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A CALL FOR CHANGE

A Call for Change in Civil Litigation in Indiana
By Steven Badger

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ISBA STAFF
Assistant CLE Director:
Christine Cordial • ccordial@inbar.org
Communication Coordinator:
Abigail Hopf • ahopf@inbar.org
Director of CLE:
Kristin Owens • kowens@inbar.org
Director of Communications:
Kelsey Singh • ksingh@inbar.org
Director of Finance & Operations:
Sarah Beck • sbeck@inbar.org
Director of Meetings & Events:
Ashley Higgins • ahiggins@inbar.org
Director of Membership:
Carissa Long • clong@inbar.org
Executive Director:
Joe Skeel • jskeel@inbar.org

Legislative Counsel:
Paje Felts • pfelts@inbar.org
Membership Coordinator:
Julie Gott • jjgott@inbar.org
Office Manager:
Kimberly Latimore Martin • klatimore@inbar.org
Outreach Coordinator:
Shanae Gay • sgay@inbar.org
Receptionist:
Chauncey Lipscomb • cclipscomb@inbar.org
Section & Committee Liaison:
Rebecca Smith • rs smith@inbar.org
Section & Committee Liaison:
Megan Mance • mmance@inbar.org
Section & Committee Manager:
Leah Baker • lbaker@inbar.org
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President's Perspective

THOUGHTS ON ARTIFICIAL INTELLIGENCE AND THE DELIVERY OF LEGAL SERVICES

By Clayton C. Miller

A n attorney friend of mine on the East Coast annually shares the results of the Social Progress Index, a report on global quality of life indices, as well as Our World in Data. Through 2020, the worldwide population had for the past several years been experiencing a consistently encouraging overall trend according to such metrics as life expectancy, poverty rates, and prevalence of disease.

Even considering that the full impact of the COVID-19 pandemic had not yet been quantified, the long-term trend lines are cause for optimism. That’s not to suggest there is no longer any need to continue the work to bring about positive societal change in the U.S. and elsewhere. Also, one factor underlying this good news had been the decreasing extent of armed conflict; the statistics predated Putin’s predations in the Ukraine, highlighting what an outlier his act of aggression has become. Other inputs have been at least indirectly influenced by technological advances resulting in increased levels of automation that have improved working conditions and reduced demand for some of the most dangerous forms of manual labor. That’s my focus for this month’s column.

Automation isn’t limited to mechanical processes replacing manual effort. We’re also seeing incursion of automated systems into more esoteric endeavors, including the practice of law. And whether you view artificial intelligence as a cousin or subset of automation, increasingly sophisticated AI is already impacting such basic tasks as discovery, when, for example, computers with specialized software can review tens of thousands of emails in a fraction of the time it would take a newly minted litigation associate who might deign to take an occasional bathroom break.

It’s also the case that the drive for efficiency coupled with old-school forces incenting entrepreneurial innovations has fueled efforts to develop technology-based alternatives to humans with legal training even in areas where judgment would seem to be at a premium. Algorithmic-driven dispute resolution is gaining a growing following especially among those concerned
about obtaining a speedy result at a, at least for now, relatively lower cost. EBay has rolled out a popular AI-based platform for buyers and sellers to input their bases of dissatisfaction with a given transaction. The outcomes of this Extreme ADR have been well-received, at least if we are to believe EBay's customer satisfaction surveys, and will likely be increasingly so as the tool “learns” from its growing database of what makes for a satisfactory resolution in different circumstances. One wonders at the extent such a tool might prove its utility in other contexts beyond relatively low-dollar online purchases.

As these and other automated processes within the legal space gain a foothold, some within and without our profession have raised a caution about reducing or eliminating the human factor. One critique posits that AI, which accumulates expertise through experience, can be a poor vehicle for ameliorating the impacts of legacy biases notwithstanding its facial objectivity, and may instead have a tendency to reinforce stereotypes. So as, for example, increasing ranks of employers rely on AI to screen job applicants, is the gatekeeper truly assessing the individual candidate's fitness to fill a position or instead assessing her prospects for success by comparing her to others who share some or many of her traits? If the AI program making predications about whether I'm more likely to be a good fit at a company than other applicants for an open position is “learning” based on what characteristics defined previous employees promoted from the same position, I may have an unfair advantage just because I went to the same school, or I look or act like them, even in ways not directly applicable to the tasks involved.

On the other hand, as imperfect humans it can be hard to escape let alone acknowledge our own implicit biases. Sticking with the example of hiring decisions, there's presumably something to be said for a more automated means of differentiation between applicants that, even if not necessarily free from bias, at least has a more transparent architecture susceptible to scrutiny. Not only does AI learn from experience, but so do its programmers. If those deploying AI find that AI-based outcomes are flawed there may be options to tweak how the program interprets the data it receives in a way more likely to deliver better results.

One area for close scrutiny and even skepticism about the use of AI is in criminal law. A recent work of fiction paints a nightmarish picture of how wrong an increased reliance on non-human-based justice can go. Nominated this year for an Academy Award in the live-action short category, the 19-minute-long film “Please Hold” was described by Variety magazine (March 14, 2022 ed.) as “a darkly comic dystopian tale set in the not-so-distant future.” The director and co-screenwriter KD Davila attributes her inspiration to non-fiction accounts of a man arrested and incarcerated by mistake. “He was unable to convince anyone that they had the wrong guy. Even his public defender didn't believe him.”

The movie's protagonist, Matteo, is walking to work one day when he receives an alert on his phone that he is under arrest. Suddenly he's facing an armed police drone delivering handcuffs for him to put on, or else. He's then taken to a fully automated corporate-run jail, where he's processed and directed to his cell without any human contact. The video screen in his cell informs Matteo that he has a high probability of conviction, but the computer-generated cheery voice isn't able to explain what it is he allegedly did. He's repeatedly asked if he wants to plead guilty and receive a lesser sentence, although the charge against him remains a mystery. Matteo's attempts to speak to a live person are continually thwarted, but at least he's shown an ad for a live, non-AI defense lawyer he later attempts to engage. I won't spoil the ending, but I suspect anyone who's been through the hell of trying to resolve with a phone call a misunderstanding while told to “please hold” and then presented with yet another not-quite germane selection of automated choices (press one if you want X, press two for Y; but your issue involves A, not B, part of C and occasionally D) can sympathize.

I'll conclude by observing that automated cherry-picking of tasks in the delivery legal services is applicable to the tasks involved. like them, even in ways not directly on, or else. He's then taken to a fully automated corporate-run jail, where he's processed and directed to his cell without any human contact. The video screen in his cell informs Matteo that he has a high probability of conviction, but the computer-generated cheery voice isn't able to explain what it is he allegedly did. He's repeatedly asked if he wants to plead guilty and receive a lesser sentence, although the charge against him remains a mystery. Matteo's attempts to speak to a live person are continually thwarted, but at least he's shown an ad for a live, non-AI defense lawyer he later attempts to engage. I won't spoil the ending, but I suspect anyone who's been through the hell of trying to resolve with a phone call a misunderstanding while told to “please hold” and then presented with yet another not-quite germane selection of automated choices (press one if you want X, press two for Y; but your issue involves A, not B, part of C and occasionally D) can sympathize.

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On June 6, 2022, the Indiana Supreme Court amended Admission and Discipline Rules 28 and 29, ultimately striking down the limit on distance education hours and expanding professional responsibility (ethics) credits to include wellness and DEI-related topics.

The amendment removed language in Rules 28, section 3(a) and 3(b), and 29, section 3(a), that placed a 12 or 18-hour limit on the distance education, or virtual, CLE credits a judicial officer or attorney could receive in a typical CLE cycle. The amendment also expanded Rule 29, sections 3(b)(2) and 3(b)(3), so that any course whose main focus is wellness or diversity, equity, and
inclusion can now be considered for ethics credit. (You can view the full amendment at https://www.in.gov/courts/files/order-rules-2022-0606-admis-dis.pdf.)

These changes will be huge in terms of ease and flexibility and in terms of building a more informed and engaged legal community. Virtual programming often provides a cheaper, more convenient, and more equitable alternative to in-person CLE. Attorneys who work in rural deserts can choose the topics and speakers they want, no longer having to settle for whichever CLE pops up in their backyard. And the ease of virtual CLE means that more voices can be brought together, more topics covered, and more high-quality resources shared, all whenever and wherever you need access to them.

And that collection of voices and topics will only expand with the expansion of ethics credits. We are excited to see diversity, equity, and inclusion and wellness be given the same weight as other topics and trainings. We hope it will encourage more attorneys to participate in such trainings, helping continue important conversations and ultimately strengthening the profession by increasing civility and empathy among colleagues and helping attorneys be better advocates for their clients.

How will your state bar be responding? The same way we already have been. ISBA has placed a high value on DEI and wellness training and made a point to provide these opportunities for our members. Our House of Delegates even voted to adopt a resolution urging the Court to require one hour each of diversity and inclusion CLE and mental health/substance use disorder CLE back in 2018. We’ve continued pushing those programs since, with our award-winning Open Conversations series and programs led by our sections and committees that train members to be better advocates and more informed individuals. And we’ll continue to provide virtual and in-person programming strategically, utilizing our resources to make sure we’re leveraging the right resources for the right goals. (And we’re excited to see how the limitless virtual CLE will encourage us to further strategize – making sure that all our in-person events focus on networking and connections-building, while our virtual CLE remain as high quality and educational as possible.)

Members also already have access to our on-demand library of virtual CLE (including a member benefit library of free CLE), where they can pick and choose which courses will best match their needs and interests and watch whenever they like.

The ISBA is excited about these changes and what benefits they could have for Indiana’s legal profession. If you have any questions, don’t hesitate to contact our CLE team or your section or committee liaison.
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A CALL FOR CHANGE IN CIVIL LITIGATION IN INDIANA
Change in the civil justice system is inevitable whether by design or as a result of broader external technological and social forces. The challenge lies in shaping and managing change in a way that helps our civil courts operate more efficiently and achieve the aspiration in Trial Rule 1 of ‘the just, speedy and inexpensive determination of every action.’

Report of the Civil Litigation Taskforce, at 5.¹

On June 20, 2022, the Indiana Supreme Court released the report of the Court’s Civil Litigation Taskforce. As described below, the report includes 24 specific recommendations in the areas of case management, discovery, service of process, self-represented litigants, alternative dispute resolution, and technology.

The report culminated a year of research, analysis, and consideration by the Taskforce “focusing on improvements related to civil litigation including procedure and case management,” as directed in the Supreme Court’s January 12, 2021 Order creating the Taskforce.²

THE CALL FOR CHANGE

The cost, delay, and complexity of civil litigation have sparked increasingly vocal calls for change in recent years. Reform efforts have generally been too modest and failed to recognize or address profound social, economic, and technological changes in our country. In recent years, however, momentum has been building toward implementation of meaningful improvements in state courts around the country.

