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STOP WORKPLACE HARASSMENT

You Can Help Clients Stop Workplace Harassment by Minding Your Ps (and One Q)

By Catherine F. Duclos
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President's Perspective

REASON, PASSION, AND THE AMERICAN FLAG

By Clayton C. Miller

The 2001 comedic film “Legally Blonde” follows a colorful southern California sorority president, played by Reese Witherspoon, as she initially pursues her ex-boyfriend to Harvard Law School. During the movie, she exceeds her law school classmates’ expectations and discovers a talent for earnest advocacy, a confident independence, and (spoiler alert) a new boyfriend. On her first day of law school a professor quotes Greek philosopher Aristotle’s assertion that “the law is reason free from passion.” In the movie’s closing moments, this quote makes a return in Witherspoon’s character’s commencement speech, in which she observes that over her three years in law school she has, with apologies to Aristotle, “come to find that passion is a key ingredient to the study and practice of law... and of life.” One can forgive the screenwriters for glossing over the distinction between studying and practicing law with passion, and what seems to be the crux of Aristotle’s quote: in its application the law must be dispassionate.

Scholars and deep thinkers have grappled with the implications of Aristotle’s statement, not infrequently focusing on the extent passion might have an appropriate role in applying the law, while acknowledging passion’s tendency to dilute reason. Our oath of attorneys touches on this subject. As Hoosier lawyers, we’ve sworn not to “encourage either the commencement or the continuance of any action or proceeding from any motive of passion or interest.”

I suspect many readers of this column have encountered examples of advocacy influenced by passion. And I’m not suggesting there’s anything wrong with being passionate about our clients’ causes. But there’s more than a bit of wry truth in the lawyer’s axiom attributed to author Carl Sandburg: “If the facts are against you, argue the law. If the law is against you, argue the facts. If the law and the facts are against you, pound the table and yell like hell.” The inference is that such tactics are the last refuge of those seeking to avoid an outcome in a legal proceeding based on reason free from passion.

I came to this subject after national events last year had me contemplating a 33-year-old U.S. Supreme Court case involving the intersection of public passions and constitutional principles. In Texas v. Johnson, 491 U.S. 397 (1989), the Court grappled with interpreting the First Amendment in the context of inflammatory conduct. Here's
the succinct first paragraph of the majority opinion: “After publicly burning an American flag as a means of political protest, Gregory Lee Johnson was convicted of desecrating a flag in violation of Texas law. This case presents the question whether his conviction is consistent with the First Amendment. We hold that it is not.” The Court thus affirmed the ruling from the Texas Court of Criminal Appeals that had overturned Johnson’s conviction.

The High Court split along atypical lines, and the majority and minority opinions make for fascinating reading. Joining Justice Brennan’s majority opinion were Justices Blackmun, Kennedy, Marshall, and Scalia. Chief Justice Rehnquist wrote a dissent joined by Justices O’Conner and White. Justice Stevens dissented separately. Although he joined the majority, Justice Kennedy also penned a separate concurrence, in which he described this as a rare case in which the Constitution compels a distasteful result, noting that “It is poignant but fundamental that the flag protects those who hold it in contempt.”

I’m also intrigued by the closeness of the vote and the divergent reasoning expressed in the multiple opinions. Chief Justice Rehnquist’s dissent focused on the flag’s “unique position as the symbol of our Nation, a uniqueness that justifies a governmental prohibition against flag burning in the way respondent Johnson did here.” This dissent waxes rhapsodic about the star-spangled banner’s history, quoting the entirety of our national anthem, and incorporating all 60 lines of an 1863 poem by John Greenleaf Whittier, “Barbara Frietchie.” It also emphasized the adoption by 48 of the 50 states of laws making it a crime to publicly burn the American flag. To these three justices the defendant had other means available to express his political views, and they saw his conduct as merely “the equivalent of an inarticulate grunt or roar” that did not express any particular idea but was rather “indulged” “to antagonize others.” The penultimate paragraph of the dissent concludes with this provocative assertion: “Surely one of the high purposes of a democratic society is to legislate against conduct that is regarded as evil and profoundly offensive to the majority of people – whether it be

“Scholars and deep thinkers have grappled with the implications of Aristotle’s statement, not infrequently focusing on the extent passion might have an appropriate role in applying the law, while acknowledging passion’s tendency to dilute reason.”
murder, embezzlement, pollution, or flagburning.”

