.org/ondemand). You'll get access to more than 60 CLE courses, all available at a reduced cost to ISBA members.
3. **CLE bundles:** If you're looking to accumulate several CLE hours in one go, keep an eye out for our on-demand bundles. These bundles offer multiple CLE courses that you can download and watch at your convenience, all at a reduced cost.

All on-demand CLE courses are available to watch at any time through the expiration date listed on that CLE's description. You'll immediately receive a link to download and

view the CLE upon registering. After completing the course, you'll click the "CLE Credit Reporting" link on the webinar screen to submit your attendance for CLE credit. ISBA will then report your attendance to ACE within 14 days.

### FREQUENTLY ASKED QUESTIONS

What else might you need to know in the rush to get your CLE credits? Check out these frequently asked questions.

#### How do I check my current CLE hours?

Visit the Indiana Courts Portal at [portal.courts.in.gov](http://portal.courts.in.gov) and access your CLE statement by clicking the "Download your complete CLE history report" link on the CLE summary page.

#### What should I do if a CLE I attended isn't showing on my CLE transcript?

For ISBA programs, we will report your attendance to ACE within 14 days of the program's completion. If that timeframe has passed, please send an email to [cle@inbar.org](mailto:cle@inbar.org) with your name and the CLE you attended, and we will assist you. For non-ISBA programs, contact the organization that hosted the CLE to verify your attendance.

#### How late can I complete a CLE and still have it reported?

The deadline for completing your annual CLE requirements is December 31. If you're viewing ISBA's on-demand CLE, as long as you watch the recording and submit your electronic CLE report on or before December 31, then the course will count towards your 2023 requirements.

(Please note that ISBA will be closed December 25 through January 2, so we will not be reporting CLE attendance during that time. But

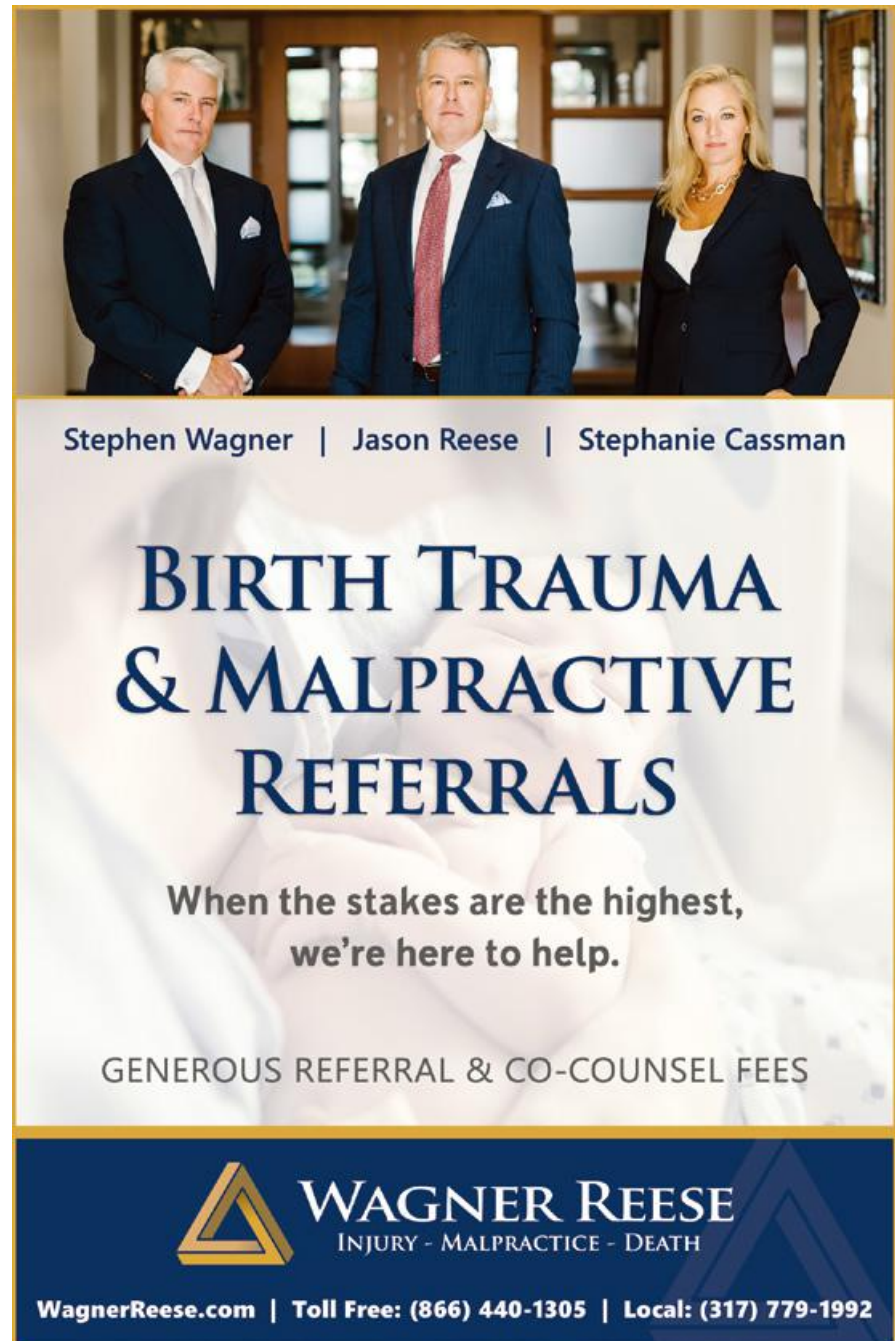
don't panic! As long as your report shows you completed the CLE course on or before December 31, it will still count for your 2023 requirements, regardless of when the ISBA submits your attendance.)

#### Still have questions?

If you have specific questions about your CLE requirements, please

reach out to ACE at 317.232.2552. For any ISBA CLE-specific questions, please contact us at [cle@inbar.org](mailto:cle@inbar.org).

We wish you the best of luck this CLE season! For more information and to explore our CLE offerings, visit [www.inbar.org/CLE](http://www.inbar.org/CLE). ☎



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# **THE ETHICS OF ATTORNEY ATTIRE**



## FEATURE

**By Jon R. Pactor**

*The opinions expressed in this article are those of the author and do not necessarily reflect the views of the publication, the association, or the Written Publications Committee. We share this with you in the hopes of sparking a conversation about attorney apparel in Indiana.*

Most of us attorneys have not given much thought to the ethics of what we wear in a professional capacity. We have thought about our attire in other ways. What is comfortable today? What will my clients or colleagues think? What is appropriate?

Ethical concerns apply to attire—clothes, accessories, and tattoos. I am still developing my thoughts about it. I have done some legal research, and I have reached out to about 30 colleagues whose insights, opinions, and anecdotes on the subject have influenced me.

Attorneys and children alike know that attire is important to professional work. Years ago, I was officiating a boys' basketball game at First Baptist Athletics at 8600 North College Avenue in Indianapolis. In one game, a boy about 10 or 11 years old did not like a call made by my partner in stripes. My partner was wearing tired jeans, an untucked shirt, and unclean tennis shoes. The future All-American pled his case to me and wondered whether my partner was a real referee. He said: "He does not even look like a referee!"

### **THE INDIANA SUPREME COURT HAS NOT ADOPTED A DRESS CODE FOR JUDGES OR ATTORNEYS**

While attire is important for our professionalism, the word "attire" does not appear in the Rules of Professional Conduct, and the Indiana Supreme Court has not adopted a dress code for judges or attorneys. I found only one Indiana case on the ethics of the attire for attorneys. In the early 1990s, a trial court judge caused a new attorney to be arrested for contempt after he failed to attend court for a client. The attorney appeared in court the next day in prison garb for his own problem and for his client's problem. The Indiana Supreme Court, criticizing the trial court, said that "having an attorney appear in jail attire with his client creates a definite suggestion of partiality."<sup>1</sup> The



**"The court thus recognized that attire, including the attire of an attorney, can have an impact on the fairness of court proceedings."**

court thus recognized that attire, including the attire of an attorney, can have an impact on the fairness of court proceedings.

