



JAN/FEB 2023

INDIANA STATE BAR ASSOCIATION

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INDIANA COURTS AS ENGINES
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STATE OF THE JUDICIARY

2023 State of the Judiciary: Indiana Courts as Engines of Economic Development, Fairness, and Public Safety.

By Hon. Loretta H. Rush

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President's Perspective

PRÊT-À-PRACTICE: MEASURING THE QUALITIES REQUIRED FOR SUCCESS IN LAW SCHOOL AND BEYOND

By Amy Noe Dudas

PRESIDENT'S PERSPECTIVE

How many of us walked into the courthouse for the very first time as an attorney and felt like we had any idea what we were doing? No hands? I'm not surprised.

To get into law school, we had, in part, to have a decent score on the LSAT, which meant we demonstrated skill in reading comprehension, reasoning, and writing. The American Bar Association, which accredits law schools, currently requires either the LSAT or the GRE be a component of any accredited law school's admissions standards.

Many will tell you the LSAT is the best way to predict success in law school and ultimately on the bar examination. Others argue the LSAT reflects the built-in inequities in the educational system, which makes marginalized students less likely to pass. In fact, data shows white examinees are significantly more successful on the LSAT than their peers of color.

Once someone gets into law school, are they learning the skills and qualities important to the overall practice of law? Students learn

research skills, critical thinking, ethics, issue spotting, and an understanding of the foundation of the American legal system. But are they also cultivating tact, emotional intelligence, humility, coping, and curiosity?

Most law school classes follow the same general format. Students are assigned a chunk of old case opinions to read (and brief, if they're really on the ball). Professor Soandso then puts Janie Lawstudent on the spot, asking pointed questions about the holding, the underlying analysis, and the law on which it is based. (It can be terrifying, especially when you didn't do the reading, but even if you did.) The Socratic method is designed to cultivate critical thinking, help students develop ideas, and lead to a better understanding of one's own thought process. It's a sound method for teaching the obvious skills we need as lawyers.

Then comes the bar exam, where law school graduates spend months memorizing restatements of law so they can regurgitate them (and promptly forget all of it when they leave the testing site). It's supposed to measure minimum competence to practice law (whatever that means), and the



experience can be a life-defining one. Those of us who got our results back in the day when they were delivered by your friendly neighborhood mail carrier can remember exactly when and how we learned our professional fates. (I was in a motel room in Bentonville, Arkansas, with my parents on our way to visit my Nana in Plano, Texas, when I was told by telephone—the old-timey kind that plugs into a wall—that my results came in the mail.) I would venture to say most seasoned lawyers would not pass a bar exam without taking a fair

necessary for new lawyers to have, but it also then analyzed how legal education and admissions standards are—or are not—ensuring law students and new admittees are minimally competent. Some of these are obvious, but some are less so; we often forget that qualities not directly related to the law are just as important to do what we do really well.

The abilities that seem obviously important to what lawyers *do* include:

- acting professionally and in

"Up until recently, there was very little effort to specifically define 'minimum competence.' Doing so seems to be a great start as we work to better explain to the public not just what lawyers do, but who lawyers *are*, that makes us uniquely qualified to provide certain legal services."

amount of time to study—a *lot*.

The idea, then, is those who pass the bar exam have enough knowledge and skill to immediately start practicing law. Up until recently, there was very little effort to specifically define “minimum competence.” Doing so seems to be a great start as we work to better explain to the public not just what lawyers do, but who lawyers *are*, that makes us uniquely qualified to provide certain legal services.

In December 2020, the Institute for the Advancement of the American Legal System issued its report titled, “Building a Better Bar: The Twelve Building Blocks of Minimum Competence.” Not only did it outline what skills and qualities are

accordance with the rules of professional conduct

- understanding legal processes and sources of law
- understanding threshold concepts in a variety of subjects
- interpreting legal materials
- spotting legal issues
- conducting research

But these other named qualities are more about who lawyers *are*:

- interacting effectively with people
- communicating clearly, thoughtfully, tactfully, and respectfully
- seeing the big picture
- managing time, stress, and life in general
- coping, in a healthy way,





with stress, anxiety, pressure, and conflict

- desiring to learn new things on one's own

The top six seem to be well covered in law school and, to some extent, by the bar exam. Law school admissions strive to ensure its admittees can learn and progress in those skills. But does the LSAT (or GRE) effectively measure whether an applicant has the capacity for developing qualities in the second set of abilities? Does the bar exam show examiners that prospective licensed lawyers learned how to demonstrate those qualities?

Those who believe the answer is no have ideas about how to do better. For example:

The ABA's Section of Legal Education and Admissions to the Bar has proposed amending its accreditation standards to make standardized admissions tests optional for law school admissions. This proposal will be considered at the ABA's February 2023 House of Delegates meeting.

The Oregon Supreme Court has approved two new attorney licensing options *in addition* to the bar exam:

licensure after completing a law school experiential learning program; licensure after completing a certain number of hours of supervised practice after graduation. California, Massachusetts, Minnesota, Nevada, New York, Utah, and Washington also are studying alternatives to the bar exam.

The ABA has allowed accredited law schools to teach online and is considering more flexibility in providing remote learning opportunities. Syracuse University has a hybrid program, Loyola University and St. Mary's University were allowed to transition part-time JD programs to remote learning.

If any of these alternatives concern you, as they do many lawyers, what might you define about such efforts that do not cultivate the desired abilities necessary for the practice? In better defining our concerns in ways that avoid accusations of mere protectionism, we give ourselves a seat at the table that will allow us not only to voice those concerns but also listen to the possibilities for improving the system in ways that perhaps everyone can live with. ☯

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2022 IN REVIEW

For many, including us here at the ISBA, 2022 was another year of change and uncertainty. New faces. New challenges. A new normal. But it was also a year of re-connection, of moving forward and re-evaluating and pushing ourselves to be the best we can be. We found new ways to support each other, took a hard look at our practices and improved them. We navigated a return to in-person events and meetings and celebrated some major achievements. And we couldn't have done it without you.

So, here's a look at some of the things we accomplished this year.

DIVERSITY AND INCLUSION

With your help, the ISBA and the broader legal community made large strides in DEI for the legal profession. From the return of the *Open Conversations* program (which nearly 1,000 legal professionals watched live) to the 25th anniversary of the Indiana Conference for Legal Education Opportunity (ICLEO) (which paved

a path for nearly 670 diverse individuals to enter Indiana's profession).

2022 also saw the unveiling of 120 self-service civil legal kiosks throughout the state, through an Indiana Bar Foundation initiative designed to help Hoosiers easily access [IndianaLegalHelp.org](https://indianalegalhelp.org) and gain resources, legal forms, and referrals. Several Indiana Supreme Court commissions and initiatives have also made strides in identifying and addressing legal challenges across the state, like the Civil Litigation Taskforce which released their report and recommendations in June 2022.

The ISBA Diversity Committee also evaluated the ISBA's standing statement on diversity and created a new one to better reflect recent events. The new statement was adopted by the ISBA Board of Governors in April.

ADVOCACY

You helped shape and advocate on several issues throughout the year. From the ISBA Animal Law

Section that provided testimony to get HB 1248 passed, to all the members who banded together to shut down HB 1083 (the Tax on Services bill) in the 2022 legislative session. At the House of Delegates meeting, delegates also voted unanimously to support a pass through entity tax in the 2023 General Assembly, as presented by the ISBA Tax Section.

And it goes without mentioning all of the committees, commissions, and councils you sit on, the conversations you bring to the table, and the challenges you help address every day.

EDUCATION

You also provided new resources to share with other legal professionals. In 2022, both the ISBA Diversity Committee and the Well-Being Committee compiled a series of articles, CLE, programs, events, and other resources related to diversity, equity, and inclusion and well-being practices respectively. You can access them anytime at inbar.org/DEI and inbar.org/well-being.

In 2022, the Law Practice Management Committee also launched the Law Practice Management Hub—an online library of thought leadership and solutions on marketing strategies, data privacy, budgeting, and more. You can download eBooks, white papers, guides, etc. at inbarLPM.org.

CONNECTIONS

2022 saw a return to in-person events and CLE, with the added challenge of figuring out the new normal. Nevertheless, you made new connections and brought the community closer together.

Several programs celebrated major milestones in 2022. The Leadership Development Academy—a program that has graduated nearly 250 legal professionals—welcomed its 10th class and took the young legal professionals everywhere from New Harmony to Crown Point. The Women's Bench Bar Retreat—a conference bringing together women from across the state for a weekend of fun and new connections—celebrated its 20th anniversary. As did the Solo and Small Firm Conference, the largest gathering

of solo and small firm attorneys in the state.

The ISBA also moved offices this year, opening up our doors in the Capital Center. The new space was designed with connections in mind, where members can rent out offices and/or conference rooms when you need them.

We accomplished a lot in 2022, and we look forward to the new memories, celebrations, and progress 2023 will bring. 🎉

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2023 STATE OF THE JUDICIARY: INDIANA COURTS AS ENGINES OF ECONOMIC DEVELOPMENT, FAIRNESS, AND PUBLIC SAFETY



FEATURE

By Hon. Loretta H. Rush

Governor Holcomb, Lt. Governor Crouch, members of the General Assembly, Chief Judge Altice, colleagues, and fellow Hoosiers—welcome to the 2023 State of the Judiciary! It is a true joy to be here today, for the ninth time, fulfilling my constitutional duty to report to you on the condition of Indiana's courts. I will get right to the point: your judiciary is stronger than ever!