Perhaps not willing to go as far rhetorically as the other three dissenters, Justice Stevens similarly focused his separate dissent on the American flag’s unique status as a symbol of “the ideas that characterize the society that has chosen that emblem as well as the special history that has animated the growth and power of those ideas.” He described the flag as “a symbol of freedom.” And while he recognized the potential for the flag’s value to be enhanced by the majority’s conclusion that among the freedoms it symbolizes is the freedom to dissent with strong words and deeds, including flag desecration, he remained unpersuaded, analogizing public flag burning to painting graffiti on the Washington Monument or defacing the Lincoln Memorial, the desecration of which might legitimately be prohibited in the interest of preserving the quality of an important national asset.

“Though the asset at stake in this case is intangible, given its unique value, the same interest supports a prohibition on the desecration of the American flag.”

Another reason this case is fascinating is because the subject lends itself to broad engagement not only 33 years ago, but today. Citizens of all stripes can understand, even if they don’t necessarily agree with, the Court’s articulation of why Johnson’s inarticulate roar was expressive conduct deserving of First Amendment protection. The majority summarized the state’s justification of Johnson’s conviction as amounting to an assertion that “an audience that takes serious offense at particular expression is necessarily likely to disturb the peace, and that the expression may be prohibited on this basis.” They then held that the Court’s precedents “do not countenance such a presumption.” Plenty of other valid laws address actual disturbances of the peace. Space constraints do not permit me to parse the Court’s reasoning, but I confess to having been persuaded by the majority, finding their careful examination of precedent and application of the First Amendment to be a model of dispassionate reason. And I’m glad – even (dare I say) passionate – to live in a country where respect for our national symbol does not trump the freedoms our flag symbolizes. As we get ready to celebrate Independence Day, here’s to our grand old flag!
ISBA’s Board of Governors met for their second quarterly business meeting in Notre Dame’s 1842 Club earlier this April. In addition to touring Notre Dame’s law school and holding a reception to meet local bar members, the board also voted on a few proposals (including one to change the Wellness Committee to the Well-Being Committee, with an update to their mission statement). The key proposal, however, was an update to ISBA’s diversity statement.

ISBA’s original Diversity Position Statement was written and approved in 2008 for its broad definition and its outline of important values and beliefs. It read:
The Indiana State Bar Association (ISBA) will integrate diverse perspectives into all aspects of its activities and into the fabric of the legal profession of this state. The ISBA believes this commitment is not only essential to the pursuit of our mission “to improve the administration of justice and promote public understanding of the legal system,” but it also strengthens our ability to address all of our members’ needs. This commitment extends to fostering an inclusive work environment that respects, values and supports individuals regardless of differences.

Following the creation and implementation of ISBA’s Strategic Plan (of which diversity and equity is a key pillar), the board felt it beneficial to update the statement and provide a more in-depth definition. The task was shared with ISBA’s Diversity Committee, who analyzed the current statement, researched other diversity positions, and crafted a new one. They proposed their statement to the board and, after discussion and a round of edits, the following was approved:

The Indiana State Bar Association (ISBA) will integrate diverse perspectives into all aspects of its activities and into the fabric of the legal profession of this state. ISBA, engaging with lawyers and others within the legal profession from all backgrounds, strives to build a diverse pipeline to the legal profession, and to inform the broader legal community about issues surrounding diversity and inclusion. The ISBA takes affirmative steps to eliminate bias and enhance diversity to ensure that members of all backgrounds, identities, and circumstances are included in every level of the organization. This commitment is not only essential to the pursuit of our mission “to improve the administration of justice and promote public understanding of the legal system,” but it also strengthens our ability to address all of our members’ needs and the needs of those the ISBA’s members serve and represent in our respective communities.