In 2015, the Florida Supreme Court adopted a rule that requires all judges, while on the bench during judicial proceedings, to wear solid black robes with no embellishments.<sup>2</sup> Its order did not mention any judicial robe that sparked the new rule, but it did follow some unusual choices. One Florida judge, for example, wore a "camo" robe, apparently with a motif of battle fatigues, in the courtroom.

The Florida Supreme Court stated: "The demeanor of judges in a public courtroom, including the attire they wear there, is a crucial indicator of the seriousness of the judicial office and of the proceedings."<sup>3</sup> Judges wearing different colored robes or robes with varying embellishments, the order said, could result in uncertainty for those coming before the courts and could counter the judicial branch's efforts to gain the public's trust. "For example, one could question whether there is a 'status' attributed to the varying colors or embellishments worn by different judges," e.g., whether a color denotes a rank or qualification.<sup>4</sup>

Like the boy at the basketball game, the Florida Supreme Court said that depending upon the color or pattern of the robe or embellishment, some may wonder whether the presiding judge is a “real judge” or whether a judge will take the proceedings seriously.

A statewide dress code or guidelines for Florida attorneys apparently does not exist. The ethics of attire for judges in the courtroom will not be the same as the ethics of attire for attorneys. Judges should dress to promote impartiality and dignity in the limited space of the real or virtual courtroom. Attorneys are partisan advocates who may dress strategically, but they are restrained by the ethics of integrity, fairness, and civility. Unlike judges, the ethics of attorney attire is not limited to the courtroom, as discussed below.

Although the Indiana Supreme Court has not adopted a dress code for attorneys or judges, it has a code for nearly everything else. It has a code about appellate writing. The court prescribes rules for fonts, page size, margins, and footnotes on how appellate filings should look. These rules promote the administration of justice and the dignity of the judicial process. Attorneys’ failure to follow the rules can lead to negative results for clients and themselves. Violations have resulted in disciplinary sanctions against appellate counsel.<sup>5</sup>

The Indiana Supreme Court also has an informal code of conduct about the usage of written and oral language in and out of court. This code is found in the Rules of Professional Conduct, in the trial rules, and in court decisions. Wrongful language interferes with the judicial process and professionalism. The Supreme Court has disciplined attorneys for

wrongful language in their court filings, in their e-mails, and in the media.<sup>6</sup>

Like writing and language, the attire of attorneys can promote or impair the judicial process and professionalism. But the Indiana Supreme Court has been silent. I take no position whether it should issue a code on attire, but I do advocate that the court or the Indiana State Bar Association provide some guidance. They would not be acting on a clean slate.

Several local communities in Indiana have not been silent but have adopted rules on attire, ranging from platitudes to specifics. I offer four examples. Spencer County requires lawyers appearing for court proceedings to be “in professional attire.”<sup>7</sup> Jackson County is more expressive, referring to “respect” and “dignity” of the state:

Attorneys are officers of the court. With the privilege of practicing before the bar comes the responsibility to be professional in every aspect of practice. When appearing in court, Attorneys are expected to dress in a manner which shows due respect for the dignity of the State of Indiana.<sup>8</sup>

Dearborn County goes further:

The Court’s offices and the Court Rooms are not casual environments. Accordingly, all persons appearing before the Court, either in official Court proceedings in the Court Rooms

or in the Court related offices, shall present themselves in appropriate business attire to ensure the professional integrity of the Court and the judicial process. All clothing worn must be appropriate, clean, and reflect the proper level of respect due the Court. Neat and clean personal grooming is also required. Professional business attire is required for counsel in all courtroom proceedings.<sup>9</sup>

Grant County is even more explicit. It has a rule “to protect the decorum and dignity of the Courts and judicial process.” Under its rule, all persons entering any courtroom shall refrain from wearing the following inappropriate clothing:

1. Short-shorts, micro-mini skirts
2. Tank tops, muscle shirts, halter tops, tube tops
3. See-through clothing, low-cut tops
4. Clothing that exposes bare midriff and/or undergarments
5. Hats, head coverings (except those worn for religious purposes)
6. Pajamas, slippers
7. Clothing that depicts or promotes illegal activity, drug/alcohol use, violence, sex acts or profanity.<sup>10</sup>

I found no law firm with a dress code although some firms probably have them. Law firms seem to

**"Like writing and language, the attire of attorneys can promote or impair the judicial process and professionalism."**

**"New York's highest court ruled against him. It held that a trial court has discretion to regulate the conduct and appearance of counsel before it, but that discretion cannot violate the constitutional right of counsel to free exercise of religion."**

expect their lawyers to dress appropriately for the occasion.

There is a disparity of how attorneys appear on their websites from how they appear in their offices. The photos on most lawyers' websites show them appearing in traditional, professional business attire of coats and ties for men, and nice blouses, suits, or dresses for women. Perhaps law firms have dress codes for the photos on their websites. One

might wonder why it is important for them to portray themselves in traditional professional attire on their websites but dress casually in the office. Many of the attorneys pictured on websites will never be in a courtroom unless they have been sued or arrested.

There is a difference between ethics and practice pointers. I will share two of my own practice pointers with you. "Never go into court

with unclean shoes." Wearing unclean shoes is probably not a good practice, but it is probably not bad ethics, either. My second practice pointer is: "Don't give your opponent an opening. Always zip up your pants." However, it could be an ethical violation if I leave my zipper open on purpose.

With that overview, I take you to 1975 and a fascinating case from New York. It may be the leading



case on attorney attire. It is *LaRocca v. Lane*, 37 N.Y.2d 575, 338 N.E.2d 606 (1975), cert. denied, 424 U.S. 968 (1976).

LaRocca had been an ordained Catholic priest for 25 years and a licensed attorney for two years. He was employed by the legal aid society as criminal defense counsel for a mother who was being tried before a jury for an assault on her child's teacher.

LaRocca appeared for trial. He was wearing his clerical collar. The state objected to his wearing it at trial. The state was concerned the clerical attire might influence or prejudice one or more jurors for or against the defendant.

LaRocca protested. He argued that he had always worn clerical garb at law school, at his appearance before the Committee on Character and Fitness, at his admission to the bar, and at all previous court appearances. He acknowledged that he had never represented a client at a jury trial. He also stated that he had been "designated" by his bishop to appear in court as a Catholic priest wearing his clerical garb. He contended that an order for him to remove his clerical garb would violate his client's right to be represented by counsel of her own choice and would violate his free exercise of religion.

The trial court judge upheld the objection and ordered LaRocca to remove his clerical garb or be disqualified as defense counsel. He refused. He sought a writ of prohibition. The trial did not occur.

New York's highest court ruled against him. It held that a trial court has discretion to regulate the conduct and appearance of counsel before it, but that discretion cannot

violate the constitutional right of counsel to free exercise of religion. Balancing the facts and issues, the court held that the right of a fair trial outweighed LaRocca's right to wear clerical garb as defense counsel at a jury trial.

The court did not focus on the ethics of the situation but mentioned it generally. The court said:

The appearance of a lawyer in court is the occasion for him to discharge a particular function in the administration of justice. His function is not to displace his client but to serve as his agent in the litigation. It is rarely good advocacy and never quite ethical for the lawyer to substitute himself for the client before a jury or court. That this may happen because of the limitations of human nature does not undermine the imperative of the rule. To the extent to which it is possible, the improper displacement of client by attorney should be minimized by elimination of...assumed or real idiosyncracies (sic) of dress, appearance, status, or conduct. The purpose is, at least as to outward appearances, to place counsel in their proper relation toward their clients.<sup>11</sup>

The court further ruled the lawyer is subject to the regulation of the judge in matters of attire when that regulation is reasonably related to the preservation of order and decorum in the courtroom, the protection of the rights of parties and witnesses, and generally to the furtherance of the administration of justice.