In 2016, a groundbreaking roadmap for change was issued by the Conference of Chief Justices (“CCJ”), an organization comprised of the highest judicial officer in each state plus the District of Columbia and U.S. Territories.³ In its Call To Action: Achieving Civil Justice for All (“Call to Action”), the CCJ observed:

American deserve a civil legal process that can fairly and promptly resolve disputes for everyone – rich or poor, individuals or businesses, in matters large or small. Yet our civil justice system often fails to meet this standard. Runaway costs, delays, and complexity are undermining public confidence and denying people the justice they seek. This has to change.⁴

The Call to Action was an invaluable resource for the Taskforce and was specifically referenced in the Court’s Order
establishing the Taskforce. In forming the Taskforce, the Supreme Court identified for consideration advances recommended by the National Center for State Courts (“National Center”), the Institute for the Advancement of the American Legal System (“IAALS”), and the CCJ. The Call to Action included dozens of innovative recommendations for state courts aimed at making civil justice more expedient, affordable, and fair for all citizens regardless of their financial standing. This seminal work culminated years of research by thought leaders at the National Center and IAALS and has influenced improvement efforts in state courts nationwide.

THE INDIANA INNOVATION INITIATIVE AND CIVIL LITIGATION TASKFORCE

The Taskforce sought to build off these national developments, research by the National Center and IAALS, and experiences of other states that have implemented reforms. The Taskforce consulted with national and local experts and innovators to evaluate potential improvements that the Taskforce determined would make sense for Indiana. Members of the Indiana Bar were included in the process through a survey and by participating in an open forum led by Justice Steven David during the Indiana State Bar Association’s House of Delegates Fall session. The Indiana Innovation Initiative, led by Justice David, provided oversight and input at key stages of the Taskforce’s work.

LET’S NOT MAKE A FEDERAL CASE OUT OF IT

The Call to Action emphasized that efforts to improve civil justice be informed to the extent possible by objective data concerning state court litigation and caseloads. In Indiana, state court dockets are dominated by consumer collection matters. Tort cases make up only 5.8 percent of all civil cases. Analyses of state court dockets nationally have shown a dramatic shift in the last 30 years, skewing caseloads heavily toward consumer collection matters. In 1992, there was an equal weighting of contract and tort cases in state courts nationally. A 2012 national landscape study found that the ratio of contract cases had ballooned to 7-1 over tort cases. Tort cases and commercial disputes – the kinds of cases receiving the most attention – make up a relatively small proportion of the state court dockets.

Some other meaningful data points about state court litigation:

- 64% of cases are contract cases; more than half of those were debt collection (37%) and landlord/tenant (29%)
- 75% of all judgments were for less than $5,200
- 4% of cases were disposed by bench or jury trial, summary judgment, or binding arbitration; the overwhelming majority (97%) of these were bench trials
- 76% of cases involved at least one self-represented party, usually the defendant

The full federal procedural model simply does not make sense for the majority of state court cases involving straightforward and uncontested issues. The key to improvement is sorting cases at an early stage by the level of their complexity and contentiousness so that case management procedures fit the needs of the case.

PILOTING NEW PATHWAYS FOR IMPROVED CASE MANAGEMENT

The Taskforce’s lead recommendation is to conduct pilot tests of an innovative pathway approach to case management first suggested in the Call to Action. The pathways approach involves initial assignment of cases to alternative pathways based on complexity and other factors that correlate with a need for greater judicial involvement. The approach seeks to allocate judicial time and resources to the types of matters where they are needed the most.

This pathway approach right-sizes case management through assignment upon filing of civil cases to one of three pathways:

1. Streamlined Pathway – A simplified process is suited for cases involving uncomplicated facts and legal issues and requiring minimal judicial involvement. Cases assigned to the streamlined pathway will involve a limited number of parties, routine legal and evidentiary issues, few anticipated pretrial motions, limited need for discovery, few witnesses, minimal documentary evidence, and

"The key to improvement is sorting cases at an early stage by the level of their complexity and contentiousness so that case management procedures fit the needs of the case."
anticipated trial length of no more than one day. Most cases will be assigned to the Streamlined Pathway.

2. **Complex Pathway** – A more elaborate process and schedule is appropriate for cases that present multiple factual and legal issues and/or involve numerous parties and claims. The complex pathway is designed to emphasize the need to comply with case management deadlines to ensure that the litigation progresses without unnecessary delays.

3. **General Pathway** – Some cases will not fit in either the Streamlined or Complex Pathways. Therefore, there is a practical need for a middle ground, for example, for streamlined cases requiring additional attention or for cases that are relatively more complex but would benefit from a more expedited process than the Complex Pathway.

While case assignment upon filing is a critical feature of the pathways approach, there should be flexibility to move cases to a different pathway based on case developments or unique circumstances. The recommended pilot would test the pathways in six to eight different courts with a diversity of dockets and communities being served – an approach similar to the Supreme Court’s piloting of Commercial Courts and Criminal Problem-Solving Courts.

**LOCAL RULES REVISITED**

Inconsistency in procedural rules in courts throughout the State is a source of confusion which leads to inefficiencies and delays. The Taskforce took a close look at Local Rules promulgated in the 92 counties and found that they vary greatly from county to county, and many were in direct conflict with the Trial Rules. The lack of uniformity in the treatment of such basic matters as the calculation of deadlines and format of court papers adds to the complication, expense, and delay of civil litigation. The lack of uniformity also complicates the ability to leverage technology to automate calendaring and creation of legal forms.

For these reasons, the Taskforce proposed eliminating Local Rules that are obsolete or in conflict with the Trial Rules, standardizing how time and deadlines are computed, and requiring that all Local Rules (not just those related to selection of special judges, court reporter services, caseload allocation plans, and service of acting judges) be submitted for approval by the Indiana Supreme Court.

**ADDITIONAL GUARDRAILS TO KEEP DISCOVERY ON TRACK**

Discovery is often cited as a major contributor to the exorbitant cost and delay of civil litigation. Yet, discovery cost and delay have proven exceedingly difficult to reign in, and consensus among lawyers about causes and remedies has been elusive. Through patient and respectful discussions and debates, the Taskforce was able to reach a consensus on modest steps that research shows reduce discovery disputes, costs, and delay.

**DISCOVERY PROTOCOLS AND FORMS**

Generally eschewing extensive changes in the discovery rules themselves, the Taskforce drafted and recommends comprehensive discovery protocols that would vary based on pathway assignment as part of the proposed pathways pilot project. The goal is to ensure discovery proceeds smoothly in accordance with the needs of the case. The protocols include recommended limits on discovery tailored to each pathway and would be made available (much like case management forms are currently used) to enable counsel to tailor them to individual cases. If the protocols prove effective in the pilot program, then their use could easily be widely expanded.

The Taskforce also provided and recommends certain other discovery forms, including a preservation order, protective order, and order for discovery cost-sharing.

**ENHANCED USE OF DISCOVERY MASTERS**

The assignment of a Special Master to assist in prompt resolution of
discovery disputes has proven to be effective in cases involving significant amounts of e-discovery. The Indiana Commercial Courts first embraced use of discovery masters15 and the Taskforce recommends that their use be expanded to other trial courts in complex matters.

PROPOSED DISCOVERY RULE CHANGES

After reviewing available research and considering the Taskforce’s own collective experiences and input gathered from other members of the Indiana Bar, the Taskforce recommends the following changes in the discovery rules:

- **Proportionality** as a fundamental principle guiding discovery;
- **Prohibition** of general objections to written discovery;
- **Aligning** the general scope of discovery with the issues in the case, rather than its broad subject matter; and,
- **Limiting** the number of discovery requests and the number and duration of depositions, subject to the parties’ agreement or court approval of additional discovery.

The Taskforce recommends these modest steps to reinforce guardrails already in place to ensure discovery is focused on the needs of the case and proceeds efficiently with minimal delay. Such changes are in line with existing requirements for discovery requests and objections in the Commercial Courts and federal courts.16

**BRINGING SERVICE OF PROCESS INTO THE TWENTY-FIRST CENTURY**

Service of process is a fundamental requirement of due process; yet the means used to effectuate service are largely unchanged even with the advent of the Internet. Regarding service of process, efficiency and effectiveness converge in supporting a number of updates recommended by the Taskforce:

**E-SERVICE ON REGISTERED AGENTS**

Electronic service of process saves time and expense for both plaintiffs and defendants and, within proper limits, can be completed in a way that ensures prompt receipt and confirmation of service. Commercial registered agents represent over 70,000 businesses registered with the Indiana Secretary of State; many of them have requested electronic service. The Taskforce recommends a change to Trial Rule 4.6(B) to specifically accommodate electronic service for consenting registered agents.

**OTHER TWENTY-FIRST CENTURY MEANS OF SERVICE OF PROCESS**

The Taskforce recommends that the Supreme Court move ahead with previously published proposed amendments to Trial Rule 4.13, which would extend service by publication beyond newspapers to include publication on the Indiana Court Legal Notice Website. The proposed amendments would assist litigants by providing a lower-cost alternative to newspaper publication.

The Taskforce also recommends following the examples of other states in permitting service by social media as an alternative method of service when other means have failed. A vast majority of adults in the United States regularly use social media. Experiences in other states, including California, New York, Texas, and Virginia,17 have shown that service through social media can, with appropriate due process limitations (such as proof the email or social media profile is associated with and generally
used by the entity being served), help to ensure notice is provided in accordance with Indiana law. Permitting service through “social media, electronic mail, or other technology” offers flexibility to accommodate the evolution of service methods over time.18

**OTHER RULE CHANGES RELATING TO SERVICE**

The Taskforce also recommends steps be taken to clarify notice requirements in proceedings supplemental, as well as tweaking Trial Rule 4.1(B) to ensure delivery of service to the party’s “dwelling house or usual place of abode.” Finally, the Taskforce recommends a technological update in the e-filing process that would automatically generate certificates of service for documents filed and served via the Indiana Electronic Filing System.

**MORE EFFECTIVELY SERVING THE GROWING NUMBER OF SRLS IN INDIANA COURTS**

One consequence of the escalating cost of civil litigation is that an increasing number of litigants are choosing to proceed without counsel, as a self-represented litigant (“SRL”). The limited existing data shows at least a 33 percent increase during the last decade in the percentage of cases in Indiana that involve at least one SRL. Nationally, over 75% of state court cases involve at least one SRL. The trend is upward, and there is little reason to think it will not accelerate.

The Taskforce recommends a variety of steps to assist SRLs, including establishing self-help centers in every county, providing trial court judges with a best practices toolkit to help them more effectively handle cases with SRLs, requiring trial courts to accept forms available on www.indianalegalhelp.org, and making online guided interviews available to SRLs to automate generation of a form based on the interview responses. SRLs should also be able to electronically file petitions and pleadings from the guided interviews, making the process of filing and service more efficient and uniform.