The statement is a result of rigorous research, thought, and conversation, and outlines the elements of diversity, equity, and inclusion the board feels are important for Indiana attorneys to recognize and important for the ISBA to pursue. The new Statement on Diversity will be a consistent reminder in actions ISBA takes moving forward – from event planning to appointing positions on task forces. It is also encouraged for members to read through the statement and consider ways they can enact its elements in their own work.
YOU CAN HELP CLIENTS STOP WORKPLACE HARASSMENT BY MINDING YOUR Ps (AND ONE Q)
Organizations continue to find themselves on the front pages for failing to resolve harassment, discrimination, and toxic workplaces. Google made headlines when 20,000 employees walked out to protest Google’s handling of sexual harassment complaints. A federal jury recently awarded a Tesla contractor $137 million due to Tesla’s failure to address racial harassment. In March 2022, the U.S. Equal Employment Opportunity Commission (the “EEOC”) announced that Activision had agreed to pay $18 million to settle a lawsuit the EEOC filed on behalf of Activision workers. Closer to home, the Indianapolis Public Library faced a social media firestorm, front-page headlines, loss of funding, and resignation of its CEO over allegations that it failed to address discriminatory behavior directed at employees and patrons.

What can you do to keep your clients off the front page and out of the courtroom? A small business with no dedicated human resources department may not know that there are prophylactic steps it can take to root out problems before they sprout into employee turnover, EEOC charges, lawsuits, and news stories.

1. BE PROACTIVE

An employer is responsible for providing nondiscriminatory working conditions. It may seem counterintuitive, but an organization can best fulfill this responsibility by making it easy for employees to complain about inappropriate workplace conduct. This allows management to address an issue, or even a potential issue, when it is merely a policy violation and before repeated behavior rises to the level of unlawful harassment. As the Seventh Circuit has repeatedly explained, “The genesis of inequality matters not; what does matter is how the employer handles the problem.”

Rooting out potential harassment starts with policies and training designed to identify issues early and encourage individuals (whether employees, contractors, or others to whom a duty is owed) to speak up.

- Make anti-harassment and discrimination policies clear and understandable. Will teenagers understand it? Will non-English speakers know what to do?
- Make sure policies provide multiple, easily accessed avenues of complaint.
- Tailor training to the audience. As with the policies, the goal is to encourage people to come forward. Training for teenagers at a fast-food restaurant should
look different than training for doctors at a hospital.

- Train supervisors and managers to be observant and respond appropriately when someone raises a concern or they see inappropriate behavior. Knowledge of supervisors and other agents can be imputed to the organization and the EEOC is likely to challenge a policy that attempts to remove responsibility from local management.

- Require supervisors and managers to elevate all potential issues through proper channels (human resources or company attorney) rather than making their own decisions about the validity of allegations or corrective measures.

2. BE QUICK

Policies and training are the framework for rooting out harassment and discrimination, but they are insufficient on their own. Organizations must enforce the policies by promptly investigating and correcting violations. As the Seventh Circuit has explained, “A prompt investigation is the hallmark of a reasonable corrective action.”

"Policies and training are the framework for rooting out harassment and discrimination, but they are insufficient on their own"

3. BE PROTECTIVE

Part of creating an environment where people are comfortable raising concerns is protecting them when they do. At a minimum, this means keeping an investigation confidential as much as possible. It may also include interim measures. A supervisor can wreak havoc while an investigation is pending. Consider power dynamics and potential for reprisal. An appropriate step may include putting the alleged perpetrator on paid leave. Such measures are not punishment but merely a hold on the workplace dynamic pending conclusion of the investigation.

Take care, however, that interim measures do not adversely affect the complainant. It is unlawful under Title VII of the Civil Rights Act of 1964 and other anti-discrimination laws for an employer to take adverse action against an employee because the employee complained or otherwise opposed an unlawful employment practice.

4. BE PICKY

Choose the right investigator. Typical options are human resources specialists, supervisors, internal attorneys, compliance personnel, and external professional investigators. Choose carefully as this decision will determine the course, thoroughness, and fairness of the investigation and set the stage for trust in the findings. Those attempting to challenge the validity of an investigation – whether litigants, jurors, the EEOC, or reporters – will start with the investigator. Find one who can withstand scrutiny.