The court commented about the status of a clergyman, which may not be as true today as it was in 1975. The court said:

A clergyman is accorded high status by most members of our society. Whatever the character of the man or woman who wears the cloth, the cleric is accorded a measure of respect and trust unlike that which is given to those of other vocations. Consequently, it is understandable, but not condonable, that a juror might view differently statements made by a member of the clergy than those made by others, and might ascribe a greater measure of veracity and personal commitment to the rightness of his client's cause.<sup>12</sup>

The court also acknowledged the converse may be at play, namely that there are prejudices against clergy or religion in general.<sup>13</sup>

#### **SOME RULES OF PROFESSIONAL CONDUCT THAT MAY DEAL WITH ATTIRE**

Inappropriate attire can violate Indiana's Rules of Professional Conduct. Here are six rules that attire could offend, and there may be others. I discuss four of them in this article:

- Rule 1.1 requires competence.
- Rule 1.7 addresses conflicts of interest involving a lawyer's personal interest.
- Rule 3.5(a) prohibits a lawyer from seeking "to influence a judge, juror, prospective juror or other official by means prohibited by law."
- Rule 3.5(d) prohibits a lawyer from engaging "in conduct intended to disrupt a tribunal."
- Rule 8.4(d) prohibits a lawyer from engaging "in conduct that is prejudicial to the administration of justice."



- Rule 8.4(g) addresses conduct or words related to bias or prejudice while an attorney is in a professional capacity.

#### **Rule 1.1—Competence**

The first rule of the Rules of Professional Conduct is competence. It states: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

The rule does not mention attire, but no one can seriously dispute that an attorney’s attire can affect the attorney’s ability to competently persuade a court, a jury, the

opponent, or one’s own client. Attorneys want to look like “real” attorneys and not show disrespect to the court.

One colleague told me about her experience as a juror in a criminal case. The jurors talked about the lawyers. One juror said the defense lawyer “must not be that good of an attorney or else he would have a better suit.” If a juror thinks that way, so can the client, the prospective client, the opposing client, and opposing counsel. Thus, an attorney who does not appear competent may be perceived as being less skillful, less persuasive, and less competent, and the perception may reflect or lead to reality.

#### **Rule 1.7—Conflicts of Interest**

Conflicts of interest are another ethical concern for attire. The *LaRocca* court did not use the term “conflict of interest.” But *LaRocca* pitted his personal interest against the interests of the state, the jurors, the society at large, and perhaps his client.

His attire would be a conflict of interest in Indiana. Under Professional Conduct Rule 1.7, an attorney’s insertion of his personal interests into his client’s legal affairs can be a conflict of interest. The Indiana Supreme Court has disciplined attorneys for putting their own religious, social, political, or ideological views ahead of their clients’ interests or otherwise inappropriately injecting them in litigation.

In *Matter of Mullins*, 649 N.E.2d 1024 (Ind. 1995), a young woman had been in a chronic vegetative state for years. Her family wanted to end artificially delivered nutrition and hydration. Mullins, an attorney, created a corporation named the “Christian Fellowship with the Disabled, Inc.” Ostensibly on behalf of that corporation, she filed a document titled “Petition for Appointment of Guardian Over an Adult Incompetent” in Marion County. There were related matters pending in Hamilton County. Neither Mullins nor the corporation had a connection to the family. She obtained the medical records of the disabled woman and released them without the authorization of her guardian or any court.

Those facts have nothing to do with what attorneys wear, but the court’s reasoning does. The court stated that her actions “resulted from her misguided pursuit of ideological objectives.”<sup>14</sup> She desired only to further her own

**"Under the principles of *Mullins* and *Maternowski*, an attorney's attire, including accessories, could violate the conflict rules if attorneys inject their 'personal interests' or their ideologies while they are representing clients."**

agenda. "We remind lawyers that duty to the law comes before personal objectives where the two are in conflict."<sup>15</sup>

The second case came the next year. In *Matter of Maternowski*, 674 N.E.2d 1287 (Ind. 1996), two attorneys did not allow their criminal clients to cooperate with the government because of the attorneys' policy that they would not represent criminal defendants who would want to cooperate with the government. The court suspended their licenses for conflicts of interest under Professional Conduct Rules 1.7 and 1.8(f).

Like *Mullins*, the facts in *Maternowski* have nothing to do with the attorneys' attire, but what the Supreme Court said does. The court held that clients need an objective attorney, not one guided by the attorney's "own blanket opinions and moral objections."<sup>16</sup> The court said:

The free exercise of independent professional judgment on behalf of a client is a cornerstone of the attorney-client relationship. The subtle pressures inherently present when interests conflict erode away the element of trust which must exist in such a relationship.<sup>17</sup>

Under the principles of *Mullins* and *Maternowski*, an attorney's attire, including accessories, could violate the conflict rules if attorneys inject their "personal interests" or

their ideologies while they are representing clients.

**Rule 3.5—Decorum of the Court**

Rule 3.5 deals with decorum of the court, and Rule 3.5(d) prohibits a lawyer from engaging "in conduct intended to disrupt a tribunal."

An attorney's attire can be disruptive and disrespectful. In 2014, a male attorney appeared without socks in the Blackford Circuit Court. He was ordered to wear socks. The incident made the national news. It was appropriate that no disciplinary action ensued.

Wearing tennis shoes in court may be seen as disruptive or disrespectful in violation of Rule 3.5(d). A colleague gave me an example of an attorney who wore tennis shoes in court to demonstrate his client's product—tennis shoes—which was the subject of the litigation. Is wearing

a client's product to demonstrate a point ethically OK? Perhaps. Could an attorney representing a manufacturer of swimming attire wear a Speedo or a bikini in court to demonstrate the product? Probably not. (Most of my lawyer friends should not be wearing them at the pool.)

**Rule 8.4(g) on Conduct and Words About Bias and Prejudice**

A source of concern with the ethics of attire may arise from Indiana's anti-bias rule. Rule of Professional Conduct 8.4(g) provides: "It is professional misconduct for a lawyer to...engage in conduct, in a professional capacity, manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status, or similar factors. Legitimate advocacy respecting the foregoing factors does not violate this subsection..."<sup>18</sup>



This rule does not limit itself to bias or prejudice “against.” It could be bias or prejudice “for.” Rule 8.4(g) is also not limited to court attendance, Zoom hearings, mediations, or depositions. It could apply to advertisements, websites, and employment practices by law firms. This rule has relevance to attorneys’ clothing, including accessories and tattoos.

### WHAT IS A LAWYER TO DO?

The ethics of attorneys serve important principles for our legal system—competence, integrity, respect, and civility.

As a legal community, the Indiana State Bar Association or the Supreme Court, the two pre-eminent groups for the entire legal community in Indiana, should explore the formation of guidelines for attorneys, if not formal rules. **Lawyers want to know and need to know about attire, just as they want to know and need to know how to write and talk professionally.**

As individuals, attorneys will continue to use discretion to resolve conflicts when their personal interests such as attire clash with their responsibilities to their clients or to the legal system. Compliance with the rules is chiefly based on the voluntary compliance with the rules and their principles, as the preamble proclaims: “Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings.”

### CONCLUSION

A primary goal of this article is to make us attorneys think about the ethics related to our attire. If you did not like the article, sorry. There is no redress for you. ☹

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*Jon R. Pactor has been a solo practitioner with his office in Indianapolis since May 1976. He has concentrated his practice in legal professional liability and legal ethics.*

### ENDNOTES

1. *Matter of Atanga*, 636 N.E.2d 1553, 1257 (Ind. 1994). The next year, the court issued a public reprimand against the judge for violating the Code of Judicial Conduct. *In re Johnson*, 658 N.E.2d 589 (Ind. 1995).
2. SC 15-457. *In Re: Amendments To The Rules of Judicial Administration—New Rule 2.340* (September 2015).
3. *Id.*
4. *Id.*
5. E.g., *Matter of Fox*, 78 N.E.3d 1096 (Ind. 2017).
6. E.g., *Matter of Fox*, *supra*, (appellate filings); *Matter of McCarthy*, 938 N.E.2d 698 (Ind. 2010) (e-mails); *Matter of Atanga*, *supra* (media).
7. Spencer County Local Rule LR74-AR00-3(C) Conduct, Dress, and Courthouse Policies.
8. Jackson County Local Rule LR36-AR00-1: Appropriate Attire for Attorneys.
9. Dearborn County Local Rule TR-5: Appropriate Appearance for Conducting Court Business.
10. Grant County Local Rule LR-27 JC 2.8-26: Courtroom Dress Code.
11. *LaRocca*, 37 N.Y.S.2d 575, 582.
12. *Id.* at 583.
13. *Id.* at 583-584.
14. *Matter of Mullins*, 649 N.E.2d at 1026.
15. *Id.*
16. *Matter of Maternowski*, 674 N.E.2d at 1292.
17. *Id.*
18. The Judicial Code has a provision comparable to Rule 8.4(g). It is Rule 2.3.