Fifty years ago, Indiana became my home. My father was a railroad man, and we moved frequently—16 times to be exact—following the train tracks from Hoboken, New Jersey, to the southside of Chicago. It was those trains—those early engines of economic development—that transported me to Indiana and this opportunity to serve our great state with all of you!

Like those trains, Indiana's courts are working as engines of economic development. It may seem unusual to think of the judicial branch as a vital economic driver or as a crucial protector of public safety, but let me explain.

Two-and-a-half million cases are currently pending in our courts—cases that touch on every facet of Hoosier life. Here's just a sampling:

- 10,500 fresh starts coming through criminal expungements
- 19,000 mental health cases—the largest ever—to ensure those suffering from mental health issues receive the help they need
- 36,000 new protection order cases to help prevent domestic or workplace violence
- 13,200 endangered adults receiving protection in guardianship cases
- 20,000 children in need of services served by GAL/CASA programs
- 13,000 new paternity cases to help ensure children receive support from both parents
- 5,000 new adoptions to officially bring forever families together
- 4,200 domestic violence convictions that are shared with law enforcement to prevent the purchase of firearms by dangerous people
- 80,000 small claims cases that allow businesses,



neighbors, and others to peacefully settle their disputes

Being in court is a particularly vulnerable time—personally, emotionally, and economically. The sooner a person can get before a judge and resolve differences with a creditor, settle disputes with a landlord, obtain child support, expunge a conviction, or be made whole in a lawsuit, the sooner they can get back to their family and back to work. The same is true for businesses in a legal dispute. Court efficiency and fairness are paramount in fostering a safe community and a strong economy.

COMMERCIAL COURTS

According to the U.S. Chamber of Commerce, nearly 70% of businesses look at a state's litigation environment when deciding where

to locate or expand. In 2015, we committed to a bold overhaul of complex business litigation when we launched our Commercial Courts Project. These specialized courts—now ten statewide—are laser-focused on resolving complicated business disputes. They utilize highly trained and seasoned judges, business-specific resources, and uniquely dedicated legal advisors.

More than 1,600 cases have been filed in our commercial courts, and these complex cases are being decided quickly and in a predictable, consistent, and fair environment. Business owners see these positive outcomes, enabling them to make informed decisions on the costs and risks of potential legal issues. As a result, our commercial courts help make Indiana an attractive state for economic development and expansion.

But we aren't done. We are working hard to ensure our commercial courts become a preeminent forum for the determination of business disputes. At a recent meeting, attorneys from across the state indicated some businesses are now writing contracts that name Indiana's commercial courts as the arbiter of any dispute. Amazing! Why not lead the nation in this model and strive for our commercial courts to challenge the Delaware Courts of Chancery? We're committed to doing just that.

We could not have realized these achievements without the support of the Indiana Chamber of Commerce, business leaders across the state, our ten commercial court judges, and members of our legislature, including the leadership of Senator Eric Koch.

Our commercial courts are not the only specialized court model producing measurable outcomes: Indiana's problem-solving courts are changing and saving lives.

PROBLEM-SOLVING COURTS

In my first State of the Judiciary, I announced that we had 68 problem-solving courts statewide, with veterans courts experiencing the fastest growth. We promised you that we would expand these specialized courts, and we've delivered—we have more than *doubled* them! Today we have 143 problem-solving courts, including 30 veterans courts, with more to come!

These courts exemplify all that is good in our judicial system—justice tempered with mercy and based on principles of reformation as set forth in the Indiana Constitution.

But with over 30 counties without a problem-solving court and many existing courts at capacity, we still have work to do to ensure *all* Hoosiers have equal access to these powerful engines of justice. As Dearborn County Judge Jon Cleary recently told me, “So many of our current treatment court participants are coming to us for help to escape the hell that they are living in. And the results are good. Very good.”

I want to offer a special thanks to the judge who ten years ago pioneered one of Indiana's first veterans courts—Floyd County's Maria Granger. Her Veterans Court of Southern Indiana includes Clark, Floyd, and Scott counties. This tri-county cooperation allows a county that may lack the individual resources to maintain a problem-solving court to work with justice partners just up the road—or maybe

better said—just up that rail line. And cross-county cooperation just makes good economic sense.

Like Judge Cleary, Judge Granger describes problem-solving courts as “effective crime-reducers” because “the participants are required to face

the truth; get treatment; and think, speak, and act with accountability.”

During my first State of the Judiciary, I invited one of the program's first graduates, Specialist Christopher Bunch, to this assembly. You might remember that he commended

"I want to offer a special thanks to the judge who ten years ago pioneered one of Indiana's first veterans courts—Floyd County's Maria Granger."

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the veterans court's rigorous program, which provided him with "counseling, support, and the chance to make amends."

Specialist Bunch—like so many of his fellow graduates—turned his life around and to this day continues to be a valuable member of his community. He's married with children, his family bought their first house, he owns a construction company, and he has been sober for nine years. Today, Chris represents the thousands of successful problem-solving court graduates here in Indiana.

TECHNOLOGY

One reason our specialized courts work so well is their integration of reliable data. Critical pieces of information are available through an indispensable tool for justice: court technology.

In so many ways, court technology is the engine that enables vital connections not just for our judges and all Hoosiers but also between government entities. Connections that previously would have been impossible are now seamlessly part of our modern courts:

- 8 million documents were filed electronically through our paperless court system last year alone
- We alerted the VA to connect with nearly 20,000 veterans with court cases to get them specialized help
- 4 million text messages have been sent to remind parties about upcoming hearings
- We enabled 1,500 parties to settle their cases through online dispute resolution, and we now have an online portal accepting gigabyte upon gigabyte of evidence
- 1 million protection orders have been filed in the statewide registry
- Several non-profits are working with us to help Hoosiers navigate and resolve their legal problems. With our support, the Indiana Bar Foundation is providing 120 self-help kiosks in courts, libraries, and community centers throughout Indiana.

Additionally, all Hoosiers now have 24/7 access to courts, which reduces costs, speeds up cases, and saves taxpayer money. Please raise your hand if you are one of the millions of people who have freely accessed an Indiana case using MyCase? If not, you should. More than 50 million pages were viewed online just last year. And you might just discover, like I did, that your child had a speeding ticket you didn't know about.

Aside from enabling this astounding access, we are also a national leader in developing and leveraging new technology to improve public safety. By creating a fully connected and accessible court system, we are

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providing information to you and other policymakers in tangible, life-saving ways. Two examples come to mind.

Drugs, particularly methamphetamine, continue to ravage our communities. You asked us to send the names of those convicted of drug crimes to a national tracking system. We delivered. As a result, more than 90,000 people are on the list pharmacies check before selling ingredients that can be used to make meth.

In another remarkable example, we provide data on felony child abuse, drug, and other violent criminal convictions to the Department of

abuse, the Justice Reinvestment Advisory Council, and pretrial improvements. We are also working with them to roll out a new jail management system—INJail—for potential statewide use.

This project came about after your Jail Overcrowding Task Force identified systemic problems with multiple, unlinked jail management systems—problems that prevent all of us from collecting and analyzing reliable data. You asked for a solution, and we're delivering.

Seven counties are participating in the system design, and it's going to be implemented this year in Martin, Grant, and Elkhart counties. This new system will improve public

"Drugs, particularly methamphetamine, continue to ravage our communities. You asked us to send the names of those convicted of drug crimes to a national tracking system. We delivered."

Education. Together, we have found matches with 328 licensed educators. It's scary, I know. But providing that information allows the DOE to pursue license suspensions. And our children are the beneficiaries of this governmental cooperation—for that we should all be proud.

INJAIL

A key partner in using the courts as engines of public safety are our sheriffs. We have partnered with the Indiana Sheriffs' Association on many justice-system reforms, including mental health, substance

safety by ensuring accurate criminal records, allowing judges to view real-time incarceration status, and alerting community agencies when a supervised individual is arrested.

This new ability to share offender information between jails, law enforcement, community corrections, probation, and all justice partners will be vital to public safety. And it will give you information you've never had before to help guide your policymaking.

INJail is our most complicated court technology project to date. And it



reflects our resolve to do everything we can to support the men and women in law enforcement—those who dedicate their lives to the crucial work of keeping our communities safe.

MENTAL HEALTH

When we met this time last year, we talked about a shared concern—mental health problems in our communities. They are pervasive, they drain workers' productivity, and they persistently affect public safety. The criminal justice system has become taxed beyond its abilities—jails are not treatment centers, and we pledged to work with you to find solutions.

Thank you, Governor Holcomb, President Pro Tem Bray, Speaker Huston, Senators Crider and Sandlin, Representative Steuerwald, Justice Goff, and other leaders, for your time, input, and attendance at the 2022 Mental Health Summit. Also, a special thanks to the nearly 1,000 Hoosiers representing teams from all 92 counties who came together at the Summit to find a better path in their communities to help those suffering from mental illness.

We know that our communities have come to rely on county jails to serve as de facto mental health treatment centers. We also know this was never planned and is not sustainable. When we ask sheriffs to

take on this never-intended duty, we prevent them from carrying out their core mission to provide public safety.

We confronted this reality at the Summit by collectively examining and evaluating Indiana's mental health delivery system, including the development of a new crisis response system. This system ensures every Indiana community has a more humane alternative to the county jail when someone is suffering from a mental health crisis.