- Unbiased. An investigation must do more than arrive at the truth. Its value is lost if participants, employees, the media, or jurors believe the outcome was pre-ordained or an attempt to shore up the organization’s reputation or
defense. It is not enough for the investigator to be impartial—the investigator must also be perceived as impartial. Take, for example, an investigation conducted by NBC Universal’s in-house counsel after Variety magazine published its explosive story about Today Show anchor Matt Lauer. The attorney concluded there was no evidence that senior executives were aware of Lauer’s history of alleged workplace harassment. The report, however, drew immediate criticism from NBC employees, the media, and advocacy groups who said the investigation lacked independence because the in-house attorney was part of management and reported to some of the executives she was investigating. Thus, while her findings may have been accurate (still unclear), they were not trustworthy.

- **Trained.** The need for a trained investigator increases in proportion to the allegations.

On one end, supervisors and low-level human resources representatives often conduct investigations of minor employee disagreements. On the other end of the spectrum, a trained investigator will be the best choice for matters that involve allegations of discrimination or harassment, numerous witnesses, potential litigation, high profile personnel, or other complexities.

- **Available.** The investigator must conduct and complete the inquiry promptly.

- **Empathetic.** The investigator must be able to obtain information from nervous, hostile, emotional, untrusting, and unwilling witnesses. Good investigators can develop rapport with people from all walks of life.

- **Professional Presentation.** Consider whether a potential investigator will be a good witness capable of explaining findings and supporting the fairness of the investigation.

Employment attorneys are often good choices because they have knowledge of applicable laws and experience interviewing witnesses. Moreover, when an attorney is the investigator, the attorney-client privilege or work-product doctrine may shield the investigation from disclosure. It is important, however, for the investigator, company, and company attorney to recognize that the company will likely waive these privileges if it uses the investigation to defend a lawsuit. Since such a defense is one of the key benefits of a quality investigation, those responsible for the investigation must be prepared from the outset that the investigator may be deposed and required to produce all documents and communications related to the investigation. Thus, in-house counsel or the company’s regular litigation defense firm may not be the best choice when litigation is likely.

Continued on page 33...
We have become more aware and sensitive to these terms in the last couple of years. Inclusion is a term I am familiar with. As an attorney who represents students with disabilities in education matters, I frequently advocate for the inclusion of students with disabilities in classrooms and school activities with their nondisabled peers. One of the basic tenants of the Individuals with Disabilities Education Improvement Act (commonly referred to as the IDEA) is for students with disabilities to be educated, to the maximum extent appropriate, with their nondisabled peers. Yet all too often students with disabilities are excluded from the classrooms and school activities, and sometimes are excluded from school altogether.

I read a recent article by the National Disability Rights Network called “Out from the Shadows” which highlighted the unauthorized practice that many public schools use to informally remove children with disabilities from school. These students are often sent home for an indefinite period, sometimes missing an entire semester of school, and receive little or no educational instruction. The article noted these “off the books” suspensions are immune from data reporting and policy reform efforts. I wish I could say this does not happen in Indiana’s public schools, but it does. Frequently, families will contact our office because their child with a disability has been removed from school and placed on some type of homebound services, often due to behavior related to their disability. It is devastating for the student who is missing educational and social instruction and for the families who must find childcare.
and/or quit their jobs to be home with the student.

In enacting the IDEA, Congress found that disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. And yet, persons with disabilities often face barriers and encounter discrimination in employment and education. Congress also found that improving the educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency.

**SO, GIVEN THIS FINDING, HOW DO WE ENSURE THAT CHILDREN WITH DISABILITIES SUCCEED IN SCHOOL AND ARE PREPARED FOR FURTHER EDUCATION AND EMPLOYMENT AND ARE FULLY INTEGRATED INTO THE COMMUNITY IN WHICH THEY LIVE?**

One of the first steps is to provide sufficient support and training to teachers and school staff to understand the student’s disabilities. The IDEA requires that school personnel have the necessary skills and knowledge to successfully serve children with disabilities. Indiana schools must provide preservice and in-service training to paraprofessionals to ensure they understand the specific special needs and characteristics of the student with whom the paraprofessional will be working. Yet many times teachers and paraprofessionals who work with the student do not have sufficient training to understand the student’s disabilities or manage the student’s behavior. When paraprofessionals attempt to implement behavioral interventions without the proper training it can exacerbate the student’s behavior and result in discipline for the student and, even worse, injuries to the student and staff. The IDEA provides funding to schools for training purposes, and

"Congress also found that improving the educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency."