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# A NOTE ON ATTORNEY ATTIRE

**By Hon. Marianne Vorhees and  
Melissa Keyes, Written Publications  
Committee Co-Chairs**

**M**r. Pactor's article raises many interesting points for discussion. As co-chairs of the Written Publications Committee, we wanted to share our own perspectives on attorney attire and encourage you to join in on the conversation.

## **HON. MARIANNE VORHEES**

Let me add my “two cents” about attorneys’ attire in the courtroom from an over twenty-year perspective from the bench.

Attorney attire used to be a uniform: suit, tie, and shoes with laces or tassels for men; dresses or suits, hose, and heels for women. I would hear attorneys talk about what color tie worked better before the jury, but other than that, their attire was conservative. Women eventually ventured into wearing pant suits instead of skirts. But things were pretty vanilla as far as fashion in the courtroom.

As the 21st century went forward, “business casual” became a thing, and attorneys started dressing more casually for court. Sports coats and khakis with a tie for men (and some even stopped wearing ties!), with slip-on casual shoes. Women’s attire became much less formal as they stopped wearing suits and pantyhose. Was this a bad thing? In my opinion, it was not. (Although I still liked to see a tie on a male attorney in the courtroom during a formal hearing.)

Then the pandemic hit. And casual dress became more of a norm than an exception. Attorneys appeared virtually from their homes and their offices, never in T-shirts or very casual attire but often dressed in pullovers or athletic-style wear. Once we returned to

the courtroom for hearings, some attorneys continued to dress as if they were “zooming” from home.

So, do Indiana lawyers need a “dress code”? I would caution against calling it a “dress code,” a phrase that can cause a negative reaction from attorneys of my age and older. I brought up this discussion about courtroom attire recently with a group of female attorneys, from my age down to brand new, fresh-out-of-law-school attorneys. They were not against the idea of having standards for courtroom attire. But the more senior attorneys remembered days

when judges, senior partners, and/or supervisors required women to wear a dress or skirt and pantyhose, for example.

#### MELISSA KEYES

Let me start by saying, I am in no way speaking on behalf of the sisterhood of women lawyers. I am, however, speaking from the perspective of a 40-something attorney, mother of two, who cut her teeth in the age of wearing the dreaded hose and heels but now gladly lives in the comfort of stretch Ponte fabric and flats.

When I started out, dark suits, light blouses or button-up dress shirts, and black heels were the norm. And, even if I was dressing down at the office, I learned early on to keep a suit nearby, just in case.

Those who know me, know that a fashionista I am not. And while I tend to choose comfort over style, there is something to be said for presenting the perception you want to give off in a professional setting. If you look clean, wrinkle-free (at least clothes-wise), and put together, then people are more likely to see your arguments as clean and put



together. But you also need to feel comfortable and confident. If you are fidgeting with ill-fitting pants, or are bothered by uncomfortable shoes, that discomfort is likely to come through.

The larger elephant in the room, however, is how inaccessible formal business attire can be. Good quality suits can be quite expensive. And for those with atypical body types, mobility issues, physical disabilities, sensory sensitivities, or allergies, finding acceptable professional wear that both looks good and is comfortable can be challenging. For example, when I got pregnant, maternity suits were expensive, especially for such a time-limited need, so I would blend jackets and dresses if I had to appear in court. Now, with terrible knees, even looking at a heel over one inch causes me to reach for the ibuprofen.

While I agree that the pandemic certainly changed our dress habits as more folks Zoomed to court, I think some of that may be attributed to a desire to feel comfortable when we work, a re-prioritization for other things in our budget beyond clothing, and a realization that the content of our words should matter more than the content of our closets.

I agree with my colleagues that a standard dress code isn't necessarily the answer. I do believe, though, in empowering our legal community to embrace the power that presentation, including our dress, can have, both as a reflection of ourselves and of our clients. And for those who come from backgrounds or cultures that may have different experience with professional attire, those who have barriers to accessing business wear, I encourage us to offer a non-judgmental ear, to mentor, and to share those 20% off coupons.

### JOIN THE CONVERSATION

The Written Publications Committee for *Res Gestae* offers this article as "food for thought" for Indiana lawyers to consider.

Share your thoughts at [www.inbar.org/attorney-apparel](http://www.inbar.org/attorney-apparel) and we may publish your response in

an upcoming issue of *Res Gestae*. Tell us about the challenges and experiences you've faced with attire. Do you feel a dress code is necessary? What else is missing from the conversation? Let us know your reaction! ☯

# HAPPY HOLIDAYS AND BEST WISHES FOR THE NEW YEAR



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# PLANNING FOR RETIREMENT

*By Ted A. Waggoner*



Your Indiana State Bar Association is building new resources to help its members as they continue the practice of law into their later years. A working group on retirement issues has formed and will offer suggestions and resources to members to assist them in making decisions on the ways to successfully conclude their practices. Ultimately the association will produce a guidebook to help members with this critical topic.

This is the first in a series of articles on retirement issues. The working group is not advocating a retirement age or a competency test for older lawyers. Instead, the group relies on the intelligence and understanding of competent lawyers to make decisions that recognize their fiduciary duty to clients and the obligations they have to others, including family members, law firm members, and themselves. Eventually the working group will share information on more in-depth issues, including financial planning before and during retirement, working with partners to create workable firm retirement agreements, and selling the practice as a part of a retirement plan.

Some of you fully intend to “die at your desk” and, if you successfully do so and aren’t overcome with an illness or disability that interrupts your plan, won’t have to worry about the matters we are discussing. But, if you need some planning, these thoughts may be of some benefit.

## WAYS TO WRAP UP YOUR LAW PRACTICE

Although some don’t believe it, lawyers can’t practice forever. Even if you don’t plan to retire, you will still quit practicing one day. Let’s examine your options:

- A. Die at the desk. Some lawyers plan to die with their boots on. If their health, memory, and analytical skills stay strong, this possibility works for them and their clients. Most lawyers do not get to win the trifecta of health, memory, and analytic skills, though. As one falters, the lawyer’s production and output also falters, and the client suffers.

- B. Deal with unexpected health issues. Issues of health increase as lawyers age. According to the Council for Disability Awareness, 5% of adults suffer short-term disability annually, with that rate rising with age, and 25% of adults will suffer a long-term disability during their work life.<sup>1</sup>
- C. Create a retirement plan, start on the road to retirement, and live out the plan.

There are resources to assist you (including the ISBA guidebook, coming soon). For now, though, here's what you need to know.

### EARLY STEPS IN YOUR EARLY 50s

Evidence says the earlier you start planning, the more prepared you will be when the time comes to retire, to handle an unexpected illness, or to help your family prepare for an unexpected death.

Reviewing your finances with a financial professional is a necessary early step. Normally by your 50s, any children are grown, out of the house, and no longer relying on you for financial support. Your earnings are still growing, and you can invest funds into an investment account or some form of pre-tax retirement account. If you have already started your retirement savings, you're far ahead; but now is the time to seriously start if you have any plans to enjoy life after you stop working.

A second step is to set your proposed retirement age. Be flexible. Whether you estimate retiring at 60, 75, or older, the date can change. But by at least setting a date, you're making retirement a realistic goal rather than ignoring the issue. Consider the genetic information you have about parents and siblings. Did they have any serious illnesses that you may acquire? Were they long-lived

individuals? How healthy were they in their older years? How many years can you reasonably expect to spend in retirement?

There is no need to share this projected date beyond a few select members of your family. The date is only for your personal preparation, after all, to make you comfortable with the idea and to ensure that you will be psychologically and financially ready when retirement comes.

When the time does come to share your retirement date, make sure

to discuss it with your partners or managers first, before sharing with other lawyers, staff, and, ultimately, clients. If you are in a firm, the managing partner, office manager, and direct support staff should know early in the process, probably 6–12 months prior to the date. You will need to work out a retirement agreement (if the firm does not have an existing policy in place), start identifying replacement counsel for ongoing clients, and watch for upcoming events that must be resolved (like hearing dates and

**"Be aware that discussions with staff and clients may not go as you expect; they did not for me."**

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deadlines for client events). Some firms start introducing clients to new lawyers a year or more before you actually retire.