The Taskforce also recommends making it easier for attorneys to help SRLs on a limited basis. Limited scope representation allows litigants to obtain assistance from an attorney for particular aspects of a case on which they need the most help. For example, a litigant may generally feel capable handling the case, but wish to have help with a summary judgment brief or oral argument, or in taking the deposition of an opposing expert witness. Lawyers in other jurisdictions have marketed such limited services, offering clients a smorgasbord of options tailored to their needs. Although the Rules of Professional Conduct and Trial Rules already allow limited scope representation, they are silent on frequent issues such as ghostwriting a brief or pleading, and how an opposing attorney should communicate with a litigant who has engaged counsel for a limited purpose in litigation.

**MAKING MEDIATION AND OTHER FORMS OF ADR MORE WIDELY AVAILABLE**

Indiana has historically been a leader in using ADR, particularly mediation, as an alternative to litigation. Both objective data and experience prove that mediation is a particularly effective tool in resolving disputes out of court.21

"Both objective data and experience prove that mediation is a particularly effective tool in resolving disputes out of court."

The Taskforce sought to build on that success through recommendations making mediation more widely available to litigants, regardless of their means, and to encourage innovation in ADR, including streamlined and online forms of ADR.

Although ADR often offers parties an expeditious and less costly means of resolving their disputes, many litigants, including SRLs, are unaware of ADR methods that may be available. The Taskforce prepared and recommends an ADR Information Sheet be sent to the parties by courts after an Answer is filed or with an initial scheduling order. The ADR Information Sheet briefly summarizes mediation and other common methods of ADR and provides a list of resources for litigants. To avoid misunderstanding by SRLs, the ADR Information Sheet makes clear that requesting or participating in ADR does not stop the lawsuit or stay any deadlines.

The Taskforce also makes two recommendations to increase the availability of no or low-cost mediation. First, senior judges and/or magistrates can conduct virtual or in-person settlement conferences. Second, the Taskforce seeks to increase the availability of pro bono mediators by (1) enabling users of the Indiana Mediator Registry22 to search for mediators who have agreed to provide services without charge, and (2) by encouraging mediators to volunteer for such service by awarding Continuing Mediation Education (CME) credit annually based on free mediation conducted during the calendar year. Since successful mediators’ skills in diplomacy and facilitation are often more important than substantive legal knowledge, granting inexperienced mediators CME for conducting a free mediation will help them to improve their craft more than an additional hour of formal training.

Continued on page 43...
Asian-Americans are a marginalized population that are experiencing racism and xenophobia at increasingly alarming rates. “Asian Americans are predominantly an immigrant group, with 59 percent being foreign-born, according to Pew Research Center. That rises to 73 percent when looking at adults.”¹ The racial breakdown of the United States in 2020 was 61.6% White, 12.2% Black or African American, 18.5% Hispanic, 6.2% AAPI, and 10.2% multiracial.² By contrast, Indiana was 84.8% White, 9.9% Black, 7.3% Hispanic or Latino, 2.7% AAPI, and 2.2% multiracial.³

The term “Asian” masks more than it reveals. “AAPI,” which stands for “Asian American and Pacific Islander,” includes a diverse and fast-growing population of 23 million Americans that encompasses approximately 50 ethnic groups from East and Southeast Asia and the Indian subcontinent, with roots in over 20 countries. Great internal diversity exists. Differing cultures, languages, religions, paths of immigration, and economic diversity ensure that stereotypes cannot be applied to any AAPI without great harm.

Yet Harvard stereotyped AAPI applicants as less courageous and less likable, imposing higher admissions standards too. *Students for Fair Admissions, Inc. v. Harvard*, set for oral argument in October 2022, is a monumental Supreme Court case spotlighting AAPIs. How did AAPIs become the unique wedge between underrepresented minority groups who stand to gain the most from affirmative action to the advantaged majority who stand to lose the most?
"How did AAPIs become the unique wedge between underrepresented minority groups who stand to gain the most from affirmative action to the advantaged majority who stand to lose the most?"

PRESENT DAY DISCRIMINATION AGAINST ASIAN-AMERICANS

Nationally, there is a lack of awareness of the discrimination AAPIs face, some antipathy, and great confusion created by pejorative stereotypes created over 100 years ago. While 2018’s Crazy Rich Asians highlighted desirability of Asian men for the first time, it also magnified a false stereotype that all Asians are wealthy, for example.

Bias exists in many forms. Implicit bias is unintentional, automatic and affects our behavior. Bias causes a behavior to deviate from accuracy. If two individuals of different ethnicity are born in Indiana, say Asian and White, it is accurate to call them both Hoosiers. Yet if measures of implicit beliefs indicate that one group is more “Hoosier” (i.e., Whites are more Hoosier than Asians), that belief can be concluded biased in the sense that it deviates from accuracy. A second type of bias refers to behaviors that deviate from one’s own consciously stated values.

The Federal Bureau of Investigation (FBI) has documented a 77% increase from 2019 to 2020 in hate crimes against AAPI people living in the United States. AAPIs were blamed for the COVID-19 pandemic. AAPI students have reported bullying and harassment by classmates. In March 2021, a man murdered 6 Asian-American women on a shooting spree in Atlanta. This a “Dual Pandemic.”

HISTORY OF AAPI DISCRIMINATION

1. AAPIs Painted as Inferior and Untrustworthy Americans

In 1854, California’s Supreme Court decided in People v. Hall that Chinese Americans were not allowed to testify in court against white citizens, making it impossible for Chinese Americans to seek justice against mounting violence. In denying the admissibility of a Chinese man’s testimony, the judge wrote that the Chinese were “a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, as their history has shown; differing in language, opinions, color and physical conformation; between whom and ourselves nature has placed an impassable difference...” Fast forward to Franklin D. Roosevelt’s response to the bombing of Pearl Harbor on December 7, 1941. The Federal Bureau of Investigation rounded up 1,291 Japanese Americans, arresting them without due process or evidence. Between 1942 and 1945, ten concentration camps were opened, incarcerating 120,000 innocent Japanese American adults and children across six American states, thanks to Executive Order 9066. AAPIs continue to suffer collectively from a “perpetual foreigner” status.

2. The Removal of Dignity from Asian-American Women Started in 1875

The Page Act of 1875 is best known as an anti-prostitution law that paved the way for the Chinese Exclusion Act of 1982. President Ulysses S. Grant exclaimed in his remarks to Congress in 1875: “I invite the attention to Congress of another evil – the importation of Chinese women, but few of whom are brought to our shores to pursue honorable or useful occupations.” “However, if Congress and California were truly worried about the moral vices associated with prostitution generally, they could easily have solved this problem by banning prostitution on its face.”

Today, Asian women continue to be subjected to fetishization, also known as “yellow fever.” The objectification of their bodies originated in the 18th and 19th centuries when Euro-Americans popularized Chinoiserie, and the Japanese idea of geisha painted them as subservient, obedient, and docile. In the workplace, this bias results in surprise and hostility when AAPI women are assertive and often times, they must adapt to deferential roles, or prepare to be talked over or confronted with hostility. AAPI women remain the least likely of all minority groups/subgroups of being promoted to positions of leadership, including judgeships in the legal profession.

3. Asian-American Exclusion and Invisibility

The Chinese Exclusion Act of 1882 was passed suspending Chinese immigration to the United States for
ten years and declared them ineligible for naturalization. The immigration ban was extended another 10 years by the Geary Act of 1892. The Supreme Court upheld the Geary Act in *Fong Yue Ting v. United States* in 1893, and in 1902 Chinese immigration was made permanently illegal. They were called a “yellow peril.”

Today, exclusion appears as AAPI “invisibility.” False beliefs exist that AAPIs aren’t deserving of minority status. AAPIs were branded as the “preferred” or “model” minority for political purposes, but the mobility is removed when equity is at issue. “Whitewashing” of AAPIs is regularly used to conceal AAPI visibility. But AAPIs are not white and do not experience the privileges afforded.

AAPIs are stereotyped as STEM oriented, educated, and hardworking. The harsh consequences of these “positive” stereotypes include:

1. A performance dilemma. AAPIs’ hard work is diminished due to performance expectation.
2. Asian-American children are passed over for special education services,
3. Families in need of social and welfare services are denied, and often,
4. AAPIs are entirely excluded from studies for populations in need.
5. Upward mobility is denied because “the Bamboo Ceiling” includes a false belief that AAPIs are well represented in leadership positions in all industries.

AAPIs have a visible presence of 5% in the legal profession, and nationally AAPIs are 6.2% of the population. Yet in the federal judiciary, AAPI judges consist of only 2.8%. AAPIs are well represented in law firm hiring yet underrepresented in law firm management.

**AFFIRMATIVE ACTION, THE MODEL MINORITY MYTH, AND EXHAUSTIVE USE OF AAPIS AS POLITICAL WEDGES**

On January 22, 2022, the Supreme Court granted certiorari to *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*. (1st) On the same day, certiorari was also granted for *Students for Fair Admissions, Inc. v. University of North Carolina, et. al.* The cases were consolidated. Oral arguments are scheduled for October 2022.
Harvard is a private institution, subject to Title VI of the Civil Rights Act. The University of North Carolina is a public institution, and the Fourteenth Amendment grants equal protection (in access to public schools). Students for Fair Admissions, Inc. (“SFFA”) is the creation of Edward Blum, a white, non-lawyer who lost a congressional election in the early 1990s. Without belaboring more of the history, Blum recruited AAPI plaintiffs to further his personal goal of ending affirmative action.

Affirmative action was created as a necessary evil – an efficient civil rights tool – to remedy the results of discrimination in areas of life that we consider of great public interest. Affirmative action is a means to an end, the end being racial equality and neutrality. In practice and application, it has produced successful results. It has also failed. SFFA highlights Harvard and UNC’s failure in its application to AAPI applicants.

The legal presumption is that racial classifications exacerbate, rather than reduce racial prejudice. The Supreme Court’s 1954 pivotal decision in Brown v. Board of Education extinguished Plessy v. Ferguson’s “separate but equal” doctrine.

While the principle of race neutrality in education was vindicated in Brown, in 2003, it was abandoned in Grutter v. Bollinger. Using strict scrutiny, the Court in Grutter upheld the affirmative action admissions policy of the University of Michigan Law School (as being narrowly tailored), permitting the use of racial preference in admissions to promote student diversity (compelling interest). Race, however, could only be used as one factor.

Now fast forward to SFFA v. Harvard. Originally filed in 2014, all lower courts, including the First Circuit, decided in Harvard’s favor. SFFA represents a group of anonymous Asian-American students who were denied admission. Through discovery and a three-week bench trial which included testimony of 18 Harvard employees, 4 experts, and 8 students, SFFA discovered that Harvard, in using race as one factor for admission, held AAPI students to a higher standard than other minority groups, including Black and Hispanic applicants.