You are looking at the 988 crisis response hotline and how it can both increase public safety and save taxpayer dollars. Our judges are here today and stand with you to take on this momentous opportunity to improve mental health care.

COMMISSION ON IMPROVING THE STATUS OF CHILDREN IN INDIANA

Families are the bedrock of any society—strong families foster a strong workforce. And it takes the collaboration of all three branches to ensure Hoosier children have the best opportunities. That collaboration is exemplified in our Children's Commission, led by our first Executive Director, Julie Whitman.

Recently, the Commission worked on a statewide child abuse prevention framework and toolkit, spearheaded a top-to-bottom review of our juvenile justice system with Representative McNamara and Senator Crider, and developed an information sharing app that has connected nearly 6,000 users with legal guidance. Today, the Commission continues working on tough issues affecting our communities: sex trafficking, youth

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ZEBULON P. BAIRD:

A FORGOTTEN GIANT AND INDIANA'S FIRST PUBLIC DEFENDER

By Zach Stock and Suzy St. John



Zebulon Baird

Forgotten history has a ring of charlatanism. It is the stuff of clickbait and the stock in trade of pseudo historians and alternative archeologists. The trick works because some things truly disappear in the mists of time. Even in our “historically oriented”¹ profession, lawyers often fail to appreciate that our modern vantage point rests on the shoulders of giants.

We should take time to remember our giants. Gratitude is healthy, and the lawyers who came before us can inspire us to exercise the power of the legal profession responsibly and to trudge on in our own quests for greater justice. It never hurts to have someone to use “as a standard against which our characters can measure themselves.”²

One such standard is Zebulon Baird, a man unjustly forgotten by the legal profession. As one early biographical sketch observed, “He loved his profession for itself, without regard to the financial rewards of success, or to political prestige. Yet, still more did he love his country and the cause of liberty.”³ A fine epitaph for any lawyer.

A LAWYER PAR EXCELLENCE

There is no question Baird was a great lawyer. His contemporaries saw him “at the head of the legal profession in Indiana.”⁴ He mentored future United States Senator

Joseph E. McDonald, who often said Baird was the ablest lawyer that Indiana had ever produced. In court, he rarely failed to attract an audience, and according to those who saw him, Baird was “an acute reasoner” whose arguments in person and in writing were “precise, finished, comprehensive, forcible and clear.”⁵

He started young. When he settled in Lafayette in 1839, Baird was only 22. By then, he had already studied at Miami University and practiced under the tutelage of a governor of Ohio. His talents must have been obvious because he quickly formed a partnership with a well-established lawyer in the city. Within a few years, Baird was engaged in the most significant litigation of the day.

He argued at least 150 civil and criminal cases in the Indiana Supreme Court and was an active participant in the litigation surrounding the controversial liquor law of 1855,⁶ which set precedents still debated to this day. In 1855, he was admitted to the bar of the United States Supreme Court and appeared as counsel of record in several cases before the high court. In the old District Court of Indiana, Baird even took part in one of the most famous patent controversies of the nineteenth century.⁷

A LIFE DEVOTED TO THE CAUSE OF LIBERTY UNDER THE LAW

Despite professional success (and being nearly 45 years old), Baird did not hesitate to fight in the Civil War. In May 1862, he enlisted as a Captain in the Union Army and was a loyal aide-de-camp to controversial abolitionist and fellow Hoosier lawyer, General Robert H. Milroy. Baird served for more than two

years but was fortunate to last so long.

Only months after enlisting, Baird found himself at the Second Battle of Bull Run. During the battle, Gen. Milroy’s brigade was cut to shreds, and the entire Union army was forced to retreat. Baird managed

to survive; but in the ensuing chaos, he was captured and sent to the infamous Libby Prison. A death sentence for many, Baird was freed in a prisoner exchange only weeks later.

This is where the currents in Baird’s life—law, liberty, and service

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converge. According to a story recorded not long after his death, on Baird's way to his new duty post, he stopped in Washington and argued a case in the Supreme Court while wearing his captain's uniform. Afterward, one of the justices is said to have quipped, "If army Captains could argue the law so well, what could be expected of the Generals?" Whether fact or fiction, Baird's life was the stuff of legend in his own time.

HIS MOST LASTING CONTRIBUTION

But it is Baird's more human endeavors that live with us today. In 1853, before he was a war hero, the Tippecanoe Circuit Court appointed Baird to defend an indigent man charged with burglary. The court also ordered the Tippecanoe Auditor to pay Baird \$25.00 for his services. Believing the court could not appropriate funds, the Auditor refused to pay. Undeterred, Baird sued and set up a dispute that would reach the Indiana Supreme Court.

In one of its most celebrated cases of all time, *Webb v. Baird*,⁸ the Court sided with Baird. For the Court, it was clear that an attorney could not be compelled to perform services without pay. It was also clear that "in a civilized community," no one should be forced to fight for life or liberty without an attorney just because they are poor.⁹ "No Court could be respected, or respect itself, to sit and hear such a trial."¹⁰ The Court ordered that Baird be paid an amount "determined by due course of law."¹¹

Thus, over a century before *Gideon v. Wainwright*, Zebulon Baird was Indiana's first public defender.

A RESTORED MEMORY

Baird's is an inspiring story for lawyers generally. For public defenders, Baird's is an origin story. Though not of the radioactive spider variety, it nonetheless reaffirms the core values of service and equality under the law at the heart of public defense.

The Indiana Public Defender Council would like to restore Baird to our collective memory. Baird was a warrior in the battle for a more perfect union on the field and in the courtroom, and his dedication to excellence and service is the epitome of a life well lived. Beginning this year, IPDC will recognize a young public defender who displays intellect, honesty, and dedication to service with the Zebulon Baird Award. Giving an award in Baird's

honor will hopefully ensure that at least one giant is never forgotten. 🙏

Zach Stock is an appellate public defender and serves as legislative counsel for the Indiana Public Defender Council.

Suzy St. John is a staff attorney with the Indiana Public Defender Council.

FOOTNOTES:

1. Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 U. Chi. L. Rev. 573 (2000).
2. Lucius Annaeus Seneca, *Letters from a Stoic: Epistulae Morales Ad Lucilium* (Robin Campbell, ed., trans., Penguin Books 2014).
3. 2 *Encyclopedia of Biography of Indiana* 289 (George Irving Reed, ed., The Century Publishing and Engraving Company 1899).
4. *Highly Important Decision*, The Bedford Independent, April 10, 1856.
5. Charles W. Taylor, *The Bench and Bar of Indiana* (Indianapolis, Bench and Bar Publishing Company 1895).
6. *See Dauphin v. State*, 10 Ind. 572 (1858).
7. *See Phelps v. Comstock*, 19 F. Cas. 449 (C.C.D. Ind. 1848). *See also* Christopher Beauchamp, *The First Patent Litigation Explosion*, 125 Yale L.J. 848, 862–63 (2016).
8. 6 Ind. 13 (1854)
9. *Id.* at 18
10. *Id.*
11. *Id.* at 20

Pursuant to Indiana Court Rule 1.15, an audited financial statement of the Indiana Bar Foundation's IOLTA program for the prior year is published in this issue of Res Gestae.

Indiana Bar Foundation, Inc.

Schedule of IOLTA Activities

Year Ended June 30, 2022

REVENUE:

IOLTA revenue	424,920
Total revenue	<u>424,920</u>

EXPENSE:

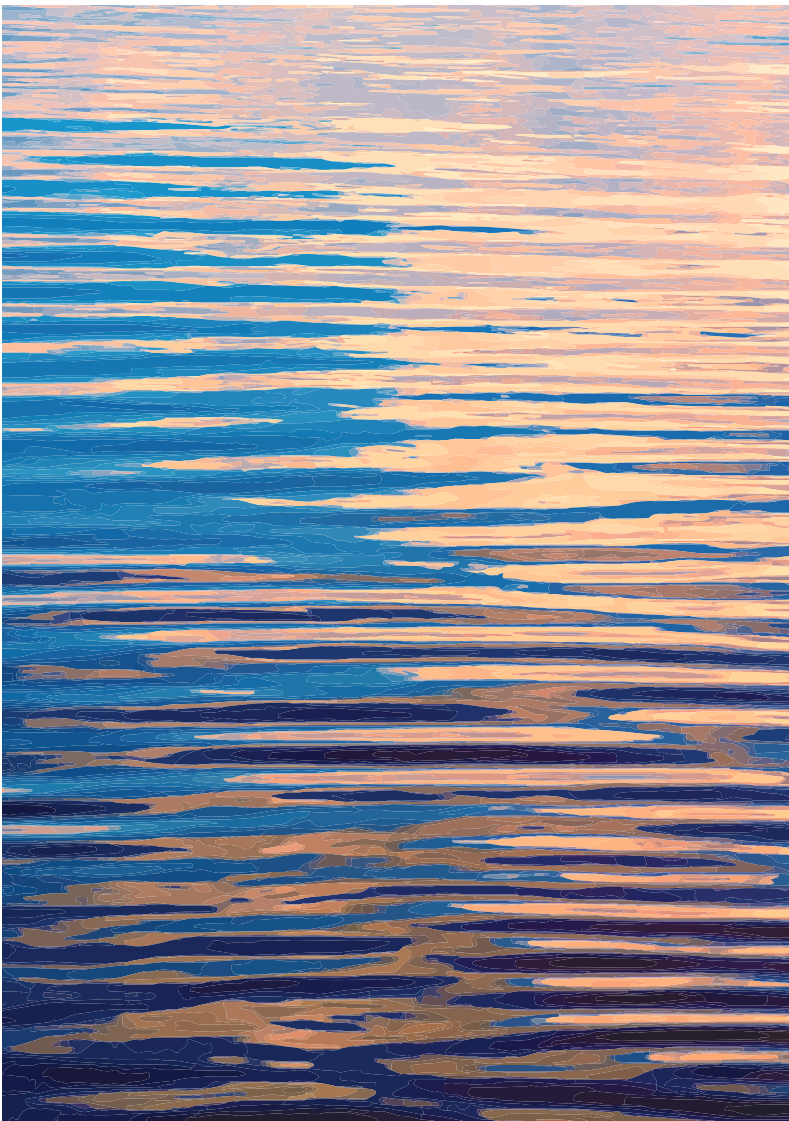
Administrative expense:

Co-employment/payroll, taxes, and employee benefits	143,607
Office supplies and leased equipment	17,507
Professional fees	21,144
Meetings	1,640
Membership dues	5,268
Telephone	2,441
Unreimbursed IOLTA expenses	<u>(59,607)</u>
Total IOLTA administrative expense	<u>132,000</u>

Net IOLTA income	<u><u>\$ 292,920</u></u>
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SUPREME COURT'S RULING IN SACKETT HAS MAJOR IMPLICATIONS FOR WATER PROTECTIONS, LAND DEVELOPMENT

By Dan Cory



The U.S. Supreme Court is reconsidering the proper scope of the Clean Water Act in a case that is likely to have sweeping impacts on federal environmental regulation and land development across the country.

In *Sackett v. EPA* (2022), the Court considers whether the Army Corps and EPA were correct in their determination that the petitioners' empty lot near Priest Lake in Idaho contained "waters of the United States" such that placing fill on the property required a Clean Water Act permit.

The case offers an opportunity for the Supreme Court to revisit its fractured 4-1-4 ruling in *Rapanos v. United States*, 547 U.S. 715, from 2006. Due to the lack of a clear majority holding in *Rapanos*, there are two alternative tests that can arguably be used to determine whether certain wetlands are "waters of the United States" under the Act. The *Rapanos* plurality opinion (authored by Justice Scalia) provided a restrictive jurisdictional test, holding that wetlands are not subject to federal regulation unless they have a "continuous surface connection" with a "relatively permanent" body of water that flows into a traditional navigable water. Justice Kennedy's concurrence in *Rapanos* articulated the more expansive "significant nexus" test. Under this test, a wetland is subject to Clean Water Act jurisdiction if



it—alone or in combination with similarly situated lands in the region—significantly affects the chemical, physical, and biological integrity of a traditional navigable water such that a “significant nexus” exists between them.

While the difference in the respective impact of the two tests is dramatic, the justices at oral argument did not seem very interested in the specifics of either. Instead, there were many comments and questions regarding a “third path” that would balance the governmental and private property interests, while still providing more certainty for future parties faced with jurisdictional questions.

The case represents the second time the Sacketts have been to the high court regarding their 0.67-acre Priest Lake property in their ongoing battle with federal regulators. See *Sackett v. EPA*, 566 U.S. 120 (2012). The couple originally prepared to construct a house on the lot in 2007

but were issued an administrative compliance order by EPA indicating that the property contains wetlands and the Sacketts violated the Clean Water Act by placing fill on the lot without a permit under Section 404 of the Act. The Sacketts sought to challenge the determination and the matter reached the Supreme Court on procedural grounds. In 2012, the Court agreed with the Sacketts that a compliance order was a reviewable final agency action and the matter returned to the district court for the Sacketts’ substantive challenge.

In the substantive challenge, the lower courts sided with the agencies, finding that the record supported their determination that the wetlands on the Sacketts’ property are waters of the United States because the property (1) is “adjacent to” Priest Lake and its tributary; and (2) in combination with other similarly situated wetlands, has a significant nexus with traditionally navigable waters.

Notably, the “adjacency” of the property was identified as an independent jurisdictional basis by the EPA and by the district court and the Ninth Circuit. The justices at oral argument also seemed much more interested in discussing the meaning of “adjacent” than they were in the specific tests set forth in *Rapanos*, leading to speculation that the Court will articulate a new rule centered on adjacency.

In their briefing and at oral argument, the Sacketts emphasized that the lot is 300 feet from an actual “traditionally navigable water” (Priest Lake) with residential development in between and is not, in fact, even “adjacent” to the tributary of Priest Lake because it is separated from the property by a road. The current agency definition of “adjacent wetlands”—which was summarized by EPA’s counsel as “reasonable proximity”—includes those wetlands “bordering, contiguous, or neighboring” a water previously identified as a “water of

the United States” including waters separated by “constructed dikes or barriers, natural river berms, beach dunes, and the like.” 33 C.F.R. § 328.3(c)(1); 40 C.F.R. §§ 230.3 & 232.2. EPA acknowledged that there was not necessarily any distance-based limitation on what may be considered “adjacent” which seemed to trouble some of the justices.

In terms of the likely ruling from the Court, there are a few possibilities.

First, the Court could take the opportunity to simply reject the “significant nexus” test, offering a relatively narrow clarification on the scope of the Clean Water Act, as it has done periodically over the years, including in *Riverside Bayview*

Homes, 474 U.S. 121 (1985) (adjacent wetlands are waters of the United States) and *SWANCC*, 531 U.S. 159 (2001) (invalidating the agencies’ Migratory Bird Rule as a basis for CWA jurisdiction). Based on the questions and comments from the justices during oral argument, the expansiveness and unpredictability of the “significant nexus” test is a major concern and will likely be scuttled by the Court. But because the agencies argued jurisdiction was supported based solely on “adjacency,” a mere rejection of the significant nexus test would not resolve the dispute.

Second, the Court could affirm the *Rapanos* plurality’s “continuous surface connection” test as the

proper test for determining whether wetlands are jurisdictional. This was the original ask from the Sacketts in their Petition for Certiorari, but then during the briefing they expanded their proposed resolution to adoption of a two-part test incorporating commerce clause concerns (described below). But many of the questions from the justices seemed to indicate that the “continuous” connection requirement went too far and would leave out many wetlands traditionally considered to be “bound up” with traditionally navigable waters.

Third, the Court could create an entirely new rule for determining wetlands jurisdiction, independent of those articulated in *Rapanos* or in recent agency rulemakings. The Sacketts initially framed the issue on appeal as whether the test from the *Rapanos* plurality opinion should be adopted as the controlling jurisdictional test. After granting certiorari, the Supreme Court on its own decided to reframe the questions as “What is the proper test for determining whether wetlands are ‘waters of the United States’ under the Clean Water Act?” The difference is important, as it potentially would allow the Court to go far beyond the question of which of the competing *Rapanos* tests is proper.

Given the focus in the justices questioning at oral argument, a new rule from the Court would likely be centered on a new definition of “adjacent wetlands” which may or may not incorporate elements of the existing agency definition or the *Rapanos* tests.

Although there was not much attention given to the question at

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oral argument, a new rule could also include some jurisdictional limitation based on the commerce clause. Earlier Clean Water Act jurisprudence had a heavier focus on Congress' constitutional authority for regulating intrastate waters. *See, e.g., SWANCC*. But recent opinions have been more focused on statutory

by subsequent administrations. On December 30, 2022, the Biden administration issued a new definitional rule which attempts to restore the pre-2015 definition of "Waters of the United States" but modified to include the "relatively permanent" and "significant nexus" tests from *Rapanos*. The agencies

"The anticipated Spring 2023 issuance of the Court's opinion in this case will come as the EPA and the Corps continue their attempts to craft an effective and workable definition of the 'Waters of the United States' by rule."

authority and congressional intent rather than any constitutional constraints. The Sacketts, perhaps sensing that the commerce clause limitations may be of interest to the current Court, added a second part to their proposed jurisdictional test during the briefing. The second part asks if the water at issue is among "those waterbodies subject to Congress's authority over the channels of interstate commerce."

The anticipated Spring 2023 issuance of the Court's opinion in this case will come as the EPA and the Corps continue their attempts to craft an effective and workable definition of "Waters of the United States" by rule. The agencies under the administrations of Presidents Obama (Clean Water Rule) and Trump (Navigable Water Protection Rule) each engaged in extensive rulemaking efforts to define the scope of Clean Water Act jurisdiction, but those rules were both ultimately undone by legal challenges or repeal

notified the Court of the new rule, evidently attempting to assure the Court that it need not craft a new jurisdictional definition and further complicate the process. The new rule takes effect on February 28, 2023—near the expected issuance of the Sackett opinion—and legal challenges are anticipated. ☞

Dan Cory practices in a variety of areas including environmental compliance, transactional, complex litigation, and administrative law with a particular focus on environmental litigation and assisting clients in managing risks on environmentally impacted properties. He also regularly presents on environmental topics and serves as an adjunct faculty member at Notre Dame Law School, teaching a course on environmental law and development, which covers both the specifics of Brownfield redevelopment as well as broader policy considerations where environmental and development interests intersect.

*By Ruth Johnson
and Jack Kenney*



CASES ADDRESS STATUTORY RIGHTS OF JUVENILES, LIMITS OF POLICE AUTHORITY, AND MORE

There were no criminal law decisions issued by the Indiana Supreme Court in October and November. The Court of Appeals addressed the statutory rights of juveniles when consenting to a blood draw and being properly advised before admitting to a delinquent act. The Court of Appeals also issued opinions on the limits of police authority to search closed containers in a home, the state's duty to uphold its end of a diversion agreement, and an improper jury instruction on attempted murder.