Be aware that discussions with staff and clients may not go as you expect; they did not for me. Only one client asked me to hold off, as his estate would be complicated, and I needed to be there for his family. When he refused to go ahead and die on my timetable (we could talk that way), he understood. Others asked who would take over their legal matters, and I told them of the lawyers I had hired to keep the firm going. They were generally pleased to be handed off to qualified lawyers.

#### **EMOTIONAL PREPARATION**

It's also important to address the emotional ordeal you may face as you consider retirement, including issues such as:

- Fear of missing out on important matters
- Increased frustration with clients
- Leaving clients behind without solutions to legal issues
- Approaching end of life issues
- And more

Many of our clients approach retirement with anticipation and glee. It is part of their profession's culture—end a job, get the gold

watch and pension, quit the grind. Lawyers usually do not have that kind of culture, and many put off thoughts of retirement for years.

Lawyers approaching retirement are often in the most exciting parts of their careers, after all. They are involved in interesting matters that took decades to attain. Larger estates, more critical business plans, or more important litigation matters have finally landed on the caseload. They are in the middle of fun and interesting legal issues, and frankly do not want to step aside and miss out on the excitement.

As they achieve these milestones, it also seems unfair to walk away, and unfair to their clients to not be there with answers and invoices. Other emotions get wrapped up in the thought process as well. Turning hard fought cases over to younger lawyers who have not put in the time to "earn" the cases seems inappropriate, for example. And even if these new lawyers have the skills, they have not invested the sweat equity in building that client relationship. New lawyers looking holistically at a body of work can be critical of the preceding lawyer (who worked piecemeal on a variety of client matters over many years), which can come across as disrespectful. (We retiring lawyers need to recall when we did that kind of analysis for our predecessors, and that any succeeding lawyer will do the same.)

Plus, turning to the next chapter of life, leaving the practice, moving into the second act of life's play (all popular themes of retirement cards) are reminders that the end of the book of life is coming. End of life issues raise many questions about how we have lived, our successes and failures, the roads taken and not taken, and the choices we've made. Such issues are too weighty for this article, but it is critical that they be addressed by each of us as we look forward to, or back on, the retirement decision.

#### **CONCLUSION**

Every lawyer eventually leaves the practice of law. If you want to go out with a reputation for planning like a lawyer, then you should plan for yourself as well as you plan for your clients. Start early, stay focused, and know where your finish line is. Cross it with pride. ☯

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*Waggoner has been a frequent speaker at the Solo & Small Firm Conference and other gatherings, including for ABA and ALI webinars. He is speaking on retirement planning these days, after his recent retirement.*

#### **ENDNOTE**

1. Disability Statistics, Council for Disability Awareness (September 20, 2021), <https://disabilitycanhappen.org/disability-statistic/>.



# SEPTEMBER OPINIONS ADDRESS JURY ISSUES, WARRANT "PARTICULARITY," AND MORE

During September the Indiana Supreme Court did not issue any opinions in any criminal cases but did issue a published order in a disciplinary matter arising from a criminal appeal. The Court of Appeals issued opinions addressing jury trial rights and juror conduct, pretrial dismissal of a charge, and the “particularity” requirement for search warrants.

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## FUNDAMENTAL ERROR TO HOLD A BENCH TRIAL AFTER TERMINATION OF DIVERSION

Criminal Rule 22 provides the procedure for defendants charged with a misdemeanor to request a jury trial. Many forfeit that right by failing to make a timely demand, but not the defendant in *Winans v. State*, No. 23A-CR-80, 2023 WL 6221953, at \*2 (Ind. Ct. App. Sept. 26, 2023), who filed a motion for a jury trial three days after being charged with two misdemeanor offenses. Months later, however, she entered into a pre-trial diversion, which she did not successfully complete. The trial court later set the case for a bench trial, which was continued a few times before her trial and convictions.

Although the defendant never objected to a bench trial, conducting a bench trial without obtaining a valid waiver of the right to a jury trial was fundamental error. As the Court of Appeals explained, discharge from the pretrial diversion program returned the defendant “to the original position that she occupied before she entered into the pre-trial diversion program, i.e., being prosecuted for domestic battery and resisting law enforcement.” *Id.* at \*2. The case should have been set for a jury trial—not a bench trial—after her discharge from the diversion program. Finally, the error was

not invited because the failure to object to the bench trial settings was not “part of a deliberate, well-informed trial strategy.” *Id.* at \*3.

### **NO FUNDAMENTAL ERROR IN ALLOWING DELIBERATING JURORS TO VIEW EXHIBITS IN OPEN COURT**

In *Torrence v. State*, No. 22A-CR-2287, 2023 WL 6282745, at \*3 (Ind. Ct. App. Sept. 27, 2023), the Court of Appeals found no error, much less fundamental error, in “allowing the jury, during deliberations, to view in open court four specifically requested exhibits instead of viewing all of the exhibits.” Indiana Code section 34-36-1-6, which outlines the procedure for handling disagreement among jurors about testimony or if the jury requests to be informed on any point of law, did not apply because the jurors expressed no disagreement but simply asked to view the exhibits.

The court then turned to case law, which sets forth three factors for courts to consider in deciding whether to permit jurors to take exhibits into the *jury room*: “(1) whether the material will aid the jury in a proper consideration of the case; (2) whether any party will be unduly prejudiced by submission of the material; and (3) whether the material may be subjected to improper use by the jury.” *Id.* at \*3 (quoting *Thacker v. State*, 709 N.E.2d 3, 7 (Ind. 1999)). Without resort to the factors, the court found no abuse of discretion in allowing the deliberating jury “to review the requested, previously viewed, and admitted exhibits, in open court while being monitored by the trial court and the parties.” *Id.*

In addition, cases applying the *Thacker* factors further supported its decision that allowing the “jury

to view exhibits in the *jury room*[] support [its] decision that the court here did not abuse its discretion by monitoring the jury’s review of the exhibits in *open court*.” *Id.* at \*4.

### **PREJUDICIAL JUROR COMMENTS DIDN’T WARRANT REVERSAL UNDER 1988 PRECEDENT**

In *Burton v. State*, No. 23A-CR-526, 2023 WL 5762963 (Ind. Ct. App. Sept. 7, 2023), a prospective juror told another juror that the defendant had been involved in a car accident twenty years earlier that killed a man and that he “should be sitting in prison.” Three prospective jurors heard this comment. Defense counsel moved to strike them for cause, which the trial court denied after each juror said they could remain fair and impartial.

The Court of Appeals agreed the remarks were prejudicial and suggested that “better courses of action” were warranted considering the constitutional right to an impartial jury. *Id.* at \*3. Because voir dire was ongoing, remedial measures would not “have greatly affected the proceedings. The court could have easily stricken these prospective jurors and continued voir dire with the remaining members of the jury panel, or at least allowed Burton to use his peremptory challenges as the State suggested.” *Id.*

Nevertheless, the Court of Appeals found no reversible error based on the binding precedent of *Kindred v. State*, 524 N.E.2d 279, 288 (Ind. 1988), which “rejected an impartial-jury challenge involving arguably worse facts.” The trial court in *Kindred* “questioned the prospective jurors regarding the possibility of prejudice, admonished the jurors to put aside preconceived notions,

and ascertained the willingness of each to base his decision solely upon evidence presented at trial”—“corrective actions [that] eliminate[d] any prejudice which may have occurred.” *Id.*

### **PRETRIAL DISMISSAL OF INVASION OF PRIVACY CHARGE NOT WARRANTED FOR VIEWING INSTAGRAM POST**

The defendant in *Hernandez v. State*, No. 23A-CR-219, 2023 WL 6323992, at \*2 (Ind. Ct. App. Sept. 29, 2023), was subject to a protective order that prohibited him from contacting the protected person “in person, by telephone or letter, through an intermediary, or in any other way, directly or indirectly, except through an attorney of record, while released from custody pending trial[.]” He was charged with invasion of privacy for violating the protective order by viewing public content that the protective person posted on Instagram, which informed the user of those viewing the posts. *Id.* The defendant moved to dismiss the charging information on the basis that the facts did not constitute an offense, which was denied by the trial court.