Harvard admissions decisions includes objective and subjective methods. Objective methods include test scores and grade point average. Subjective methods include a personal rating done by the admissions office (who never meets with the applicants in person) and personal interview scores from alumni (who do meet with applicants in person). AAPI students scored consistent with most all applicants in objective standards and scored consistently also with alumni interviews. But in terms of personal ratings, a statistical model presented at trial by a Yale economist showed “African Americans receiving the highest personal ratings, followed by Hispanics, then whites, the Asian Americans coming last...” According to Harvard’s admissions office, AAPIs lack leadership and confidence and are less likable and kind. Harvard repeatedly stereotyped Asian applicants as quiet/shy, science/math oriented, and hard workers. It was statistically found that AAPI applicants were negatively affected by their race in comparison to their minority peers.

Once final admission decisions are made and students are qualified, Harvard reduces the admissions by creating a lop list of 4 data points for the incoming class. The lop list data points include: (1) legacy status, (2) recruited-athlete status, (3) financial aid eligibility, and (4) race. Applicants are often “lopped” due to race. Harvard keeps a close eye on previous years’ admissions numbers for race, and rarely deviated before SFFA was filed. The percentage of each minority group remained eerily consistent regardless of number of applicants. A conclusion that could be drawn is a quota system was used.

Continued on page 45...
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REVERSALS FOR CONTINUANCE DENIAL, INSUFFICIENT EVIDENCE

During April and May, the Indiana Supreme Court decided cases involving the denial of a continuance, the ongoing nature of burglary, and allocution at sentencing. The Court of Appeals addressed insufficient evidence and bail.

REVERSAL FOR DENIAL OF CONTINUANCE

The denial of a continuance is reviewed for an abuse of discretion, which involves “potentially a two-step inquiry.” *Ramirez v. State*, 186 N.E.3d 89, 96 (Ind. 2022). First, “whether the trial court properly evaluated and compared the parties’ diverse interests that would be impacted by altering the schedule,” and, if not, “whether the court’s denial resulted in prejudice.” *Id.* (cleaned up)

In *Ramirez*, a prosecutor in a child molesting case spoke to the child and her mother the day before trial. “That conversation unearthed new allegations against Ramirez, including that he had touched A.P. under the clothes with both hands, he had bribed [the mother] to get A.P. to lie at trial, and he and [the mother] had both disclosed the inappropriate conduct to their
pastor.” *Id.* at 97. Within hours, defense counsel filed a request for a continuance. Although he explained how the new allegations materially changed his defense, requiring further investigation and depositions of witnesses, the trial court addressed none of the reasons and simply found the motion was not timely. The Supreme Court found the trial court’s “rigidity” in refusing to consider even a one-day continuance “can only be characterized as arbitrary.” *Id.* at 97 (quoting Carlson v. Jess, 526 F.3d 1018, 1026 (7th Cir. 2008)).

As to prejudice, the Indiana Supreme Court found it “unrealistic to expect the defense, within a few hours, to investigate the new allegations, evaluate the evidence, adapt trial strategy, and complete final preparations.” *Id.* at 99. The case cited as support suggests trial courts must offer at least a few days for such significant adjustments: “to expect the defense, within four days, to meaningfully investigate new evidence ‘misunderstands both the reality of trial and defense attorneys’ resources.’” *Id.* (quoting United States v. Williams, 576 F.3d 385, 390 (7th Cir. 2009)).

Although the reversal was based on the denial of a continuance, the opinion found two other errors. First, a county’s local discovery rule cannot “attach conditions not required by our trial rules on a defendant’s ability to obtain a copy of otherwise discoverable evidence.” *Id.* Specifically, the Allen County rule required defense counsel to submit an application to the trial court stating the specific need for a copy of relevant, nonprivileged video evidence in the prosecutor’s possession, which is at odds with (a) liberal discovery under the Trial Rules, (b) minimal trial court involvement in discovery, and (c) Rule 34(B)’s requirement of simply describing an item with particularity (and not a specific need for it).

Second, the trial court erred in granting the state’s request for a protective order “prohibiting the Defendant or counsel from obtaining a copy” of A.P.’s forensic interview. The court was not persuaded by the state’s arguments that “the interview involved a child discussing sexual acts by an adult; the identity of child victims of sex crimes should be kept confidential; and the prosecutor’s office had ‘a copy of at least one interview’ posted to social media in a different case.” *Id.* at 95.

**BURGLARY IS ONGOING CRIME**

In Fix v. State, 186 N.E.3d 1134, 1136 (Ind. 2022), the Indiana Supreme Court held that “burglary is an ongoing crime that encompasses a defendant’s conduct inside the premises, terminating only when the unlawful invasion ends.” Therefore, although the defendant armed himself after the breaking and entering, the court affirmed his conviction for level-2 felony burglary because he was “armed with a deadly weapon” during the offense. *Id.*

**ALLOCATION**

*Strack v. State,* 186 N.E.3d 99, 104 (Ind. 2022), offers a reminder to trial courts “to be clear and accurate in their sentencing hearing colloquies.” Specifically, defendants who plead guilty have a right to allocation that “is separate and distinct from the right to present sentencing testimony.” *Id.* at 103. Allocation allows a defendant to “explain his or her views of the facts and circumstances without being ‘put to the rigors of cross-examination.’” *Id.* at 102 (quoting Biddinger v. State, 868 N.E.2d 407, 413 (Ind. 2007)).

**COURT OF APPEALS’ OPINIONS**

**THREE SUFFICIENCY REVERSALS**

Challenges to the sufficiency of evidence are frequently raised and seldom successful. Three recent exceptions are notable.

First, the Court of Appeals reversed convictions for murder and attempted murder based on the insufficiency of the following evidence in *Young v. State,* 187 N.E.3d 969 (Ind. Ct. App. 2022):

Young’s DNA was on a cigarette found in the alley two days after the shooting in the same general area where the person in the alley footage discarded a lit object, Young was at the gas station minutes before the shooting, Young searched the internet a week or two after the shooting about how to clean and disassemble a weapon that could have been used in the shooting but no one could say was definitely the kind of weapon used in the shooting, and Young turned off his Google location data the day of and the day after the shooting.

*Id.* at 975. Acknowledging that it “seldom reverse[s] for insufficient evidence,” the court emphasized its important constitutional duty of ensuring an absolute and meaningful right to appeal before concluding the “evidence in this case comes nowhere close to proof beyond a reasonable doubt.” *Id.* at 975-76. Judge Crone dissented,
reasoning the majority had disregarded the deferential standard of review and concluding the state has “presented far more probative evidence” than in *Meehan v. State*, 7 N.E.3d 255, 269 (Ind. 2014), where the Indiana Supreme Court had affirmed a conviction.

Next, in *Carmouche v. State*, No. 21A-CR-1666, 2022 WL 1548727 (Ind. Ct. App. May 17, 2022), the Court of Appeals found insufficient evidence despite the high bar set in cases involving video evidence. See *Love v. State*, 73 N.E.3d 693, 700 (Ind. 2017) (“A video indisputably contradicts the trial court’s findings when no reasonable person can view the video and come to a different conclusion.”) In *Carmouche*, the state alleged battery by kicking a door that struck a woman’s knee, causing her pain. But the video showed the door hit her foot, and the state offered no evidence explaining how contact with her foot would cause pain to her knee. Moreover, other facts supported the “conclusion that the video indisputably contradicts the trial court’s findings: the video may be grainy, but it is well-lit, the angle affords a good view of the altercation, and the entire incident is recorded.” *Id.* at *2.

Finally, reiterating the necessity of forcible action — “strength, power, or violence” — the Court of Appeals reversed a conviction for resisting law enforcement in *Runnells v. State*, 186 N.E.3d 1181, 1184 (Ind. Ct. App. 2022). Simply pulling away from an officer is not enough, as in another recent reversal where the defendant “kept tensing up and pulling away” when an officer tried to handcuff her. *Brooks v. State*, 113 N.E.3d 782, 785 (Ind. Ct. App. 2018).

**BAIL AFFIRMANCES**

*DeWees v. State*, 180 N.E.3d 261 (Ind. 2022), which was summarized in May’s column, was applied in two recent cases. First, in *Medina v. State*, No. 22A-CR-167, 2022 WL 1573855, at *8 (Ind. Ct. App. May 19, 2022), the panel concluded that *DeWees* makes “clear the broad discretion trial courts possess in bail decisions; so long as the trial court followed the proper procedure and its decision is supported by the record, we must affirm.” There, the trial court refused to reduce $150,000 bail for two Level 4 offenses involving driving under the influence causing death. Although the defendant had no criminal history, had lived in the county for her entire life, and was employed full-time at the time of the offenses, the panel noted the “potentially lengthy sentence” and her continued use of marijuana, which showed a “certain ‘disdain for the law’ that increases the likelihood that she might fail to appear for trial if a high bail were not set.” *Id.* at *6. Both the trial and appellate courts acknowledged the amount of bail was high, especially for “a high-school age teenager who still lives with her parents and cannot work while incarcerated” but noted she “would have to raise only approximately ten percent of that amount to post a bail bond.” *Id.* at *8.

A week later, a different panel in *Jones v. State*, No. 21A-CR-2809, 2022 WL 1655181, at *3 (Ind. Ct. App. May 25, 2022), affirmed the denial of a request to reduce $200,000 surety or 10% cash bail in a case involving approximately 40 felony counts of vehicle theft. Although the defendant did not have “a lengthy criminal history, he is accused of committing forty-one felonies against at least twenty different victims over a three-year period, and some of those felonies allegedly occurred while he was out on bail[.]” *Id.* at *3. Accruing new charges during pretrial release supports a finding of “disdain for authority,” and the gravity of offenses increased the risk he “will fail to appear at trial.” *Id.*

**APPEAL DISMISSED**

In *Dobrowolski v. State*, 186 N.E.3d 1168, 1171 (Ind. Ct. App. 2022), the Court of Appeals reiterated that “a probationer may not challenge on direct appeal a finding the probationer violated the conditions of his probation after admitting a violation.” It dismissed the appeal because a defendant challenging the validity of the waiver of counsel who admits the violation must instead file a petition for post-conviction relief.

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ON THE MATTER OF THE EVICTION TASK FORCE’S REPORT

By Kent Hull

This article is written as a supplement to Kent Hull’s article “The Dispossessed: Observations on Indiana’s Eviction Crisis,” published in the October 2021 issue of Res Gestae. The Supreme Court’s Eviction Task Force declined to write a response.