COURT OF APPEALS

ERRONEOUS ATTEMPTED MURDER INSTRUCTION INVADIED PROVINCE OF THE JURY

Andrew McQuinn fired a handgun in the parking lot of his apartment complex as a police officer arrived to investigate a report of domestic violence. The state charged McQuinn with attempted murder and unlawful possession of a firearm by a serious violent felon. At trial, evidence as to McQuinn's intent in firing the gun was disputed. The trial court erroneously instructed the jury that "discharging a weapon in the direction of a victim can be substantial evidence from which the

jury could infer intent to kill." The instruction unduly emphasized the direction in which McQuinn fired the gun and encouraged the jury to give it considerable weight—all at the expense of conflicting evidence. Because the Court of Appeals was "not completely confident the jury would have found McQuinn guilty had it been properly instructed," it concluded the challenged instruction prejudiced McQuinn's substantial rights. *McQuinn v. State*, 197 N.E.3d 348, 353 (Ind. Ct. App. 2022). The instruction undermined McQuinn's defense that he did not have the specific intent required for attempted murder. The court also reversed McQuinn's conviction for unlawful possession of firearm by a serious violent felon, finding the trial court erred in accepting his guilty plea on that charge because he never personally communicated a desire to waive his right to jury trial. *Id.* at 354. The court reversed and remanded for a new trial.

HOMEOWNER'S CONSENT TO SEARCH DID NOT INCLUDE CLOSED CONTAINER

In *Cinamon v. State*, 197 N.E.3d 371 (Ind. Ct. App. 2022), the Court of Appeals found the police search of a small bag with one zipper and no handles or straps violated the Fourth Amendment and Article 1, Section 11 of the Indiana Constitution, regardless of whether the bag was considered "a purse, a small bag, a clutch, or even a makeup bag." *Id.* at 380. Police arrived at a home with a search warrant for the homeowner's roommate. The homeowner was mowing his grass when the police arrived and told officers his roommate was inside. As police entered the home, they encountered the roommate, arrested her, and

found drugs on her person and in her bedroom. There were other people in the home, including Cinamon, who was in the living room when the police entered. Police obtained permission from the homeowner to search the house and in the living room next to the couch they found a small, zippered bag. A detective searched the small bag and found a methamphetamine pipe and a debit card issued to Cinamon. Cinamon moved to suppress the items seized, arguing the detective should have known the male homeowner did not have authority to consent to the search of a female's purse. The state argued the detective was reasonable to

conclude the small, zippered bag belonged to the homeowner. The Court of Appeals determined the label of the bag was not dispositive, rather persons have a legitimate expectation of privacy in closed containers that normally hold highly personal items such as the zippered bag. And coupled with the fact that others were in proximity to the bag when the police entered the home indicates the homeowner did not have apparent authority to consent to the search of the bag and therefore the search violated Cinamon's rights under both the Fourth Amendment and Article 1, Section 11 of the Indiana Constitution.

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**THE STATE CANNOT REVOKE
A PRETRIAL DIVERSION
AGREEMENT BASED UPON
BUYER'S REMORSE**

Jeremiah Smith was arrested for a misdemeanor trespass and a felony lifetime parole violation, but charges were only filed on the misdemeanor. The state and Smith entered a valid pretrial diversion program on the misdemeanor charge. Soon after entering into the diversion agreement, the state had regrets about not charging Smith with the felony and remedied the situation by revoking Smith's diversion agreement and adding the felony count. The Court of Appeals found diversion agreements are contractual in nature, and therefore the state was bound by the terms of the agreement. Because Smith had made no breach of the agreement, the state could not unilaterally

"Because Smith had made no breach of the agreement, the state could not unilaterally revoke the agreement based upon buyer's remorse."

revoke the agreement based upon buyer's remorse. *Smith v. State*, 22A-CR-364 (October 25, 2022).

**BEFORE CONSENTING TO
A BLOOD DRAW AFTER A
FATAL ACCIDENT, JUVENILE
MUST BE GIVEN MEANINGFUL
OPPORTUNITY TO CONSULT
WITH A PARENT**

L.W. v. State, 22A-JV-1138 (November 23, 2022), was an

interlocutory appeal from the denial of L.W.'s motion to suppress the results of a blood draw taken after she was a driver involved in a fatal accident. L.W. was 17 years old and the officer who took her for the blood draw and obtained her consent did not allow her to have meaningful consultation with her mother, who showed up at the accident scene. A blood draw is a search under both the Fourth Amendment and Indiana

Constitution Article 1, Section 11. Under Indiana Code § 9-30-7-2, drivers involved in crashes involving serious injury or death impliedly consent to a blood draw. However, a driver may refuse consent in that circumstance, and if she does so, the state must have probable cause to proceed over the driver's objection. Here, L.W. consented after being read an implied consent warning, but was not given a chance to discuss that decision with her mother before the blood draw. Indiana's juvenile waiver-of-rights statute (Indiana Code § 31-32-5-1) requires a child be given an opportunity to speak privately with a custodial parent before waiving any rights (unless the child waives his or her rights assisted by an attorney), and Indiana Code § 31-32-5-2 provides the protections of the juvenile waiver-of-rights statute can only be waived after being notified of that protection, in the presence of the juvenile's parent, and the juvenile knowingly and voluntarily waives that right. Here, because L.W.'s mother was present on the scene, it would have taken 10 seconds for the police to notify L.W. and her mother of the right to meaningful consultation, but it did not happen. Finding no exigent circumstances, the Court of Appeals reversed the denial of L.W.'s motion to suppress and remanded for further proceedings.

FAILURE TO ENSURE KNOWING AND VOLUNTARY WAIVER OF RIGHTS RENDERED JUVENILE'S ADMISSION VOID

In *T.D. v. State*, 22A-JV-1016 (October 31, 2022), T.D. appealed the denial of his Motion for Relief from Judgment under Indiana Trial Rule 60(B),

challenging his adjudication as a delinquent child and commitment to the Department of Correction for auto theft. The motion argued T.D.'s admission was void because the juvenile court did not ensure he voluntarily waived several constitutional rights before

accepting the admission. T.D. had watched a video explaining his rights and his attorney had explained T.D.'s rights to his mother. At T.D.'s admission hearing, the court did not ask T.D. whether he had watched the video about rights or have

Continued on page 45...



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CLARITY IS ADVOCACY:

HOW TO KNOW WHAT YOU WANT AND ADVOCATE FOR YOURSELF

By Shelley Gupta



Advocating for yourself can seem difficult. Our entire lives, we're told to be humble, to not brag, to not be cocky or full of ourselves. We're told not to "rock the boat," to "keep the peace," to "go with the flow," and, in general, to avoid conflict. We become people pleasers and have this idea in our heads that if we do all the right things, we'll get what is due to us for being good, following the rules, and not making noise.

Unfortunately, the world isn't just or fair, and we don't really know that until we experience it for ourselves.

We grow up and we're in the workplace, but we're not getting anywhere or going where we want as fast as we want. Or we see injustices in the workplace, like unequal treatment of individuals, unqualified people getting promoted, and inequitable pay. There's no one to help you navigate these issues or help you get what you feel you should for doing all the right things and being a team player. What do you do? To whom do you turn?

Your best advocate is you. You know what you've done better than anyone else, and you know what's right for you. But how do you advocate for yourself? Nobody wants to be rejected, and being told "no" is a rejection, according to society.

Let me offer another perspective: Being told “no” is an opportunity and opens new possibilities.

GET COMFORTABLE WITH BEING UNCOMFORTABLE

Society teaches us conflict is bad and should be avoided at all costs because it’s uncomfortable for everyone involved. But it’s not possible to avoid all conflict all the time.

As lawyers, our work revolves around conflict. In the context of litigation, conflict is a non-issue because there’s a method to resolving the conflict. Of course, we’ve all had experiences with unpleasant opposing counsel (or have been the unpleasant opposing counsel ourselves), but it’s part of lawyering. We don’t think about the conflict, and we move on with our lives. Part of why conflict in the context of a legal practice doesn’t bother us is because we’re clear on what we want the outcome to be, and we know what steps we need to take to achieve that outcome.

When conflict comes up outside our role as attorneys (for example: when we need to advocate at work for a promotion for ourselves), however, it is unpleasant and uncomfortable in part because we’re not clear on what we want, or we know what we want but are afraid of being told “no.” We also don’t want people to dislike us, and we don’t want to make anyone uncomfortable. Let me offer two observations:

1. We grow the most when we’re uncomfortable. Change happens when we’re uncomfortable, when the organization is uncomfortable. My suggestion? Get

comfortable with being uncomfortable. There might be tears, frustration, and anger involved. There’s also resolution and something to be learned.

2. If we are clear on what we want and how to get what we want, it’s not uncomfortable. It’s getting to that point that isn’t always comfortable because we must look at ourselves, tell the truth about what we see, and decide what’s most important to us.