Another step is to improve communication between the school and the parent of the child with a disability. The IDEA encourages collaboration between the parent and the school. In-service and preservice training programs must include strategies for effectively involving parents in their child’s education, with an emphasis on fostering positive relationships between the parent and school. Indiana’s special education rules contain a provision for parent counseling and training. Sometimes parents simply need to understand more about their child’s disability and be given the opportunity to work directly with school personnel to understand what is happening at school. Parents can also share what is happening at home so behavioral strategies can be implemented in both environments. Unfortunately, many school districts refuse to allow parents to communicate with the
reminder that most of us are biased in some way against persons with disabilities, and we need to take time to incorporate the principals of diversity, equity, and inclusion for all people in our society.

Margaret Jones, Esq. is the executive director of Disability Legal Services of Indiana, a nonprofit dedicated to providing free and low-cost educational advocacy and legal assistance for students with disabilities. She represents families throughout the state of Indiana in special education matters. She earned her law degree in 1988 from Indiana University Robert H. McKinney School of Law. She is pleased to use her legal skills to ensure that children and adults with disabilities receive an appropriate education and are prepared to lead productive and fulfilling lives fully engaged in their communities. For more information about DLSI’s services go to: www.disabilitylegalservicesindiana.org

FOOTNOTES:

1. 20 U.S.C. §1400 (c) (1)
2. 20 U.S.C. §1462(a)
3. 511 IAC 7-36-2(f)
4. 20 U.S.C. §1462(a)
5. 511 IAC 7-43-1(c)(8)

INCLUSION OF STUDENTS WITH DISABILITIES GOES FAR BEYOND THE CLASSROOM.

Another important question to ask is: How do we include persons with disabilities in our lives and in our communities? Not all of us have the knowledge or skill to step in and represent a child with a disability in an educational administrative due process proceeding or litigate an IDEA violation in federal court. However, we can all make a difference in the life of a child with a disability. One way to accomplish this is to get involved with activities and organizations that support persons with disabilities. If you are athletic, maybe you could decide to coach an integrated sports team, or volunteer with the Special Olympics program in your community. If you are artistic, maybe you could use your time and talents to participate with organizations such as ArtMix, an organization that celebrates persons with disabilities using art as a medium of expression. If you love to read, maybe you could volunteer with the United Way of Central Indiana’s Read Up program and tutor a student with a reading disability in your local elementary school.

MAYBE ONE OF THE MORE DIFFICULT QUESTIONS TO ASK OURSELVES IS: HOW DO WE CHANGE OUR VIEW OF PERSONS WITH DISABILITIES AND HELP OUR CHILDREN DO THE SAME?

I read an article written by an Indiana high school senior about Ableism. I do not hear that term often and it caught my attention. Ableism is discrimination and social prejudice against people with disabilities. The article, “Ableism from a Youth Perspective,” highlighted the painful reality that students with disabilities are often viewed as inferior by other high school students, and that school staff foster this attitude by continually separating students with disabilities from their nondisabled peers. The article reminded me that society often sets low standards and expectations for people with disabilities. I shared the article with others. It was a good
MARCH CASES ADDRESS HARMFUL MEDIA, JURY SELECTION PROCEDURE, AND MULTIPLE CRIMINAL OFFENSES IN A SINGLE CRIME SPREE

In March, the Indiana Court of Appeals issued opinions addressing subject matter jurisdiction, jury selection procedure, and viewing/disseminating alleged obscene anime cartoons and internet memes. The United States Supreme Court considered whether multiple criminal offenses committed in a single crime spree occurred on different "occasions" for sentence enhancements under the Armed Career Criminal Act.