On September 13, 2021, the Indiana Supreme Court established an Eviction Task Force as the state experienced one of the nation’s highest eviction rates. The task force had a limited assignment: provide a final report to the Court, “not later than January 17, 2022,” with findings and recommendations on establishing a permanent pre-eviction diversion program. On April 20, 2022, the Court released the report, with a cover page dated January 18, which does not address criticism directed at the task force’s earlier interim report issued in October.¹

Throughout the pandemic the Court has not required (or allowed trial courts leave to require) mediation in eviction cases, an action for which both the Court and lower tribunals clearly have authority. A 2006 Supreme Court precedent holds that trial courts may require parties to mediate before going to trial:

Such a requirement is not an impediment to a party’s access to courts. Rather, it is an appropriate procedural step consistent with the efficient judicial administration of the party’s case. An order to mediate is not unlike the requirements imposed by our rules governing discovery and other pre-trial procedure. Such obligations, while prerequisites for eligibility for final hearings, merely facilitate the fair resolution of disputes. They do not prevent a party from obtaining a judicial resolution of a case nor obstruct a party’s access to the courts.
"Criticism of the Court’s order – that because landlords had no incentive to mediate voluntarily, the policy would do little to address the eviction crisis – remains. The report ignores that commentary, but the statistics support the critics."

[violating] Article 1, Section 12, of the Indiana Constitution.²

Alternative Dispute Resolution Rule 1.6 provides that “a presiding judge may order any civil or domestic relations proceeding or selected issues in such proceedings referred to mediation...” A typical local rule, St. Joseph County Local Rule 101, provides “[o]n the Court’s own motion or initiative, the parties may be required to attempt alternative dispute resolution (ADR). Such ADR efforts may include, at the Court’s discretion, mediation and/or settlement conferences and may require one or more sessions or sessions lasting a specific amount of time.”³

In 2021, there were 50,725 eviction cases filed, of which 14,635 were filed in October, November, and December 2021. Between November 1, 2021, and January 13, 2022 – the months closest to the mediation implementation date of November 1 – there were 127 mediations. The report does not list mediations by month – there is no report for January 2022 – but mediations occurred in less than 1% of cases filed in October, November, and December.⁴

Mandatory mediation presents no conflict in separation of powers because the General Assembly has acknowledged that the Court “has authority to adopt, amend, and rescind rules of court that govern and control practice and procedure in all the courts of Indiana [and] all laws in conflict with the Supreme Court’s rules have no further force or effect.” That Small Claims Court is the forum for many evictions does not limit the Supreme Court’s authority to require mediation, because as the Court of Appeals recognized four decades ago, the Trial Rules govern those proceedings unless displaced by a contrary Small Claims Rule.⁵

Criticism of the Court’s order – that because landlords had no incentive to mediate voluntarily, the policy would do little to address the eviction crisis – remains. The report ignores that commentary, but the statistics support the critics.

The report addresses eviction procedures only obliquely. A recent guest column by jurists from other states was aptly titled, “It Should Take More than 10 Minutes to Evict Someone.”⁶ Eviction in Indiana – for landlords – is “Cheap, easy, fast... caused by debt, fueled by procedures” said an Indiana Lawyer headline on October 13, 2021, quoting law professor Fran Quigley, who regularly represents impoverished Indiana tenants.⁷

The report urges consideration of a “housing court model,” but doesn’t state whether establishing that structure would require legislation, Supreme
Court rule, or only administrative action by individual trial courts. A related suggestion is a bifurcated process in which, after an initial hearing, a trial court could delay a case for fourteen days, but only if the parties agreed to mediate. The report states, “Court processes vary widely and create different paths for similarly situated cases.” This seems an understated acknowledgment that the “processes” are “cheap, easy and fast” for landlords, but for tenants with such defenses and counterclaims based on uninhabitable premises, there is little opportunity to present them at immediate possession hearings – even if they have a lawyer.8

The report also describes a new protocol in Lawrence Twp., Marion County Small Claims Court for eviction cases, which now requires “all self-represented litigants to see the court navigator and facilitator” to “assess if facilitation services would be helpful. The court is still working to increase participation by parties already represented by counsel.” These services apparently inform the parties of resources available to resolve rent and other disputes. It is unclear why the procedure is not followed in cases with attorney representation, but apparently this court concluded it had inherent authority to alter earlier eviction practices.9

“Each community has a unique set of resources, and each community needs to work in a collaborative way to continue connecting those in need with available resources (rental assistance, legal services, and settlement conferences) in an effective, efficient manner,” the report comments. Yet when Indianapolis attempted that – an undertaking the task force does not mention – the General Assembly responded, over the governor’s veto, with legislation prohibiting local government from regulating specified “aspects of a landlord-tenant relationship,” despite countervailing legislation recognizing home rule for those communities.10

The task force report missed the opportunity to address, not just the immediate eviction crisis, but the imbalances in Indiana landlord-tenant law. It is surprising, given the membership, that there is no dissenting or minority statement. This year 2022 marks the fiftieth anniversary of the Uniform Residential Landlord and Tenant Act published by the National Conference of Commissioners on Uniform State Laws and, as of 2013, adopted by twenty-one states. That legislation, and revisions being considered, might help assess how Indiana can reduce the number of evictions in a housing crisis which continues.11

FOOTNOTES:

10. I. C. § 32-31-1-20(c); on the contrast of such laws with Indiana’s home rule legislation, see generally, Brad Boswell, How State Legislative Preemption in Indiana Bars Local Governments from Building a Positive Economic Future, 51 Ind. L. Rev. 471 (2018).
The Indiana Fellows of the American College of Trial Lawyers are Proud to Announce the Induction of the Following Lawyers as New Fellows of the College:

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COMBATING ANTI-JEWSH BIAS THROUGH LAW

By Robert Katz

As president of the IUPUI Jewish Faculty and Staff Council, I work to raise awareness about Jewish concerns on campus, including antisemitism. As an educator, I’ve carried this work into my classroom by discussing the legal dimensions of antisemitism alongside regular discussions of racism, sexism, and homophobia. This comes as a surprise to most students, and not always a welcome one: at least one student has complained that I talk about antisemitism too much. Of course, the opposite is true. Few law students have likely heard a professor discuss Jews or antisemitism. At some law schools, Jews are invisible outside the classroom as well or not included in diversity and inclusion programs and committees.

To make Jews and their concerns more visible in the legal academy, I am preparing a course on the relationship between antisemitism and law. This task is somewhat daunting because no casebook on the subject exists, no law school offers a course on it, and relatively few scholars have studied it. The legal academy’s silence on antisemitism is odd. At least one casebook each exists on the legal issues related to race, gender, sexual orientation and gender identity, disability, age, indigency, incarceration, indigenous status, and immigration status, including two casebooks devoted entirely to Latinos and Asian Americans. Most law schools – including IU McKinney – offer courses on some or all of these subjects, and some run practitioner-led clinics that train students on how to combat these forms of discrimination. Legions of legal scholars have explored each of these subjects in depth. How then did the relationship between antisemitism and the law largely escape the legal academy’s attention? So began my ambition to build a field of study devoted to the subject.

The relationship between antisemitism and law is intricate and ripe for inquiry. Many official acts, while not motivated by anti-Jewish animus, disproportionately burden Jews. These include Sunday closing laws, restrictions on kosher food and religious garb in the military and in prison, and activities that make Jewish schoolchildren feel different or disparage Judaism or Jews as a class. A handful of antisemitic acts identify Jews by name. These include Major General U.S. Grant’s infamous Order No. 11 (1862), the most overt antisemitic act in U.S. history, which expelled “Jews as a class” from parts of Kentucky, Tennessee, and Mississipi, ostensibly to stop the smuggling of Southern cotton. In truth, most smugglers were not Jewish, and most expelled Jews - including women and children - had nothing to do with the smuggling.

Most acts that target Jews do not name them. Judicial enforcement of restrictive covenants enabled intolerant communities to exclude Jews and other undesirables. Some localities have enacted facially neutral zoning laws designed to impede Jews from creating synagogues and schools. The Immigration Act of 1924 – the most lethal anti-Jewish regulation in U.S. history – restricted immigration based on U.S. residents’ country of origin as of 1890, when American Jews were far less numerous. The 1924 Act, driven by Nazi-like notions of racial science, abetted Nazi genocide by dooming countless European Jews seeking refuge.
Yet the law can also be used to combat antisemitism, such as laws that prohibit discrimination, counter anti-Jewish messages, and roll back measures that disproportionately burden Jews. Recently, the U.S. Department of Education’s Office of Civil Rights (OCR) began combating antisemitism on campuses through expanded use of Title VI of the Civil Rights Act, which prohibits publicly funded universities from discriminating based on race and national origin. Most states – including Indiana – have enacted laws that enhance punishment for crimes motivated by the victim’s religion or ethnicity. Most states – including Indiana – have also taken steps to counter campaigns that single out Israel, the Jewish state, for special sanction and opprobrium. A growing number of entities – including law schools, law firms, and bar associations – are including antisemitism awareness in their initiatives to promote diversity and inclusion.

Despite a host of legal responses, antisemitism is resurgent on campuses, the Internet, and in violence against Jews and Jewish institutions. These developments demand that advocates reevaluate responses to antisemitism and consider new approaches.

To advance these discussions, I have begun work on a casebook entitled *Antisemitism and the Law*, the first such casebook in this field. It will focus on three enduring goals that American Jews have pursued through litigation and legal reform: (1) fighting anti-Jewish animus; (2) challenging laws that disproportionately burden Jews; (3) expanding opportunities for Jews to live full Jewish lives. The casebook will trace how American Jews and their allies have pursued these goals, with what success, and how these and other vital goals may be pursued in the future. My ultimate goal is to educate future lawyers about antisemitism and train them to advocate against it. Such training could not be more timely.

A casebook is critical to the growth of this field. It will be indispensable for instructors interested in teaching the subject but lack the time or resources to create a course from scratch. I hope law schools around the country – including IU McKinney – will adopt it for a free-standing elective and to supplement courses on the First Amendment, law and religion, social justice, and anti-discrimination law. It will be a unique resource for scholars studying the subject. Most relevantly, it will help guide advocates seeking to effect change.

To foster discussion of these topics, I have begun organizing academic conferences. The inaugural Law vs. Antisemitism Conference, hosted by IU McKinney, was held on March 14 and 15, 2022. The second annual Law vs. Antisemitism conference, set for March 26 and 27, 2023, will be hosted by Lewis and Clark Law School. The third annual conference will be hosted by Florida International University College of Law in 2024.

The inaugural conference was co-sponsored by the ISBA, the Indianapolis Bar Association, the IUPUI Jewish Faculty and Staff Council, and the IUPUI Division of Diversity, Equity & Inclusion. It received additional support from numerous entities committed to raising awareness about antisemitism, including Cohen & Malad, LLP; Hoover Hull Turner LLP; Ice Miller LLP; the Indianapolis Jewish Community Relations Council (JCRC); Katz Korin
Cunningham PC; Kosene & Kosene Development Co.; Mitchell Dick McNelis LLC; and the Academic Engagement Network (AEN). Breakfast and lunch were provided by Bagel Fair and Shapiro’s Delicatessen.