Getting comfortable with being uncomfortable is, well, uncomfortable. There are two parts to being uncomfortable—one is the

through this with another person, like a therapist or coach. The conversation should be with someone who can hold an open and safe space for you—not just give you answers but really hear what you’re saying, see that you have your own answers, and help you navigate past your stopping point to get what you want. There’s a difference between teaching/giving information and telling you what to do. Sometimes during this process, you must dig to see the truth. Sometimes what we really want gets buried under the expectations put on us by society, family and friends, and culture. Moving beyond what we think we should want to what we actually want is crucial to being able to advocate for ourselves. It’s also



"Your best advocate is you. You know what you’ve done better than anyone else, and you know what’s right for you."

mental aspect, where you do the work to figure out what it is that you really want, and the other is the physical part, where you put yourself in situations that are uncomfortable to get used to the feeling of being uncomfortable.

ON THE MENTAL FRONT

Getting clarity on what you really want requires self-reflection, self-awareness, and above all, a willingness to look at yourself, see yourself, and tell the truth about what you see. It’s helpful to work

not easy to let go of what has been ingrained in us—that our lives must look a certain way, that we must follow in the footsteps of those before us, or that we have to follow a particular career trajectory. It takes some degree of rebellion to go against expectations and a desire to live your best life.

ON THE PHYSICAL FRONT

Start small. Put yourself in non-confrontational positions outside your comfort zone. It doesn’t have to be all the time. Over time, increase

the frequency of what you're doing, whether it's going to an event where you don't know anyone, trying a new activity, or going out to eat alone (not fast food) without being on the phone. Next, try telling someone when there's something you don't want to do (like a social activity) and suggest an alternative. Eventually, try telling someone something they did recently that bothered you. If they care about you, they'll listen, apologize, and be mindful going forward. As you start to see successes, you'll start getting comfortable with being uncomfortable.

When it comes to advocating for yourself at work, you won't get what you want unless you ask, and the worst answer is "no," which is what you expect and the position you're currently in. You shouldn't be fired or demoted for asking and exploring the possibility of whatever it is you want. Our brains imagine the worst-case scenario because they want to protect us and keep us safe, especially when we're up to something big. The reality is

the situation is rarely the worst-case scenario. Reality is usually somewhere between worst-case and best-case, and typically closer to best than worst. Part of self-advocating is recognizing what the brain is doing, thanking it for wanting to keep you safe, and then considering other possibilities. Is it more interesting to listen to the voice in our head tell us what we're contemplating is a terrible idea, or is it more interesting to pursue what we really want?

NO AS AN OPPORTUNITY

I said earlier that "no" is an opportunity and opens other possibilities. When we're told "no" or "not right now," it affords us a chance to re-evaluate what it is we want, what's most important to us, and whether what we're doing is really the best fit for us at the moment. Maybe it is because it gives us the opportunity to take more time off, to travel, to focus on other things that are important to us. Maybe it isn't because we don't have the opportunity to move to the top, to learn more, or to expand in the way we're seeking.

PRACTICING SELF-ADVOCACY

On a practical level, when you go to professional networking events and someone asks you what you do and whether you like it, normalize talking about why you're good at your job and the changes you've implemented to make things better. It does not have to be boastful. It can simply be, "I enjoy this aspect of my job, and because that's one of my favorite things to do, I was able to improve it by doing this other thing. It was really cool to see the impact this seemingly small change made." As you build confidence and comfort in talking about your achievements with peers and colleagues, you'll more easily be able to point to what you have done for your organization and how giving you what you want will further your ability to help the organization. The worst that will happen is you won't get what you want, and you'll be no worse off than you are presently. *Plus*, you'll get the opportunity to evaluate whether your current organization is right for you, or if it is time to find something that is a better fit. You won't know until you ask.

Advocating for yourself is not a skill that develops overnight. It's a skill that takes time to develop and practice. You can speed up the process by working with a person trained to help you gain clarity on what you want and what the next small, sweet step in your journey is. 

Shelley Gupta is a trained life coach who helps individuals find clarity and take steps towards their vision, and an attorney with Health and Hospital Corporation of Marion County. You can learn more about her coaching at her website goodculturecoach.com.

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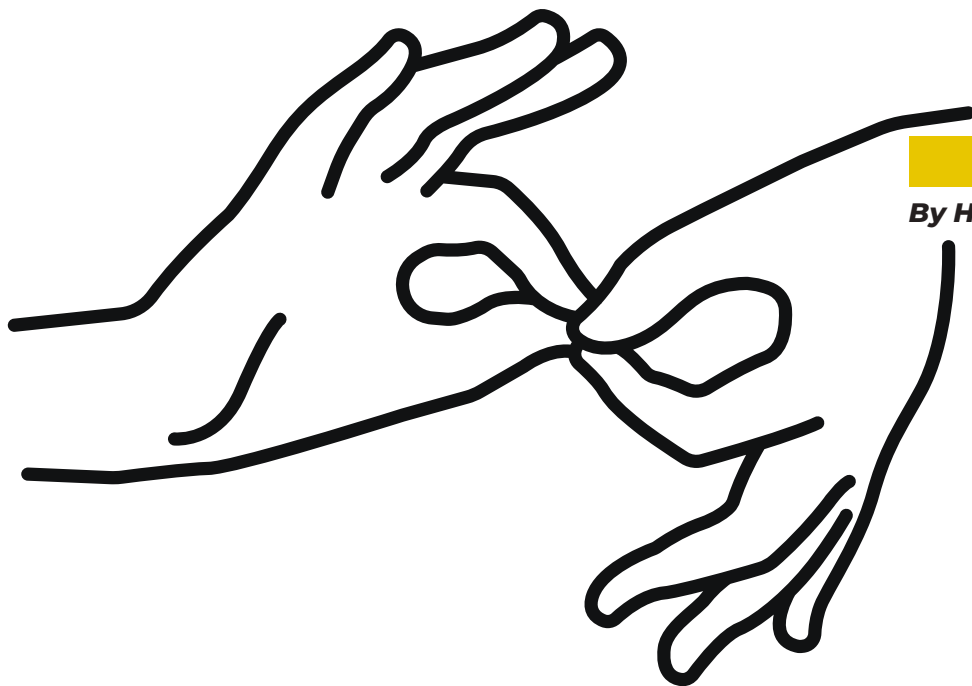
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*By Hon. G. Michael Witte*

FAILURE TO UTILIZE INTERPRETER: INCOMPETENCE OR NEGLIGENCE?

We have all survived the rigors and exams of law school and the brain drain of the bar exam. Passing those professional checkpoints has established the floor of our competency in the legal profession. It stands to reason that an attorney must fail immensely to violate Professional Conduct Rule 1.1¹, the competence rule. Competence should not be confused with neglect. In the field of lawyer ethics, neglect and incompetence intersect but are not per se synonymous.

It is not uncommon for colleagues of a neglectful lawyer to lament that the lawyer is competent and capable in knowledge and skill—so how could they put themselves in such a quandary of neglect? The general perception of incompetence in the law is that one has not kept up with changes in the law, or one has wandered into an unfamiliar field of law. If a lawyer misses a deadline or doesn't respond to clients' inquiries, the profession's perception is that the lawyer is neglectful, but not incompetent. But that perception is not necessarily accurate. Skill, thoroughness, and preparation are also

elements of competency.² The Preamble to the Rules of Professional Conduct states, “[i]n all professional functions a lawyer should be competent, prompt, and diligent. A lawyer should maintain communication with a client concerning the representation.”³

A 2021 advisory opinion from the American Bar Association Center for Professional Responsibility discusses Model Rule of Professional Conduct 1.1 as a basis for ethical compliance in common scenarios arising from language and communication disability interpretation.⁴ This opinion is a worthwhile read to measure where neglect of foreign language client communication can be amplified to a determination of incompetence.

ABA Formal Opinion 500 states:

The foundational rules of competence (Rule 1.1) and communication (Rule 1.4) in the ABA Model Rules of Professional Conduct establish a baseline for a

lawyer's duties when there is a barrier to communication because the lawyer and the client do not share a common language, or when a client is a person with a non-cognitive physical condition that affects how the lawyer communicates.⁵

and a likely negotiated plea of 30 years in prison. The client was charged with murder and had limited English language proficiency. Neither Welke nor Everroad were even partially fluent in the Spanish language. Welke did not hire an interpreter to assist in pre-trial consultation. Welke had very little major felony experience in his 20

"But that perception is not necessarily accurate. Skill, thoroughness, and preparation are also elements of competency."