The Court of Appeals agreed that dismissal at the pretrial stage was not warranted. The state did not allege that the defendant simply viewed the protected person’s social media posts but rather that he knowingly or intentionally contacted the protected person by viewing her posts in such a manner that caused a notice to be created informing the protected person that he was viewing her posts. “At trial, the fact-finder will be tasked with determining whether Hernandez knew about the technical workings of the platform or the way the Protected Person used the platform

such that Hernandez acted with the requisite mens rea.” *Id.* at \*2.

### **PANEL DIVIDED ON PARTICULARITY OF “PAPERWORK”**

*Plato v. State*, 217 N.E.3d 1279 (Ind. Ct. App. 2023), affirms the rejection of a claim of ineffective assistance of appellate counsel but at its core involves the “particularity” requirement for search warrants.

There, the defendant was initially suspected of forcing the owner of a car lot to sign over titles to three cars. In executing a warrant to search for and seize “paperwork relating to title work for vehicles,” police seized a computer. *Id.* at 1280. The defendant argued that if the police wanted to seize his computer they should have asked to do so when requesting the search warrant. *Id.* at 1282. The state responded that the computer “was plainly covered by the search warrant” because it was reasonable “to believe that paperwork related to title work could have been recorded or stored digitally on Plato’s computer.” *Id.*

Relying on Ninth Circuit precedent, the Court of Appeals’ majority noted “that a seizure is far less intrusive than a search.” *Id.* at 1283. Because the investigation involved “paperwork, it was reasonable for the police to believe that paperwork (titles) may have been stored in Plato’s computer. Hence, the police had reason to seize the computer but not to search the contents without a second, more specific warrant.” *Id.* at 1283-84.

Judge Pyle dissented. “It is insufficient to posit that, because computers might contain scanned copies of paperwork relating to vehicle titles, the term ‘paperwork’ adequately describes computers.” *Id.* at 1285. He posited:

The term “paperwork” neither described Plato’s laptop with reasonable certainty nor with as much particularity as possible under the circumstances. If the officers had probable cause to believe that a search for evidence of a robbery scheme involving vehicle titles would be found on Plato’s laptop, all they had to do was request the judicial authority to include the term “computers” on the search warrant.

*Id.*

### **PUBLIC REPRIMAND FOR “WOEFULLY INADEQUATE” APPELLATE BRIEF**

In *Matter of Ulmer*, 215 N.E.3d 351, 352 (Ind. 2023), the Indiana Supreme Court imposed a public

reprimand for violations of Professional Conduct Rules 1.3 and 8.4(d). There, the respondent had filed an appellate brief in a criminal case that included “a single sentence that failed to address the facts relevant to the issue raised. Further, Respondent’s substantive argument largely consisted of two sentences that lacked cogent reasoning and citations to the record.” *Id.* The Court of Appeals had found the sole appellate claim waived because the brief was “woefully inadequate” and “essentially made no argument at all.” *Id.* ☞

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*By Cari Sheehan*

# WEAPONIZING INADVERTENT DISCLOSURES

**Imagine being sanctioned for attempting to “weaponize” access to opposing counsel’s internal database through a web link that was inadvertently disclosed to you by a non-party during discovery. This was one law firm’s reality in New York.<sup>1</sup>**

Robins Kaplan, LLP (Robins Kaplan) was recently sanctioned by a court after gaining access to opposing counsel’s internal database through a Dropbox link that was inadvertently sent to it through an outside non-party in response to a subpoena.<sup>2</sup> After receiving the link to the database, Robins Kaplan repeatedly accessed the link and reviewed documents relating to the representation of its client.<sup>3</sup> However, Robins Kaplan maintained it never reviewed anything it thought was attorney-client privilege, and, 92% of the documents it accessed were later released in the normal course of discovery.<sup>4</sup> After a week of reviewing the contents in the Dropbox, Robins Kaplan finally alerted opposing counsel, via letter, of the inadvertent disclosure.<sup>5</sup> The letter stated that any privilege claim to the contents of the Dropbox link had been waived, and Robins Kaplan intended to use the contents in an upcoming deposition.<sup>6</sup>

The court did not take lightly to Robins Kaplan’s conduct and stated that it should have realized that remotely rummaging through [the opposing counsel’s] computer files through a link was beyond the scope of legitimate litigation discovery, and was similar to “corporate espionage” albeit without the illicit break-in.<sup>7</sup> Robins

Kaplan should have known the contents accessed through the link were not “produced” in the normal means of discovery, but rather were in a “directory” personal to the opposing counsel’s law firm.<sup>8</sup> The court further did not appreciate Robins Kaplan’s subsequent attempt to “weaponize” (vis-a-vis the letter it sent to opposing counsel) the information.<sup>9</sup> Robins Kaplan had multiple opportunities to unwind the harm, claw-back its conduct, and resolve the dispute but it refused to heed to such requests despite the ethical rules, supporting authority, and/or common sense.<sup>10</sup>

As such, the court ordered Robins Kaplan, and its client, to pay nearly \$156,000 in order to refund opposing counsel for having to pursue sanctions to resolve this issue.<sup>11</sup> In addition, the court provided that since Robins Kaplan’s review of the Dropbox files was wrongful, it must: (1) destroy any documents accessed; and (2) all subsequent discovery requests will be curtailed on the ground that they could be “fruit of the poisonous tree” and the court will review each request separately.<sup>12</sup> The court was adamant Robins Kaplan should not benefit, even in the slightest way, from its conduct.<sup>13</sup>

#### **INDIANA RULE 4.4(B) - INADVERTENT DISCLOSURE**

The Robins Kaplan case reminds lawyers of their obligations under Rule 4.4(b) regarding inadvertent disclosures. Indiana Rule 4.4(b) states that “a lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably should know the document was inadvertently sent shall promptly notify the sender.” Document includes email or other electronic modes of transmission subject

to being read or in readable form.<sup>14</sup> The prompt notification requirement is to permit the sender to take protective measures.<sup>15</sup>

Whether the lawyer receiving the inadvertent disclosure is required to take additional steps, such as returning the original document, is a matter of law/privilege beyond the ethical rules.<sup>16</sup> Rule 4.4(b) also does not address the legal duties of the lawyer who receives a document that the lawyer knows, or reasonably should know, may have been wrongfully obtained.<sup>17</sup> Rule 4.4(b) further does not require that the receiving lawyer refrain from reading the document, or even mandate its return upon request, unless there is another law mandating the same.<sup>18</sup> Refraining from reading the document and/or

voluntarily returning it is a matter of professional judgment reserved for the individual recipient lawyer. See Rules 1.2 and 1.4.<sup>19</sup>

#### **LAWYER RESPONSE TO AN INADVERTENT DISCLOSURE**

The guidance to lawyers, under Rule 4.4(b), regarding inadvertent disclosures is not entirely instructive and leaves a lot to a lawyer’s “professional discretion.” “Professional discretion” is broad and varies from lawyer to lawyer. So, how can lawyers try to make the correct ethical choice when faced with an inadvertent disclosure? What is the correct ethical response that still allows the lawyer to zealously defend the client?

At a minimum, the recipient of an inadvertent disclosure should

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immediately notify the sender of the inadvertent disclosure.<sup>20</sup> Do not follow the lead of Robins Kaplan and wait a week before making the notification. Do not try to “weaponize” the inadvertent disclosure as a litigation strategy. After prompt notification, technically, a lawyer’s ethical obligations are complete under Rule 4.4(b). However, normally, the sender will request that the inadvertent disclosure be returned, that the recipient refrain from reading it, and/or that the recipient destroy it. This is where the recipient has a decision to make on how they want to proceed.

The recipient can either attempt to petition the court to use the document in the case in favor of their client, or they can comply with the sender’s request. Which is the best course of action? It depends on the case, the nature of the

inadvertently disclosed document, and other factors. There is no right or wrong, sometimes.

If a lawyer decides to petition to the court to utilize the inadvertent disclosure, the outcome usually requires a two-part analysis: (1) is the document privileged, e.g., attorney-client privilege; and (2) was the privilege waived due to the inadvertent disclosure.<sup>21</sup> Courts will vary on how they rule on inadvertent disclosure motions, but most tend to favor protecting privilege.