More than 200 people registered for the conference, including lawyers earning CLE credit. Over 50 individuals presented including scholars, judges, practitioners, and community leaders. Presenters came (virtually) from 20 states and six countries. The Hon. Randall Shepard, introduced by the Hon. Ezra Friedlander, spoke about using state law to combat antisemitism. Richard Shevitz, a partner at Cohen & Malad, LLP, spoke about Holocaust reparations litigation. The panel on “Fighting Antisemitism: The View from Indiana and the Midwest” featured Rabbi Dennis Sasso, Senior Rabbi of Congregation Beth-El Zedeck; Rabbi Brett Krichiver, Senior Rabbi of the Indianapolis Hebrew Congregation; Trent Spoolstra, Associate Regional Director of the Anti-Defamation League Midwest; Grant Mendenhall, Community Security Director for the Indianapolis Jewish Community; and Miriam Dant, Indianapolis JCRC Board President. Other panels examined Jews in the legal profession, hate speech and the First Amendment, Jews and Judaism and the Religion Clauses, anti-Israel boycotts, and antisemitism on campus.

Studying antisemitism as a legal phenomenon can help us understand it. The point, however, is to stop it. Now is the time for every person committed to equality under the law – especially present and future lawyers – to learn more about antisemitism and put their skills into action.


Robert Katz is Professor of Law and John S. Grimes Fellow at IU McKinney School of Law and Co-Founder and President of the Law vs. Antisemitism Project, a 501(c)(3) nonprofit organization. He teaches courses on the First Amendment, Law and Religion, the Law of Nonprofit Organizations, and Trusts and Estates. He has written about religious freedom, anti-discrimination law, and inmate rights. He has successfully litigated cases defending the rights of inmates to medical care and same-sex couples to marry, and advised the Indianapolis JCRC on hate crimes legislation.
CAUTIONARY TALES: THE IMPORTANCE OF OVERSIGHT IN DELEGATION

All lawyers rely on valuable nonlawyer assistants, paralegals, paraprofessionals, and associate attorneys to effectively do our jobs. Seasoned attorneys in law firms turn over work to younger lawyers to “cut their teeth” and gain experience. As you advance in your career and build trusting relationships with members of your firm, it is tempting to hand over an increasing amount of responsibility. While it’s wise to know when to delegate, it’s equally important to know when to maintain oversight.

The Indiana Rules of Professional Conduct instruct in Rule 5.1(b), “A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.” The rule governing the responsibilities of a lawyer supervising a non-lawyer, Rule 5.3(b), contains parallel language: “[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.”
Both Rules 5.1(c) and 5.3(c) instruct that a supervising lawyer can be responsible for a nonlawyer assistant or associate lawyer’s violation of the Rules of Professional Conduct if:

1. the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
2. the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the [person], and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Whether you are managing nonlawyer assistants or associate lawyers, here are some critical reminders and cautionary tales for lawyers in supervisory roles.

**A LAWYER’S FAILURE TO SUPERVISE ANOTHER LAWYER CAN GIVE RISE TO A VARIETY OF VIOLATIONS UNDER THE RULES OF PROFESSIONAL CONDUCT.**

It seems obvious, but it warrants emphasizing: If you have an appearance on a case, you are responsible. This applies even if another lawyer is the main contact for the client or doing most of the work on the matter. In one case, Attorney A and Attorney B filed an appearance and a complaint on behalf of a client. Attorney A had minimal involvement and never met or spoke with the client. Eight months later, a federal judge issued a show cause order that ultimately led to a dismissal. Six months after the dismissal, Attorney B left the law firm, but the case file remained with the firm. Attorney A failed to take any further action until the law firm was contacted by the client some 18 months later. The Indiana Supreme Court found, “the essence of the respondent’s misconduct in this case was his failure to ensure that the client’s case was adequately prosecuted despite his having appeared in the case by signing the pleadings and thereby holding himself out as one representing the client in her case.” *In re Anonymous*, 724 N.E.2d 1101, 1102 (Ind. 2000).

Attorney A received a private reprimand for violation of Rule 5.1(c) and failure to ensure that the case was sufficiently prosecuted. Although not charged as such, the Court noted his conduct also violated Rule 1.1 (lawyer shall provide competent representation), Rule 1.2 (lawyer shall abide by a client’s decisions concerning the objectives of representation), Rule 1.3 (lawyer shall act with reasonable diligence and promptness), and/or Rule 1.4 (lawyer shall keep a client reasonably informed about the status of a matter). *Id.* at 1103 f.n. 1.

Another lawyer received a private reprimand for violations of Rule 3.5(b) by communicating *ex parte* with a judge without authorization. *In re Anonymous*, 43 N.E.3d 568 (Ind. 2015). The lawyer prepared an emergency petition to have grandparents appointed as a child's temporary guardians and then sent her associate attorney to Court to present the petition. The lawyer failed to provide advance notice to the mother or putative father before causing the petition to be presented to the judge, and the Supreme Court noted, “The parties agree that under the circumstances of this case, the actions of the associate attorney are attributable to Respondent pursuant to Indiana Professional Conduct Rule 5.1(c).” *Id.*

In another case, a corporate client was led to believe the attorney father would have primary responsibility for two matters and be assisted by the attorney son, but the attorney father delegated all internal responsibility to his son. Father and son were both unresponsive to the client’s inquiries and neglected the case. “Due to the neglect of Respondent and [son], the breach of contract action resulted in two five-figure sanction awards and a default judgment of approximately $1.8 million against Client. Client first learned of all of this when its

"While it’s wise to know when to delegate, it’s equally important to know when to maintain oversight."
bank account was seized.” In re S.J., 185 N.E.3d 864, 864 (Ind. 2022).

Even though the Court did not consider a violation of Rule 5.1 (responsibilities of a partner or a supervisory lawyer), the Court found the attorney father violated Rule 1.3 (failing to act with reasonable diligence and promptness), Rule 1.4(a)(3) (failing to keep a client reasonably informed about the status of a matter), Rule 1.4(a)(4) (failing to comply promptly with a client’s reasonable requests for information), and Rule 1.4(b) (failing to explain a matter to the extent reasonably necessary to permit a client to make informed decisions). The Court sanctioned the attorney father to a 30-day suspension with automatic reinstatement. Id. at 865. Meanwhile, the Court accepted the attorney son’s resignation from the practice of law, leaving him ineligible to petition for reinstatement for five years. In re A.J., 169 N.E.3d 406 (Ind. 2021).

While it cannot be said for sure if this outcome could have been avoided if the father stepped in sooner, in the opinion regarding the father’s misconduct, the Court did stress the importance of remedial actions. “Respondent knew of [son’s] failure to timely file an answer, noncompliance with discovery, and a resulting order to show cause; yet Respondent did not increase his attention to the case or take any remedial steps.” In re S.J., 185 N.E.3d at 864. This is an important reminder to lawyers: If you know of inaction or failure to act diligently by an attorney you supervise, you should promptly take remedial steps to avoid or mitigate negative consequences to your client. See Ind. Prof. Cond. R. 5.1(c)(3).

A LAWYER CAN BE LIABLE FOR FAILURE TO SUPERVISE A NONLAWYER UNDER RULE 5.3, EVEN WHEN A NONLAWYER’S ACTIONS ARE NOT AUTHORIZED OR SANCTIONED BY THE SUPERVISING ATTORNEY.

The Indiana Supreme Court found a nonlawyer’s actions in stealing several thousand dollars from the firm’s operating account, overdrafting the trust account, and fraudulently creating purported court orders were “enabled in significant part by Respondent’s failure to appropriately supervise her.” In re J.L., 137 N.E.3d 254 (Ind. 2020). For violations of Rule 1.15(a) (maintaining records of client trust funds) and Rule 5.3(b), the attorney was suspended from the practice of law for 60 days with automatic reinstatement. Id.

Similarly, an overdraft inquiry by the Disciplinary Commission led to the discovery that a lawyer’s bookkeeper had committed theft. In re S.R., 124 N.E.3d 595 (Ind. 2019). The bookkeeper was charged with one count of theft and seven counts of forgery, and the Respondent was suspended from the practice of law for 180 days, all stayed subject to the completion of 18 months of probation. Id. Even if a nonlawyer commits illegal acts without attorney knowledge or approval, the attorney is still in ethical hot water because of the duty to supervise.

A lawyer can also be liable for failure to supervise under Rule 5.3 and Guideline 9.3 when delegating impermissible tasks to nonlawyers. For instance, where a lawyer was affiliated with a California company offering debt-relief services, a nonlawyer at the California company would enter into a retainer agreement with the debtor and have an initial meeting with the debtor without Respondent’s supervision. In re P.F., 74 N.E.3d 1210 (Ind. 2017). Among other rule violations relating to assisting the out-of-state company in the unauthorized practice of law and failing to promptly inform a client, the Court found respondent violated Rule 5.3(b) and Guideline 9.3 and suspended respondent for six months without automatic reinstatement. Id.

CONCLUSION

Failure to directly supervise nonlawyer assistants and associate lawyers alike can lead to ethical violations. The obligation to supervise is intertwined with a lawyer’s ethical duties of competence, diligence, and communication. See e.g., In re Anonymous, 724 N.E.2d at 1103. Lawyers should carefully review the Rules of Professional Conduct to make sure they are not delegating any impermissible tasks to nonlawyers and maintain direct supervision over both nonlawyer assistants and associate lawyers to ensure the person’s conduct is compatible with the lawyers’ professional obligations.

Stephanie L. Grass is an attorney at Paganelli Law Group who practices attorney discipline defense and advises attorneys and law firms on ethical issues. She also practices civil litigation, advocating for businesses and their owners in all pre-suit negotiations, litigation, and appeals. She is still trying to guess the Wordle on the first try.
In 2011, Indiana finally made its foray into allowing people to clean up their criminal history. At first, sealing the records was the only thing allowed. Then in 2013, the state began allowing people to expunge their criminal history in limited circumstances. This article will explore generally some of the issues pertaining to eligibility for an expungement in Indiana.