The opinion further states:

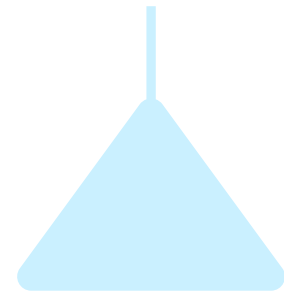
... [W]ith increasing frequency lawyers are called upon to communicate with clients who do not speak the lawyer's native language or speak the lawyer's language with limited proficiency, or for whom the conventional written or spoken word is not an accessible form of communication...⁶ Lawyers must communicate with clients in a manner that is reasonably understandable to those clients. This is a central tenet of the duties applicable to the client-lawyer relationship under the Model Rules of Professional Conduct.⁷

Indiana has addressed lawyer incompetence in the context of failure to accommodate a foreign language client. Attorney Brent Welke⁸ and his non-lawyer assistant, Joseph Everroad⁹ lured a client away from public defender representation

years as a lawyer. It was his first murder representation. At trial, Welke was ill-prepared and again did not secure a defense interpreter.¹⁰

Welke delegated to Everroad all jail visits with the client. Everroad's feeble attempt at securing an interpreter included a jail visitation accompanied by an untrained and unpaid female who was seeking public service credit for her own pending criminal case. Welke's effort at securing an interpreter occurred during a trial recess when he used a friend of the client to bridge the language gap.¹¹

Welke's incompetence went far beyond the foreign language mess and the court described his client representation as "woefully inadequate."¹² His failure to bridge the language gap led to other acts of misconduct which collectively strengthened the finding of incompetent representation. Welke





never met with the client at the jail; he delegated that task to Everroad. Welke never prepared for trial. He formulated a strategy of self-defense without looking at the evidence or directly communicating with his client. The outcome for the client was far worse than the plea offer negotiated by the public defender. These failures led to findings of violations of the following Professional Conduct Rules:

- 1.1: Failure to provide competent representation
- 1.3: Failure to act with reasonable diligence and promptness.
- 1.4(a)(2): Failure to reasonably consult with a client about the means by which the client's objectives are to be accomplished.
- 1.4(b): Failure to explain a matter to the extent reasonably necessary to permit a client to make informed decisions.¹³

Additionally, Welke neglected his supervision of his assistant when Everroad lured the client to Welke's representation and when he used an untrained interpreter at one of his jail visits. These were the bases for a violation of Professional Conduct Rule 5.3(b).¹⁴

Opinion 500 sets a four-step analysis for determining communication incompetence:

- (1) Is an interpreter necessary?
- (2) Is the interpreter qualified?
- (3) Must the lawyer supervise the interpreter as a non-lawyer employee subject to the Rules of Professional Conduct?
- (4) Do social and cultural differences impact lawyer-client communication in addition to language?

Although Welke's conduct pre-dates Advisory Opinion 500, Welke's outcome would not have been different under the opinion's standards. The court's findings obviously recognized the dire need for an interpreter. The communication barriers were there from the outset in a criminal defense of the highest degree—murder. Also, Welke was luring the client away from public defender representation where foreign language interpretation was available.

The Welke opinion does not expressly find the interpreters unqualified, but the court highlights their faults and is critical of their involvement. Not even the barest of minimum standards set by Indiana

Interpreter Code of Conduct and Procedure were met.

It is safe to assume that use of an uncertified or untrained interpreter is not per se evidence of incompetence. The degree of necessity or the nature of the setting where interpretation occurs should impact a determination of competence. A low-level client consultation can be OK for a relative or acquaintance to assist in interpretation. An in-trial strategy consultation is not, nor is an informed consent, waiver, contract negotiation, or other decisive discussion. [For an in-depth discussion of when an interpreter is necessary and the impact on access to justice and constitutional protection, see: Chief Justice Randall T. Shepard, *Access to Justice for*

People Who Do Not Speak English, 40 Indiana Law Review 643 (2007)].

Although Welke's violation of 5.3(b) rested upon his supervisory relationship with Everroad, ABA Opinion 500 would extend Welke's supervisory duties over the interpreters. The interpreters might not be employees in the strictest definition, but they were engaged to assist the defense to overcome communication obstacles. No matter how little they were used, they were nevertheless exposed to confidential client communications. Regarding Professional Conduct Rule 5.3, ABA Opinion 500 states:

This principle applies with equal force to individuals serving as interpreters or translators to facilitate communications within the client-lawyer relationship, i.e., the lawyer must make reasonable efforts to ensure that the interpretive or translation services are provided in a manner that is compatible with the lawyer's ethical obligations, particularly the Rule 1.6 duty of confidentiality.¹⁵

The fourth measurement of competence in ABA Opinion 500, awareness of social and cultural differences, was not developed in the prosecution of the Welke matter. Competent communication with a client is not just language. It also can include attention to cultural, ethnic, and religious differences. Opinion 500 warns not to rely on an interpreter to be cognizant of these differences. The interpreter might be fluent in the language but have absolutely no ties to the client's culture.

... [T]he duty of competence requires close attention to social

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and cultural differences that can affect a client's understanding of legal advice, legal concepts, and other aspects of the representation. When a lawyer and a client do not share a common language, there may be other significant cultural differences bearing on the representation including, but not limited to, ethnicity, religion, and national origin. The client may view the representation and choices it entails through the lens of cultural and social perspectives that are not shared by or familiar to the lawyer. A lawyer should not assume that a translator has this deeper cultural expertise merely because the translator is adept with the client's language.¹⁶

Although the Welke matter arose in a criminal setting, the foreign language hurdle is present in all areas of our legal system. Marital dissolution, CHINS, medical consent, eyewitness testimony, contract negotiations, labor and employment law, education law, and roadside traffic stops are just the tip of the legal competency iceberg related to foreign language. Are you prepared? Do you have a plan when the communication challenge appears in your client representation? If not, consider making it a New Year's point of emphasis for your law practice. 🧑🏻‍⚖️

FOOTNOTES:

1. Professional Conduct Rule 1.1: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

2. *Id.*
3. Rules of Professional Conduct Preamble, n. 4.
4. American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 500, Language Access in the Client-Lawyer Relationship, October 6, 2021.
5. *Id.* at 2.
6. *Id.*
7. *Id.* at 3.
8. *In re Brent Welke*, 131 N.E.3d 161 (IND. 2019).
9. *Id.* at 162, n. 1, "Everroad is a convicted murderer who was hired by Respondent following his release from prison. After Respondent's representation of Client had concluded, Everroad robbed a bank at gunpoint. Everroad was convicted and sentenced to twenty years' imprisonment. *Everroad v. State*, 998 N.E.2d 739 (Ind. Ct. App. 2013)."
10. *Id.* at 162-63.
11. *Id.*
12. *Id.* at 164.
13. *Id.* at 163.
14. Professional Conduct Rule 5.3(b): With respect to a nonlawyer employed or retained by or associated with a lawyer:
... (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer;...
15. American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 500, Language Access in the Client-Lawyer Relationship, October 6, 2021, p. 8.
16. *Id.* at 9.



By Maggie L. Smith and
Cameron S. Trachtman



CASES ADDRESS ANTI-SLAPP CLAIMS, POLITICAL SUBDIVISIONS, AND MORE

The Indiana Court of Appeals issued 10 published civil opinions in October 2022 and 14 published civil opinions in November 2022. The Indiana Supreme Court did not issue any civil opinions during this time but granted transfer in three civil cases.

SUPREME COURT TRANSFER GRANTS

Town Of Linden, Indiana v. Birge, 187 N.E.3d 918 (Ind. Ct.App. 2022) (Tavitas, J.), transfer granted October 24, 2022 (involving inverse condemnation action against town, county, and county officials after improvements to an existing regulated agricultural drain to alleviate flooding issues in town and surrounding areas caused flooding on private property).

Miller v. Patel, 189 N.E.3d 216 (Ind.Ct.App. 2022) (Baker, Sr.J.) transfer granted November 3, 2022 (involving patient who pled “guilty but mentally ill” to voluntary manslaughter, who then brought action for damages

against mental healthcare providers, asserting claim of medical malpractice alleging that providers failed to comply with appropriate standard of care).

Hoosier Contractors, LLC v. Gardner, 190 N.E.3d 359 (Ind. Ct.App. 2022) (Crone, J.) transfer granted November 15, 2022 (involving whether class of homeowners could bring class action against contractor for violations of Indiana Deceptive Consumer Sales Act and whether class members must be notified they could be liable for contractor's attorney fees if they lost).

SELECT COURT OF APPEALS DECISIONS

COURT OF APPEALS REJECTS A LESSER SUMMARY JUDGMENT BURDEN IN ANTI-SLAPP CASES

The elected auditor of LaPorte County and the LaPorte County attorney were political adversaries. To convince the LaPorte County Commissioners to hire a new county attorney, the auditor made public comments about the county attorney, alleging he had engaged in illegal and

unethical behavior. After the county attorney sued the auditor for defamation, the auditor moved to dismiss the lawsuit under Indiana's anti-SLAPP ("strategic lawsuit against public participation") laws.

On appeal, a unanimous Court of Appeals in *Stabosz v. Friedman*, 2022 WL 17098096 (Ind.Ct.App. 2022) (Bradford, C.J.) clarified the proper procedure for evaluating anti-SLAPP claims on summary judgment. Explaining that Indiana's anti-SLAPP statute balances "a plaintiff's right to have his or her day in court and a defendant's free speech and petition rights, while simultaneously providing a framework to distinguish between frivolous and meritorious cases," the court noted the anti-SLAPP defense when their actions were made "in furtherance of the person's right of petition or free speech under the United States Constitution or Indiana Constitution in connection with a public issue and taken in good faith and with a reasonable basis in law and fact."

When a defendant seeks dismissal under Indiana's anti-SLAPP statute, the motion is one for summary judgment. The defendant here argued that Indiana's normal summary judgment was too onerous, and a lesser burden should be set in anti-SLAPP cases. The court noted an older Indiana case—*Heeb v. Smith*, 613 N.E.2d 416 (Ind.Ct.App. 1993)—supported the defendant's argument. But *Heeb* was decided before the anti-SLAPP laws were enacted and in the 30 years since *Heeb*, not a single court had applied a lesser summary judgment burden.

Consequently, the court held the same general summary judgment standard is applicable in anti-SLAPP cases. The court then found

there were material issues of fact that allowed the county attorney's defamation case to proceed.