### **JURISDICTIONAL CHALLENGES<sup>22</sup>**

While navigating the basics of inadvertent disclosures is already difficult enough, there are also jurisdictional variations to Rule 4.4(b), which may cause significant challenges for lawyers who practice across multiple jurisdictions or those who are not entirely familiar

with the nuanced requirements of a specific region. While some jurisdictions may be more content with just a notification from a recipient of the inadvertently disclosed document, others demand a more rigorous and involved response process. Taking a closer look at the specific states provides a clearer picture of these jurisdictional disparities.

In Alabama, the District of Columbia, and Colorado, for instance, the protocol goes beyond mere notification. These jurisdictions mandate the recipient of the inadvertently disclosed material notify the sender and abide by any reasonable instructions of the sender for the disposition of the document.

Yet, there are states that go even further in their protective measures. Hawaii, Louisiana, Maine, New



Hampshire, New Jersey, Tennessee, Wisconsin, and Kentucky have adopted a stringent approach. In these states, upon realizing a document has been mistakenly received, the recipient is obligated to immediately stop reading the document. This immediate cessation is crucial to minimize potential damage or misuse of information. Following this, the recipient must swiftly notify the sender and then work collaboratively to arrive at an agreeable solution regarding the subsequent handling and disposition of the inadvertently disclosed document.

In contrast, there are other jurisdictions that have either opted for less stringent regulations or have altogether abstained from adopting specific rules on the matter. For example, Michigan, North Dakota, and Rhode Island have not integrated Rule 4.4(b) from the Model Rules of Professional Conduct into their own professional guidelines. The absence of this rule does not imply a lack of protocol but rather might indicate a different approach. These jurisdictions appear to be urging attorneys to exercise greater caution in their practices. The repercussions of permitting the recipient to utilize an inadvertent disclosure can be severe, placing the blame squarely on the sending attorney, such as allowing the recipient unrestricted use of the mistakenly shared information.

Which jurisdictional stance resonates with you? Should the sender bear the consequences for their oversight and negligence in an inadvertent disclosure? Or should the courts be lenient, obligating the recipient to stop perusing the document and adhere to the sender's request for its deletion?

Regardless of your individual stance on Rule 4.4(b) and opinions about which jurisdiction interprets it best, it's undeniable that your response can either maintain your professional integrity or lead to significant professional consequences. <sup>(14)</sup>

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*Cari Sheehan is an assistant clinical professor of business law and ethics at the IU Kelley School of Business in Indianapolis, where she currently teaches commercial law and business ethics. Additionally, Sheehan is an adjunct professor at the IU Robert H. McKinney School of Law where she has taught courses in professional responsibility, torts, and appellate practice and procedure. In practice, she is a conflict attorney with Scopelitis Garvin Light Hanson & Feary advising on conflicts and other ethical issues. Sheehan 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.*

#### ENDNOTES

1. *Pursuit Credit Special Opportunity Fund, L.P., v. Krunchcash LLC, et. al.*, Case No. 651070/2022 (NY 2022).
2. *Id.*
3. *Id.*
4. *Id.*

5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*; also, Robin Kaplan LLC has stated in news articles that it will be appealing the court's sanction and decision.
14. Ind. Rule of Prof. Conduct 4.4(b), Comment 2.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. Ind. Rule of Prof. Conduct 4.4(b), Comment 3
20. Ind. Rule Prof. Conduct 4.4(b) requiring "prompt" notification.
21. *P.T. Buntin, M.D., P.C. v. Rose Marie Becker, as Administratrix of the Estate of Hollis V. Becker, deceased*, 727 N.E.2d 734, 741 (Ind. Ct. App. 2000)(citing *JWP Zack, Inc. v. Hoosier Energy Rural Elec. Co-op., Inc.* 709 N.E.2d 336 (Ind. Ct. App. 1999) (stating courts balance several factors, including the reasonableness of the precautions to prevent the inadvertent disclosure, the time it took to rectify the error, the scope of discovery, the extent of the disclosure, and balancing fairness to the parties against protecting any privilege).
22. Refer to each jurisdiction's specific Rules of Professional Conduct; also see ABA, Center of Professional Responsibility, Jurisdictional Rules Comparison Charts: [www.americanbar.org](http://www.americanbar.org)

## ON THE MOVE

**Michael Michaelis** has joined **Freedman Law, P.C.** as an associate attorney in Fishers, Indiana.

Michael began his career practicing family law. Michael also has extensive experience in criminal law, both as a defense attorney and as a prosecutor. Michael has both bench trial and jury trial experience, has taken witness depositions resulting in dismissals, and has succeeded in suppressing evidence the government obtained illegally, also resulting in dismissals.

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**MEMBER ANNOUNCEMENT**

By Kathy Osborn and  
Katrina Gossett Kelly



# SEPTEMBER CASES ADDRESS SUPER PACS, PUBLIC DISCLOSURE OF PRIVATE INFORMATION, MORE

In September 2023, the Indiana Supreme Court decided two civil cases, answered one Certified Question with an opinion, and granted transfer in two other civil cases. The Indiana Court of Appeals issued 17 published civil opinions.

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## IN A CLAIM FOR PUBLIC DISCLOSURE OF PRIVATE INFORMATION, PLAINTIFFS CAN RECOVER EMOTIONAL DAMAGES AND NEED NOT PROVE THAT THE DISCLOSURE WAS INTENTIONAL

In *Z.D. v. Cmty. Health Network, Inc.*, 2023 WL 6209571 (Ind. Sept. 25, 2023), the Indiana Supreme Court considered the contours of the invasion of privacy tort claim for public disclosure of private information.

Plaintiff sought medical attention from Community Health Network. After her visit, the hospital prepared a letter to plaintiff documenting her private health information. The letter was placed in an envelope with a handwritten address for the wrong recipient. It was mailed to a teenager who attended the same high school as plaintiff's daughter. That teenager then posted the letter on Facebook.

Plaintiff brought a claim against Community Health Network for public disclosure of private information and negligence. Plaintiff alleged that, because of this disclosure, she suffered damages for emotional distress, loss of privacy, loss of income, reputational damage, and cost of rent because she had to move out of her fiancé's home.

Community Health moved for summary judgment arguing plaintiff had not proven the disclosure was intentional and that emotional damages should not be recoverable without any physical contact. Community Health further argued that plaintiffs' alleged damages under the negligence claim were not recoverable. The Indiana Supreme Court affirmed in part and reversed in part.

Community Health argued public disclosure of private information is an "intentional tort" and therefore plaintiff should have to show intentional disclosure. The court declined to impose a requirement of intentional conduct. The court explained that, in this modern age, "Hoosiers' private information warrants protection from intentional exploitation and inadvertent exposure alike."

For similar reasons, the court also held that plaintiff could recover for emotional distress under this tort. The Restatement (Second) of Torts § 652D, which was previously adopted by the court, explicitly allows emotional distress damages, and the court did not believe these damages should be limited when disclosure was negligent, rather than intentional.

The last question for the court on this tort claim was whether the private information was "communicated in a way that either

reaches or is sure to reach the public in general or a large enough number of persons such that the matter is sure to become public knowledge." The court held plaintiff had identified sufficient evidence to survive summary judgment, even though the communication was sent to only one person. The court found there were material questions of fact whether the hospital employee knew of the connection between the plaintiff and the teenage recipient, such that the information would be "sure to become public knowledge."

On the negligence claim, the court declined to exempt negligence-based medical privacy breaches from the physical-impact requirement, instead pointing plaintiff toward tort law as a path to recovery of emotional damages. The court did, however, reverse summary judgment on plaintiff's claim for pecuniary damages and remanded the issue to the trial court to determine if the alleged negligence was the proximate cause of those damages.

## APPEALS COURTS DO NOT DEFER TO A ZONING BOARD'S INTERPRETATION OF AN ORDINANCE

Billboard owner FMG Indianapolis, LLC, known as Reagan, owns several billboards in Noblesville, Indiana. A city ordinance now bans pole signs, but signs like Reagan's that pre-date the ordinance can remain as a legal nonconforming use if they are kept in good repair and not "relocated." After a storm damaged one of its billboard's support posts, Reagan tried to repair the billboard by removing the sign's display, cutting off the broken posts at ground level, and installing new posts a few feet from the posts' existing holes. But before the work was completed, the city issued a stop-work order after concluding that Reagan had "relocated" the sign, which thus lost its legal nonconforming status. Reagan appealed to the board of zoning appeals, which upheld the decision. Reagan sought judicial review.