INDIANA CASES

SEXUALLY SUGGESTIVE ANIME CARTOONS DID NOT CONSTITUTE "OBSCENE MATTER"

Under the terms of probation following his conviction for sexual misconduct with a minor, Michael Bedtelyon was prohibited from "accessing, viewing, or using internet websites and computer applications that depict obscene matter as defined by IC 35-49-2-1." After Bedtelyon’s probation officer learned he viewed several anime videos on YouTube with titles like, “My Mother and Sister Pretend to Be Expecting My Babies After I Lost My Memory,” she watched the videos and determined they were obscene. Relying only on the testimony of others
who watched the videos, the trial court found Bedtelyon violated the probation term against viewing obscene matter and revoked his suspended sentence.

In *Bedtelyon v. State*, No. 21A-CR-1952 (Ind. Ct. App., March 4, 2022), the Indiana Court of Appeals reversed because the testimony merely proved the videos were suggestive but did not prove they constituted “obscene matter” under the statutory definition. The evidence suggested the videos might have erotic themes, are erotic in tone, and describe erotic feelings. But the state did not present evidence that “sexual conduct” as defined by statute was depicted or described, rather than merely implied. *Id.* at 6. The court found the state’s arguments otherwise were “conclusory,” and that its reliance on *Fordyce v. State*, 569 N.E.2d 357 (Ind. Ct. App. 1991), was misplaced. *Id.* at 9-11. *Fordyce* involved an obscene book containing a description of incestuous sexual conduct. Here, the court could not infer from such a “slim record” that sexual conduct occurred in the videos. *Id.*

**PRELIMINARY DETERMINATION THAT INTERNET MEMES CONSTITUTED MATTER “HARMFUL TO MINORS” AFFIRMED**

In a prosecution for disseminating matter harmful to minors, the trial court did not err in preliminarily determining the widely circulated internet memes Cory Chapman circulated to his 17-year-old former band student constituted matter “probably harmful to minors.” On interlocutory appeal, Chapman argued the memes, which involved sexual jokes, did not meet the standard of “probably harmful to minors.” If they did meet the standard, it would violate his First Amendment rights. In *Chapman v. State*, No. 21A-CR-421 (Ind. Ct. App., March 23, 2022), a majority of the Court of Appeals found Chapman’s constitutional challenge waived and concluded that while the memes showed no nudity or sadomasochistic abuse, “almost all, if not all” could be described or represented as sexual conduct or sexual excitement. *Id.*, Slip Op. at 8. Although Chapman argued the memes were simply humorous and do not fit the definition of “prurient,” they all suggested or used explicit language to refer to sexual activities or sexual situations in crude, vulgar, and degrading terms. The majority deferred to the trial court’s review of the memes and its preliminary decision they were patenty offensive to prevailing standards in the adult community regarding what is suitable matter for minors. The court also found the memes lacked serious literary, artistic, political, or scientific value for minors under Ind. Code § 35-49-2-2.

Judge Mathias issued a concurring opinion to note the statutory criteria for determining what is suitable matter for minors in 2022 are different than they were when the statute was written in 1983, and that “this change should be carefully considered and weighed by judges (in a preliminary determination as in this case) and juries (when deciding whether conduct charged under this statute amounts to a crime)...and by our General Assembly.” *Id.* at 12-15.

Judge Robb dissented, noting the statute and the First Amendment are entwined because the First Amendment presumptively protects matter unless the state can prove it is matter harmful to minors as defined by statute. *Id.* at 16. Thus,
the dissent would not consider the constitutional analysis waived. Judge Robb also disagreed with the majority’s conclusion that the matter was patently offensive, given the “sweeping cultural changes” as to what is suitable for minors. “The sexually suggestive memes at issue are almost certainly in poor taste and I do not support the sharing of them with a seventeen-year-old. Nonetheless, I cannot find this material patently offensive to prevailing standards in the adult community with respect to what is harmful to a teenager on the cusp of adulthood in 2022.” Id. at 22.