COURT OF APPEALS HOLDS SCHOOLS, AS POLITICAL SUBDIVISIONS, CANNOT ASSERT TAKINGS CLAIMS AGAINST THE STATE

The Indiana Code requires public schools to sell or lease any school building no longer in use to charter schools or public colleges or universities for \$1. Two public schools closed their buildings and sued the state, alleging the statutes violate the takings clauses of the state and federal constitutions.

"When a defendant seeks dismissal under Indiana's anti-SLAPP statute, the motion is one for summary judgment."

A unanimous Court of Appeals in *Lake Ridge School Corporation v. Holcomb*, 2022 WL 16827671 (Ind.Ct.App. 2022) (Vaidik, J.) held the schools, as political subdivisions, cannot assert takings claims against the state, citing precedent establishing the takings clause "do[es] not apply against the state in favor of its own municipalities" because a "municipality is merely a department of the state, and the state may withhold, grant or withdraw powers and privileges as it sees fit."

COURT OF APPEALS HOLDS A CITY IS A SEPARATE POLITICAL SUBDIVISION FROM THE PARKS

DEPARTMENT AND, THEREFORE, THE CITY IS NOT LIABLE FOR THE ACTS OR OMISSIONS OF THE PARKS DEPARTMENT

The plaintiff attended a summer camp hosted by the Carmel/Clay Parks Department and alleged another child committed pseudo-sexual assault against her. The plaintiff alleged the Parks Department and the City of Carmel were the same legal entity and, therefore, the city should be liable for the acts or omissions of the Parks Department.

Disagreeing, a unanimous court in *S.E. by Next Friend Glaser v. City of Carmel*, 2022 WL 17098095 (Ind.Ct.App. 2022) (Bradford, C.J.), held Indiana law recognizes that parks boards are distinct municipal corporations and political subdivisions. Here, an "interlocal agreement 'determined that the best interests of the citizens and taxpayers [...] would be served by administering the park and recreational needs of their respective territories through a joint board'" and allows the Parks Department to "sue and be sued" in its own name. The fact the interlocal agreement tasks the city's fiscal officer with the ability to disperse Parks Department funds, that officer may do so only for claims "approved by" the Park Board.

OTHER SELECTED DECISIONS

- *Mellowitz v. Ball State University*, 196 N.E.3d 1256 (Ind.Ct.App. 2022) (Crone, J.) (statute barring class action lawsuits against postsecondary educational institutions for COVID related claims was a nullity because it conflicted with class action

trial rule).

- *Beasley v. Harrison Cnty. Board of Commissioners*, 2022 WL 16954803, at *2–3 (Ind. Ct.App. 2022) (Bradford, C.J.) (eminent domain statute requiring “[t]he transcript must be filed in the office of the clerk of the supreme court not later than thirty (30) days after the notice of the defendant’s appeal is filed” must be strictly construed and untimely filing warranted dismissal of action).
- *Lake Cnty. Board of Commissioners v. Martinez*, 2022 WL 16954807 (Ind. Ct.App. 2022) (Altice, J.) (Sheriff’s statutory duty to take care of the jail and its prisoners included the authority to enter into contracts for that purpose and Board of Commissioners had no discretion to consider validity of invoices or refuse to pay valid invoices submitted by officials for budgeted items that had been fully appropriated and for which funds remained unencumbered).
- *In re 2020 Madison Cnty. Tax Sale*, 2022 WL 17332741 (Ind. Ct.App. 2022) (Brown, J.) (setting aside tax sale where USPS altered its signature requirement for certified mail during COVID, but mail carrier did not follow the modified customer signature procedure required and homeowners asserted no notice).
- *Z.D. v. Community Health Network, Inc.*, 197 N.E.3d 330 (Ind.Ct.App. 2022) (although plaintiff properly asserted a claim for invasion of

privacy based on the public disclosure of sensitive and private medical facts, patient was not entitled to recover damages for emotional and mental distress).

- *Red Spot Paint & Varnish Company v. Columbia Street*, 2022 WL 16549049 (Ind.Ct.App. 2022) (Pyle, J.) (holding an assignee is obligated to indemnify an assignor for the costs and fees incurred as a third-party defendant in an environmental legal action brought by the assignee).
- *Capalla v. Best*, 2022 WL 1654439 (Ind.Ct.App. 2022) (Bradford, C.J.) (noting that deliberately failing to disclose relevant information in their bankruptcy proceedings supports judicial estoppel and can prevent a litigant from bringing a claim).
- *R.K.W. Homes, Inc. v. Hutchinson*, 2022 WL 15595900 (Ind.Ct.App. 2022) (May, J.) (holding a home builder’s post-trial motions for attorneys’ fees and prejudgment interest were not barred by the doctrines of merger or satisfaction).
- *People For Community, Inc. v. City of Fort Wayne Neighborhood Code Compliance*, 2022 WL 13705557 (Ind.Ct.App. 2022) (Tavitas, J.) (dismissing a nonprofit corporation’s petition for judicial review because Indiana law requires corporations to be represented by counsel in all matters except small claims cases).
- *City of Carmel v. Duke Energy Indiana, LLC*, 2022 WL 15570661 (Ind.Ct.App. 2022)

(Friedlander, J.) (reversing decision by Indiana Utility Regulatory Commission that two city ordinances mandating utility pay for underground relocation of public utility facilities were unreasonable and void).

- *DeVane v. Arch Wood Protection, Inc.*, 197 N.E.3d 343 (Ind.Ct.App. 2022) (Vaidik, J.) (affirming a motion to dismiss on the basis that “equitable remediation” is not a valid cause of action under Indiana law).
- *Tinsley-Williamson v. A.R. Mays Construction, Inc.*, 195 N.E.3d 891 (Ind.Ct.App. 2022) (Mathias, J.) (upholding an entry of partial summary judgment for a construction company, noting the company had no duty of care to protect independent contractors, thus the independent contractor’s claim for negligence failed). ☞

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Continued from page 18...

mental health, the impact of drug use on families, infant and child deaths, and ways to improve educational outcomes for vulnerable youth.

Many of the hardworking Commission and Committee members are here with us today, including Senators Breaux, Donato, and Ford and Representatives DeVon, Summers, Clere, and Jackson. Senator Holdman, the Children's Commission was a product of your work a decade ago. We also have Julie here, who is moving on after having made a lasting difference.

JUDGE MARGRET ROBB

There is another person of impact who is moving on and deserves our thanks—the first woman Chief Judge of the Court of Appeals, the trailblazing Margret Robb, is retiring after 25 years. A nationally recognized judicial leader and legal scholar, she has authored



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NEW JUDGES

Thirty-five years ago, on this exact date in history, a new Chief Justice stood in this very room. Himself a young man, he admitted that day that the trial bench was “relatively young.”

Well Chief Justice Shepard, thirty-five years later, not all of us are so young anymore!

Like history repeating itself, we once again have an astounding number of new judges: including one-third of our trial court bench, my Supreme Court colleague Derek Molter, and newly appointed Court of Appeals Judges Peter Foley and Dana Kenworthy.

Chief Justice Shepard declared confidence in the young judges of 1988. He said that people “come to court at a time when their dearest interests are at stake—family, home, job, liberty.” And what they find is a judge carefully listening to the evidence and giving a wise decision based on the laws you have written. The young judges of 1988 lived up to that early praise. And I have the same confidence in the young judges of 2023.

I have zero doubt in your ability to take us, as Governor Holcomb often says, “to the next level.” I firmly believe that thirty-five years from now, the Chief Justice will be up here singing your praises.

BACK HOME AGAIN IN INDIANA

I am privileged to represent both Indiana and the United States as the President of the Conference of Chief Justices. I recently met in Helsinki with Justices from Ukraine, Kazakhstan, Kosovo, and other countries around the world. We discussed shared challenges and aspirations. I heard stories about decades-long backlogs and the critical need for “anti-corruption” courts. And I listened as a Ukrainian Justice emphasized their judiciary’s unrelenting resolve to keep the courts open for their citizens and their economy despite war-torn, bombed-out courthouses.

These stories gave me the utmost appreciation for the strength and efficacy of our legal system in America, and more specifically, here in Indiana.

We all pledge and take the same oath to serve and uphold our constitution. And as much as I am uplifted and proud to represent our state and country, I am always glad to be back home again in Indiana—with all of you—as we work to ensure our courts continue to be engines of economic prosperity, fairness, and public safety.

Thank you and may God continue to bless our great State. ☸



Continued from page 31...

any discussion with T.D. or his mother about the rights he was waiving by admitting to auto theft. However, in the juvenile court's order from the admission hearing, it wrote that T.D. and his mother understood that T.D. waived the rights discussed in the video. The Court of Appeals held that failure to follow the juvenile waiver statute is not a procedural error, but rather "ensures that juveniles knowingly and voluntarily waive important constitutional and statutory rights. 'Strict compliance' with the statute is required to safeguard these rights." "[A] trial court's failure to ensure that a juvenile knowingly and voluntarily waives his rights when the juvenile admits to being a delinquent child means that the agreed delinquency adjudication is void under Trial Rule 60(B) (6)." *Id.*, slip op. 11-13. Finding T.D.'s adjudication void, the Court of Appeals reversed the denial of his motion for relief. Judge Bailey, dissenting, agreed the juvenile court failed to ensure T.D. knowingly and voluntarily waived his rights when entering his admission, but the error made T.D.'s admission "voidable" and not "void." He would allow for a delinquent child to challenge his or her admission under T.R. 60(b)(8), but only if the child presents a meritorious defense. *Id.* at 14-19. ☐

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