*In Noblesville, Indiana Bd. of Zoning Appeals v. FMG Indianapolis, LLC,*

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2023 WL 6209522 (Ind. Sept. 25, 2023), the Indiana Supreme Court granted declaratory relief to the plaintiff, finding that Reagan had not “relocated” the billboard. The Court of Appeals had deferred to the zoning board’s interpretation of the ordinance, but the Indiana Supreme Court held this was not the proper standard of review. The court treats zoning boards as administrative agencies when reviewing their decisions, and, therefore, when reviewing legal questions, it gives the zoning board no deference.

Reviewing the question *de novo*, the Indiana Supreme Court found the ordinance was ambiguous about whether “relocate” included any movement whatsoever. Given this ambiguity, the court construed the statute in favor of Reagan, explaining that “[b]ecause zoning ordinances limit the free use of property and are in derogation of common law, we construe any such ambiguity to favor the free use of land.” Under the interpretive canon that ambiguous zoning ordinances are construed in favor of property owners, the court found Reagan had not “relocated” the sign and granted declaratory relief, as well as costs. The court held that costs were appropriate under a claim for declaratory relief, even though they would not be available for a claim for retroactive judicial review of the zoning board’s actions.

#### **ELECTION CODE PROHIBITS DONATIONS BY CORPORATIONS TO SUPER PACS**

In *Indiana Right to Life Victory Fund v. Morales*, 2023 WL 6209523 (Ind. Sept. 25, 2023), the Indiana Supreme Court answered a certified question from the Seventh Circuit Court of Appeals: “Does the Indiana Code—in particular, §§ 3-9-2-3 to -6—prohibit or otherwise limit corporate contributions to [political action committees]

or other entities that engage in independent campaign-related expenditures?” The Indiana Supreme Court held that it did.

The plaintiffs in the underlying case were the Indiana Right to Life Victory Fund, a PAC, organized as an independent-expenditure-only PAC, known as a “Super PAC,” as well as Sarkes Tarzian, a for-profit corporation that wished to donate \$10,000 to the Super PAC. The plaintiffs brought a declaratory judgment action against several Indiana election officials requesting a declaration that Indiana Code sections 3-9-2-4 and 3-9-2-5 are unconstitutional as applied to contributions like the \$10,000 donation Sarkes Tarzian wished to make to the Victory Fund.

The Southern District of Indiana dismissed the case for lack of standing, holding the statutes had never been used to prevent such a determination and the election officials had disclaimed any intention to do so. The plaintiffs appealed to the Seventh Circuit, which found that it could not decide standing until it understood whether the election code as written would prohibit the proposed donation. For this reason, the Seventh Circuit certified the question for the Indiana Supreme Court.

The Indiana Supreme Court noted the election code does not explicitly address Super PACs because they did not exist at the time the statutes were written. The court found, nonetheless, the election code prohibits contributions to a Super PAC because I.C. § 3-9-2-3(b) only permits corporate contributions if they are explicitly authorized by sections 4, 5, or 6. The court concluded that none of those sections authorize Sarkes Tarzian’s proposed contributions.

Section 4 of the statute sets annual limits to corporations’ contributions to various entities ranging in amounts from \$2,000 to \$5,000. Section 4 does not authorize contributions to PACs. Section 5 allows corporations to contribute to a PAC so long as the contribution (a) “is designated for disbursement to a specific candidate or committee listed under section 4 of this chapter,” and (b) does not exceed section 4’s dollar limits. Super PACs, like the Victory Fund, however, do not qualify under section 5 either because Super PACs are not allowed to make donations to any individual candidate or political party. Section 6 provides exceptions to the restrictions in sections 4 and 5 for certain things like nonpartisan registration and get-out-the-vote campaigns, but the court and the parties agreed that none of those exceptions applied.



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The Indiana Supreme Court acknowledged that the plaintiffs are suing to stop the election officials from doing something they say they have no intention of ever doing. The election officials agree that *Citizens United* protects the right to make contributions like Sarkes Tarzian's proposed contribution. Nonetheless, the court declined to take the route of interpreting the statutes as allowing the contribution because there was no ambiguity to resolve. The court explained, "we cannot resort to the constitutional avoidance canon of statutory construction if there is no ambiguity to resolve." Thus, the Indiana Supreme Court answered the certified question with a clear "Yes."

#### ADDITIONAL TRANSFER GRANTS

- *Safeco Insurance Company of Indiana a/s/o Ramona Smith v. Blue Sky Innovation Group, Inc, et al.*, 211 N.E.3d 564 (Ind. Ct. App. 2023) (whether Indiana recognizes a separate cause of action for third-party spoliation).

- *Cooley v. Cooley*, 209 N.E.3d 11 (Ind. Ct. App. 2023) (whether trial court acted within its discretion in ordering the husband to secure his equalization payment with a life-insurance policy naming wife as owner and beneficiary). ☯

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*Katrina Gossett Kelly is a Faegre Drinker senior business litigation attorney. She practices in the areas of trade secrets, e-discovery, business, and utilities litigation. She graduated from the University of Notre Dame, with a B.A. in Theatre and a minor in Science, Technology and Values, summa cum laude, and earned her J.D. from the University of Chicago, with honors. In addition to her litigation practice, she served multiple years as chairperson for the Indiana Governor's Council for People with Disabilities.*



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# The Impact of Generative AI on the Legal Profession

Over the past five years, generative artificial intelligence (AI), like ChatGPT and other machine learning models, has had a significant impact on the legal field in powerful and unexpected ways. AI offers tools designed to streamline tasks, enhance research, and optimize workflows. While these advancements promise to revolutionize many aspects of the legal system, they come with the potential for increased risk, particularly in terms of legal liabilities for the attorneys and firms who have adopted AI into everyday practices.

## Applications for Generative AI in the Legal Field

The legal profession balances interpersonal skills, ethics, and judgment as law firms work on behalf of their clients. Some of the ways in which AI can benefit legal professionals include:

**Document Drafting & Review:** Generative AI can help draft legal documents, such as contracts, wills, and trusts. These models can produce standard clauses or sections based on input requirements. They can also help in the review of large sets of documents to identify inconsistencies or errors.

**Legal Research:** Generative AI can assist lawyers in legal research by parsing large amounts of case law, statutes, and other legal materials, providing summaries or pointing out relevant passages. This can speed up the process of preparing for cases.

**Predictive Analysis:** AI models can be trained to predict outcomes of legal disputes based on historical data. While these predictions are by no means definitive, they can offer guidance to lawyers and clients regarding the potential outcomes of a case.

**Discovery and E-Discovery:** The discovery phase in litigation can be labor-intensive as it involves sifting through vast amounts of data and documents. AI can automate the process of identifying relevant documents or information by scanning and categorizing them.

**IP Management:** Generative AI can assist in tasks like patent searches, identifying potential infringements, or suggesting potential areas for new patent filings based on technological trends.

AI can streamline workflows, make complex preparations for cases easier than ever, and analyze data to inform decision-making processes.

## Potential Pitfalls of AI in the Legal Profession

While the benefits of AI are already felt within many industries, including the legal profession, the adoption of AI tools is not without risks.

The utilization of AI in legal cases introduces concerns about data privacy, potential algorithmic biases, and the reliability of AI-generated insights. Additionally, the legal sector's inherent emphasis on human judgment and ethical considerations makes the wholesale adoption of AI a complex endeavor.

Incorrectly applied or verified information generated by AI language learning models can also present significant professional liability risks, including the risk of expensive errors & omissions or legal malpractice claims. While AI offers numerous benefits for the legal profession, its integration comes with a unique set of challenges and potential liabilities. Lawyers and firms must be proactive in understanding these risks and establishing best practices to mitigate them.

For more information on how the use of generative AI could affect your practice as it relates to professional liability, please visit Ritman & Associates at [www.ritmanassoc.com](http://www.ritmanassoc.com).



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