CHARGED BUT NEVER CONVICTED

There are several groups of people eligible for expungements. The first are those who were charged with a crime but never convicted. The requirements in these cases are found in IC 35-38-9-1. The person must have been arrested or charged with an offense and the arrest or criminal charge cannot have resulted in a conviction. The person cannot be participating in a pretrial diversion program. It also must not be earlier than one year after the arrest or criminal charge unless the prosecuting attorney agrees in writing to an earlier time. The person also must not have any criminal charges pending. Additionally, IC 35-38-9-1 lists the information required to be included in the petition and order for expungement. Under this section, the petition must be filed in the county in which the arrest occurred or county in which the information or indictment was filed. With this type of expungement petition, there is no filing fee.
CHARGED AND CONVICTED

The question then becomes: Are people who are convicted eligible for expungements? The answer is yes under certain circumstances. The eligibility requirements for an expungement as it pertains to a misdemeanor conviction is found in IC 35-38-9-2. This also includes a D felony committed before July 1, 2014, or Level 6 felony committed after June 30, 2014, in which the charge was reduced or entered as a misdemeanor conviction. Unless the prosecuting attorney agrees to an earlier period in writing, the person must wait five years from the date of conviction. The person must not have any pending criminal charges and not have been convicted within the previous five years. The petition is filed in a Superior or Circuit Court in the county in which the conviction occurred. There are certain exclusions under this section that prevent expungements of certain convictions. Those exclusions include a person convicted of two or more felony offenses involving the unlawful use of a deadly weapon that were not committed as part of the same episode of criminal conduct and is a sex or violent offender under IC 11-8-8-5.2

The issue has come up, based upon a prior version of this section, as to the proper time frame to be eligible for an expungement for a D felony or Level 6 felony that was amended to a Class A misdemeanor after conviction. The prior version of this section did not specify the time period that applied to a felony conviction modified to a misdemeanor. The Court of Appeals3 held the date of conviction for an expungement was the date of the misdemeanor conviction, in other words, the date the conviction was amended. However, this opinion was vacated when the Indiana Supreme Court granted transfer.4 Before the Indiana Supreme Court could decide the issue, the legislature amended the statute to clarify that the original conviction date is to be used for time purposes of this section. The Indiana Supreme Court did decide that this amendment applied retroactively.5

Indiana has made it possible to expunge felonies in certain circumstances as well. IC 35-38-9-3 provides Level 6 or D felonies are eligible for expungement if certain criteria are met. The convicted person may seek expungement of a D felony conviction from prior to July 1, 2014, or Level 6 felony after June 30, 2014, not earlier than eight years after the date of conviction unless the prosecuting attorney consents to a shorter time period. The convicted person must not have any pending charges against them, and have paid all fines, fees, court costs, and any restitution obligation as part of their sentence. The person cannot have been convicted within the previous eight years. The same exclusion of convictions that cannot be expunged from the misdemeanor expungement section are also excluded from eligibility under IC 35-38-9-3.

Additionally, offenses under IC 35-42-1, IC 35-42-3.5, and 35-42-4 are excluded and not eligible to be expunged. An elected official

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convicted of an offense while serving in office or as candidate for public office is barred from seeking expungement under this section. A person convicted of perjury, official misconduct, or a felony that resulted in bodily injury to another person also may not seek expungement under this section.6

"If the conviction does not fall into one of those excluded categories, the person must wait to seek expungement eight years from the date of the most recent conviction or three years from the completion of the person's sentence, unless the prosecuting attorney consents in writing to an earlier time."

**FELONY CONVICTIONS PREVIOUSLY EXCLUDED**

The final section for expungements applies to two types of felony convictions otherwise excluded under previously discussed sections. A person with a felony conviction that resulted in serious bodily injury to another person, or an elected official convicted of an offense while serving the official’s term as a candidate for public office, may petition for expungement. The person must wait 10 years from the date of the most recent conviction or five years after the completion of the person’s sentence unless the prosecuting attorney consents in writing to an earlier time. The same exclusions apply as for types of felony convictions discussed earlier. The person cannot have any pending charges and cannot have been convicted of a misdemeanor or felony in the previous 10 years (or within a shorter period agreed to by the prosecuting attorney).
The prosecuting attorney must consent in writing to an expungement of the person’s criminal history when the petition is filed under this section.8 The last issue for a petition filed under IC 35-38-9-7 is the records related to the conviction and expungement are marked as expunged but remain public records.9

There are certain felony offenses where a person may not seek an expungement. A category of felony convictions that are completely barred from expungement throughout the code are those for a sex or violent offender as defined in IC 11-8-8-5.10 A sex or violent offender may not seek expungement under any expungement sections. Felony convictions for offenses under IC 35-42-1 (homicide), 35-42-3.5 (human trafficking), 35-42-4 (sex crimes). Additionally, a conviction for a felony that resulted in death to another person, a person convicted of official misconduct, offenses under 35-42-1, 35-42-3.5, and 35-42-4 are all excluded from expungement if the conviction was a felony.

Indiana does give a person with a prior criminal history the ability to obtain a fresh start. This fresh start is limited based on the level of offense of the conviction as well as certain time restrictions based on the conviction. People that have been conviction-free and meet the eligibility requirements should take advantage of the expungement statutes and get a fresh start.

FOOTNOTES:

1. IC 35-38-9-1
2. IC 35-38-9-2
5. Ng v. State, 148 NE 3d 971 (Ind 2020)
6. IC 35-68-9-3
7. IC 35-38-9-4
8. IC 35-38-9-5
9. IC 35-38-9-11

Eric J. Weitzel is a 1997 graduate from Marian University in Indianapolis with a Bachelor of Arts degree in history and received his Juris Doctor from Indiana University Robert H. McKinney School of Law in 2000. Prior to joining Fifer Law Office, he practiced law as a Deputy Prosecuting Attorney in Clark County, Indiana. He primarily concentrates his practice in the area of criminal defense. He is licensed to practice law in Indiana and is a member of the Indiana State Bar Association, Floyd County Bar Association, Clark County Bar Association, a member of the National Association of Criminal Defense Lawyers, and a member of the National College for DUI Defense.
AUGUST, MAY DECISIONS ADDRESS MALPRACTICE ACT, JUDICIAL REVIEW

In April and May 2022, the Indiana Supreme Court issued two civil opinions and the Indiana Court of Appeals issued 31 published civil opinions.

INDIANA SUPREME COURT DECISIONS

SUPREME COURT HOLDS MALPRACTICE ACT DOES NOT APPLY TO UNAUTHORIZED ACCESS OF A PATIENT’S INFORMATION AND HOLDS INDIANA RECOGNIZES THE SUB-TORT OF PUBLIC DISCLOSURE OF PRIVATE FACTS

Patients sued a healthcare provider after the provider’s employee accessed the patients’ private health information, alleging negligent training, supervision, and retention against the provider, as well as claims of negligence and invasion of privacy against the employee. In Community Health Network v. McKenzie, 185 N.E.3d 368 (Ind. 2022) (Rush, CJ), a unanimous Supreme Court held Indiana’s Medical Malpractice Act does not apply to the plaintiff’s claims where, as in this case, the unauthorized access of a patient’s information violates protocols and procedures that are neither conduct related to the promotion of a patient’s health or require the provider’s exercise of professional expertise, skill, or judgment.

The Supreme Court also answered what had been an open question for years, holding that an invasion-of-privacy tort claim based on public disclosure of
private facts is recognized under Indiana law.

**SUPREME COURT HOLDS PROVIDER CAN SEEK JUDICIAL REVIEW AND BRING DECLARATORY JUDGMENT ACTION WITHOUT FILING SEPARATE COMPLAINT OR JOINING PATIENTS**

The private operator of intermediate care facilities for individuals with intellectual disabilities sought judicial review of a final order of the Office of Medicaid Policy and Planning of the Family and Social Services Administration (FSSA) and included a request for declaratory judgment. The trial court concluded the request was insufficiently pleaded and ResCare’s patients needed to be added to the litigation.

A unanimous Supreme Court in *ResCare Health Services, Inc. v. Indiana Family & Social Service Administration*, 184 N.E.3d 1147 (Ind. 2022) (Massa, J.), held the provider need not bring a separate declaratory judgment action because “a petition for review is analogous to a complaint and allows a party to include other claims that were previously unavailable on administrative review.”

In addition, patients need not be sued for the provider to seek declaratory relief blocking a government enforcement action. The issue in the present case was only between the provider and the FSSA to determine whether the provider violated Medicaid regulations and did not involve the underlying patients who were tangential and not a party of interest to this potential enforcement action against the provider.

**SUPREME COURT TRANSFER GRANTS**

624 Broadway, LLC v. Gary Housing Authority, 181 N.E.3d 1013 (Ind. Ct. App. 2021) (Mathias, J.) *transfer granted May 5, 2022* (involving housing authority taking land through an administrative eminent-domain procedure and whether its use of notice by publication for hearing regarding exercise of eminent domain, rather than providing actual notice to condemnee’s agent whose name and address were known to authority, violated condemnee’s right to due process.)

"A unanimous Supreme Court...held the provider need not bring a separate declaratory judgment action..."

**SELECT COURT OF APPEALS DECISIONS**

*Tippecanoe School Corporation v. Reynolds*, 187 N.E.3d 213 (Ind. Ct. App. 2022) (Robb, J.) (entering summary judgment on negligence claim because high school cheerleader being hoisted into the air by her teammates was ordinary within the sport of cheerleading and school corporation did not breach a duty of care when cheerleader experienced injuries when she struck gymnasium’s floor during routine; as to the negligent supervision claim, “As the routine [the coach] had the cheerleading squad perform was ordinary under a general analysis of the sport, we cannot now separate out a coach’s specific conduct related to supervision of the routine as a separate cause of action.”)

*Miller v. Patel*, 2022 WL 1634226 (Ind. Ct. App. 2022) (Baker, S.J.) (finding a criminal proceeding wherein patient pled “guilty but mentally ill” to voluntary manslaughter did not collaterally estop patient from litigating medical malpractice claim for damages against mental healthcare providers in which patient alleged that providers failed to comply with appropriate standard of care.)

*B & B Farm Enterprises, LLC v. Hudson*, 2022 WL 1613289 (Ind. Ct. App. 2022) (Bailey, J.) (“[T]he essence of the dispute as developed through summary judgment proceedings is whether Neighbor has an easement to use the drainage system on the Farmland and, if so, whether Neighbor's use of the drainage system exceeds the scope of the easement. This sort of claim is not subject to a six-year statute of limitations.”)

*Crowley v. State*, 2022 WL 1531765 (Ind. Ct. App. 2022) (Altice, J.) (requiring offender to register as sex offender did not violate ex post facto clause of Indiana Constitution.)

*Barclays Investment Funding LLC v. Jamalee Investments, LLC*, 186 N.E.3d 659 (Ind. Ct. App. 2022) (Robb, J.) (“[A]n award of attorneys’ fees may be appealable as of right under Indiana Appellate Rule 14(A)(1). However, to be appealable as of right, an award of attorneys’ fees must be for a sum and time certain. Here, Barclays was ordered to pay Jamalee the sum of $1,749.50. However, the trial court provided no date by which that same sum needed..."
to be paid. As a result, the trial court’s award of attorneys’ fees is not appealable as of right..."

In re O.J.G.S., 187 N.E.3d 324 (Ind. Ct.App. 2022) (Altice, J.) (“I.C. § 16-37-2-10 has been improperly interpreted by this court on a number of occasions... The statute simply does not grant courts of this state the authority to order a change of a gender marker on a birth certificate. Such a policy objective, no matter how worthy, must be sought through the deliberative legislative process rather than via piecemeal litigation with limited records and, most often, in the face of no adversarial process.”)

Decker v. Star Financial Group, Inc., 187 N.E.3d 937 (Ind.Ct.App. 2022) (Tavitas, J.) (“We conclude that Star Financial failed to provide the Deckers with reasonable notice of the arbitration provision. Placing the Addendum, which contained the arbitration provision and time-sensitive opt out provision, at the end of the routine monthly statement with no notice to the Deckers that something was unusual about the monthly statement was not reasonably calculated to provide the Deckers with notice... Accordingly, the Deckers did not assent to the arbitration provision.”)

Town of Linden v. Birge, 187 N.E.3d 918 (Ind.Ct.App. 2022) (Tavitas, J.) (“frequent but non-permanent flooding of the Property constituted a permanent physical invasion of the property and a per se taking. Instead, such temporary but frequent flooding must be analyzed under the Penn Central factors as expanded in Arkansas Game.”)

Wiley v. ESG Security, Inc., 187 N.E.3d 267 (Ind.Ct.App. 2022) (Altice, J.) (finding that genuine issues of material fact existed as to whether concert’s security provider assumed a duty of reasonable care to attendees who crowd surfed at concert, precluding summary judgment in negligence action by concert attendee to recover for injuries allegedly sustained when he fell while crowd surfing at concert.)


"We decline to adopt a rule that a governmental unit’s denial of a general claim for damages, without more, relieves the tort claimant from the ITCA notice requirements."

(Given that Central was required to prove damages in order to be successful on its numerous claims against three different defendants, coupled with the fact that Central knew and subsequently admitted that it suffered no damages, we conclude that the trial court could reasonably find that Central’s act of bringing and/or continuing to litigate its numerous claims against the Precast parties was frivolous, unreasonable, and groundless, and was done in bad faith... Amici curiae Kathleen A. DeLaney, Paul L. Jefferson, and Matthew R. Gutwein argue that ordering unsuccessful litigants to pay attorney’s fees ‘would have a chilling effect on access to Indiana courts.’ We disagree. Central is not just an unsuccessful litigant. Instead, Central litigated this case up to and through trial, to the point of resting its case, before conceding that it had no proof that it had been damaged by the Precast parties’ conduct. In addition, our decision is limited to the facts and circumstances of this case.”)

Town of Cicero v. Sethi, 2022 WL 1613210 (Ind.Ct.App. 2022) (Najam, J.) (“[T]he Town satisfied its initial burden as summary judgment movant to show that Sethi did not timely file notice under the ITCA. The burden then shifted to Sethi to designate evidence creating a genuine issue of material fact regarding their equitable estoppel claim. Sethi has not presented ‘clear evidence’ that [the Town Attorney] misrepresented the law or facts when he asserted that the Town was immune from liability for Sethi’s claim for damages allegedly caused by the demolition on their property. Sethi has not shown that they had a right to rely on [the Town Attorney’s] statement that he would ‘stop re-answering the same questions and claims’ as an inducement to believe that formal ITCA notice was unnecessary. And the Town had no legal duty to advise Sethi of the ITCA notice requirements... We decline to adopt a rule that a governmental unit’s denial of a general claim for damages, without more, relieves the tort claimant from the ITCA notice requirements.”)

Maggie L. Smith is a member with Frost Brown Todd LLC and practices in the area of appellate litigation. She is recognized in the field of appellate practice by Best Lawyers in America®, Indiana Super Lawyers®, and Chambers USA.

Brock C. Bucher is an associate in the Indianapolis office of Frost Brown Todd, focusing on corporate and real estate transactions. He joined the firm in January of 2021 after graduating cum laude from Washington and Lee University School of Law.
Continued from page 17...

The Taskforce also recommends increasing diversity among the ranks of Indiana mediators and neutrals. In this regard, the Taskforce supports the direction being taken by the Indiana Supreme Court Commission on Equity and Access\(^\text{23}\) and the American Bar Association's Resolution 105 – Diversity in ADR.\(^\text{24}\)

Finally, with regard to the ADR Rules, the Taskforce proposes a number of amendments to update the Rules and facilitate innovation:

- **ADR Rule 1**: the proposed amendment would reference additional types of ADR, including binding arbitration, documents-only arbitration, and online arbitration, and clarify that the list of ADR types in the Rule is not exhaustive.

- **ADR Rule 2.5(D)**: the proposed amendment would authorize CME for pro bono mediations.

- **ADR Rule 3**: the Taskforce recommends the current Rule continue to include binding and non-binding arbitration to accommodate those who prefer binding arbitration without the cost of using a commercial organization to administer the arbitration. An amendment is also proposed to specifically authorize documents-only arbitrations, which are suitable to particular types of lower value and simple contract disputes.

- **ADR Rules 4, 5 and 6**: the Taskforce's proposed amendments would delete Rules relating to mini trials, summary jury trials, and private judges. These forms of ADR are used infrequently, and the emphasis placed on them by having rules specifically devoted to those forms of ADR implies that they are more accepted than other forms of ADR. The intent is not to foreclose use of these forms of ADR, as they would still be listed in Rule 1 as an available type of ADR.

**LEVERAGING TECHNOLOGY TO IMPROVE EFFICIENCY, TRANSPARENCY, AND ACCOUNTABILITY**

The final section of the Taskforce’s report recommends that our courts prioritize the evaluation and potential investment in emerging technology aimed at making civil justice more efficient and accessible. The Indiana Supreme Court’s implementation of Odyssey and e-filing state-wide is a game-changer in enabling our Courts to use technology to more efficiently manage heavy caseloads.

The Taskforce offers two additional recommendations regarding technology:

First, the Taskforce recommends improving the courts’ data analytics capabilities to objectively measure improvement in case disposition times and accessibility of justice and to guide civil justice improvements in the future. The *Call to Action* recommends a number of ways courts can use technology to better manage crowded dockets, to improve efficiency and communication, to objectively measure progress in reducing cost and delay, to inventory and analyze dockets and trends, and to increase transparency and accountability thereby fostering public trust.\(^\text{25}\)

Second, the Taskforce recommends establishing a permanent technology advisory group. The Indiana Innovation Initiative included a Technology...
Working Group that recommended several specific improvements in court technology, many of which have already been adopted. The Taskforce recommends that the Technology Working Group, or a body like it, comprised of both lawyers and technologists, be periodically established as an advisory body. New technologies emerge rapidly, and an advisory body of experts could assist the Courts in monitoring developments, evaluating new applications, and making recommendations for cost-efficient technological investments.

**CONCLUSION**

The CCJ’s *Call to Action* included the following warning, which we should all heed:

> We’ve come to expect the services we use to steadily improve in step with our needs and new technologies. But in our civil justice system, these changes have largely not arrived. . . . If our civil courts don’t change how they work, they will meet the fate of travel agents or hometown newspapers, entities undone by new competition and customer expectations – but never adequately replaced.26

Lawyers should embrace the drive for civil justice improvement. It is not only in our economic self-interest to do so, but as an “officer of the legal system and public citizen,” we each have a “special responsibility for the quality of justice.”27

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Steve Badger chaired the Civil Litigation Taskforce and also serves on the Indiana Supreme Court’s Innovation Initiative. He is a partner with Barnes & Thornburg LLP in Indianapolis and has represented litigants on both sides of the “v” for over 30 years. Badger also serves as Barnes & Thornburg’s Deputy General Counsel.

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"Lawyers should embrace the drive for civil justice improvement."

**FOOTNOTES:**

5. *Call to Action*, at 7, 31-32.
8. *Call to Action*, at 8.
9. *Id.*
10. *Id.* at 8-9.
11. *Id.*
12. *Id.* at 18-27.
15. *See Ind. Commercial Court Rule 5*
21. Mary Beth Howe & Robert Fiala, *Process Matters: Disputant Satisfaction in Mediated Civil Cases*, 29 The Justice Sys. J., 85-86 (2008) ("Research has typically found high levels of satisfaction with mediation, and when comparison is made with conventional court proceedings, persons in mediation usually exhibit greater satisfaction.")
25. *Call to Action*, at 31-32.
26. *Id.* at 2.
27. *Ind. Prof. Cond. Rules, Preamble [1].*
Continued from page 21...

SFFA seeks to reverse Grutter’s holding that race can be used as one factor in admissions. To pass strict scrutiny, the affirmative action must show that there were no other race neutral alternatives available to accomplish the goal. One of SFFA’s experts, a Yale Economist, provided various simulations, one that showed what Harvard’s racial composition would look like if it eliminated race preferences and preferences for the children of donors, alumni, and faculty/staff for its 2019 class, and increased its socioeconomic boost. It showed that white admissions would decrease from 40 to 33%, AAPI would increase from 24 to 31%, Hispanic and Other admits would increase from 14 to 19%, but African American admits would DECREASE from 14 to 10%.\(^7\)

ELIMINATING BIAS AGAINST AAPIs AND FINDING THE MIDDLE GROUND

There is far more discussion that could be included regarding the SFFA consolidated case. I have barely scratched the surface. My goal was to uncover an intricate picture of the continued damaging effects of AAPI discrimination and bias. I hope that I have expanded awareness, too, of what AAPIs are experiencing.

Do I believe the Supreme Court’s decision in SFFA will help eliminate bias toward Asian-Americans? I remain hopeful, but cautious. I know two things. One, that Asian-Americans won’t be helped in the harming of other minority groups. Racial equality is not achieved by eroding the successes of other Black and Brown communities. Lastly, I’d feel more confident in the Supreme Court’s upcoming decision if an AAPI justice were on the Court. \(^6\)

L. Leona Frank focuses her commercial litigation practice on environmental and toxic tort defense, contract disputes and Chapter 11 business bankruptcies. She is a civil mediator, Guardian ad Litem, and a 2002 law graduate of Texas Southern University, a HBCU. Leona is a native Hoosier of Korean descent and can be reached at: lfrank@franklawyers.com.

FOOTNOTES:

1. Kimmy Yam, 70% of Asian Americans support affirmative action. Here’s why misconceptions persist, NBC News (Nov. 14, 2020, 5:10 p.m.), 70% of Asian Americans support affirmative action. Here’s why misconceptions persist. (nbccnews.com).
3. The author is not including mention of all census categories for brevity of all census categories for brevity and germaneness.
5. The People of the State of California v. George W. Hall, 4 Cal. 399.
6. Uniquely, 24 Japanese Americans were able to escape the camps by enrolling in Earlham College in Richmond, Indiana.
9. Victoria Tran, Asian Americans are falling through the cracks in data representation and social services. Urban Institute (June 19, 2018). Asian Americans are falling through the cracks in data representation and social services | Urban Institute
11. Section 601 of Title VI of the Civil Rights Act of 1964 (42 U.S.C. §2000d) states: No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program of activity receiving Federal financial assistance.
12. Metro normally forbids the assumption that ethnicity determines how individuals think.
16. Harvard Writ, Page 15
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