HARMLESS ERROR IN REFUSING TO ALLOW DIRECT QUESTIONING OF PROSPECTIVE JURORS

Trial judges have broad discretion in regulating the form and substance of jury selection. See, e.g., Logan v. State, 729 N.E.2d 125, 133 (Ind. 2000). But that discretion is not without limits. In Dorszko v. State, No. 21A-CR-1645 (Ind. Ct. App., March 29, 2022), the Court of Appeals held the trial court’s refusal to allow Dorszko or his attorney to question prospective jurors personally and directly was an error under Logan and Trial Rule 47(D). However, the error was harmless because Dorszko did not indicate what questions he would have asked had he been allowed to directly question the prospective jurors, did not show the court’s procedure hurt his ability to exercise his peremptory challenges, and he did not allege that any specific juror should have been removed but was not. In a footnote, the court disagreed with another panel’s decision in Peppers v. State, 152 N.E.3d 678 (Ind. Ct. App. 2020), which found no error in the trial court’s procedure for conducting voir dire, because it believed Peppers was contrary to the Supreme Court’s decision in Logan. Dorszko, Slip Op. at 9.

ADULT COURTS DO NOT HAVE SUBJECT MATTER JURISDICTION OVER ADULTS ALLEGED TO HAVE COMMITTED CRIMES BEFORE REACHING AGE OF 18

In Pemberton v. State, No. 21A-CR-668 (Ind. Ct. App., March 31, 2022), a 2-1 decision, the Court of Appeals affirmed the dismissal of a Class B felony child molesting charge filed in adult court against 23-year-old Derick Pemberton for an alleged incident committed when he was 16 years old. In a 2-1 opinion, the court noted a “lack of clarity in the Indiana code” but concluded the “legislature did not intend criminal courts to have jurisdiction over adults who allegedly committed delinquent acts as juveniles, unless the alleged
Ind. Code § 11-8-8-8(a)(1), which requires a sex offender to provide information related to “any vehicle the sex or violent offender operates on a regular basis,” was unconstitutionally vague as applied to the defendant. In granting habeas relief, the federal district court in McClernon v. Wedding, 2022 U.S. Dist. LEXIS 41557 (S.D. Ind. March 9, 2022), concluded the statute does not provide an objective standard to determine whether one’s use of a vehicle is “regular.” It therefore fails to place a person of ordinary intelligence on notice of the conduct proscribed and opens the door for arbitrary enforcement.

Jack Kenney is research and publications director at the Indiana Public Defender Council.

FOOTNOTE:

1. In D.P. v. State, 151 N.E.3d 1210 (Ind. 2020), the Indiana Supreme Court ordered the juvenile court in this case to grant Pemberton’s motion to dismiss the delinquency petition filed against him, holding that juvenile courts do not have subject matter jurisdiction to waive an alleged juvenile delinquent offender into adult criminal court if the individual is no longer a “child.” Thereafter, the state filed the instant Class B felony child molesting charge against Pemberton in criminal court, the dismissal of which prompted the state’s appeal.
Attorney access to mycase.in.gov allows Indiana attorneys in good standing access to confidential documents in cases, regardless of whether the case itself is confidential or public, as long as they have filed an appearance in the case. They also have access to all public documents in all public cases even if they have not filed an appearance. They do not have access to confidential documents or cases in which they have not filed an appearance.

Changes to Trial Rule 5(B) allowed clerks to begin sending notices to parties electronically in January 2013. E-notices can include a link to a court order or any document that the court wants to attach. Attorneys provide a designated email address when filing an appearance in a case, and all e-notices are sent en masse to those addresses the following morning beginning around 2:00 a.m. This process may take many hours to complete.

Although e-notices have saved courts and clerks time and money, there are some challenges with this process. For example, an attorney with a large number of cases may receive a sizable number of e-notices in their inbox. And, more concerning, e-notices can be blocked by the attorney’s email or internet provider interpreting a large number of incoming messages from the same sender as spam. In those cases, the clerk must manually send the notice and any accompanying order through regular mail.

When presented with these challenges, members of the Innovation Initiative approved the Indiana Office of Court Technology recommendation to design and develop a dashboard for attorneys that would allow attorneys to access e-notices in near real time and at their convenience 24/7. They envisioned a dashboard built on the foundation of attorney access already available on mycase.in.gov.

A working group made up of practicing attorneys and members of the Innovation Initiative met to exchange ideas and brainstorm features for the dashboard. Suggestions included the ability for an attorney to:

- display a list of all pending cases for the attorney
- access e-notices and associated case documents easily
- see a calendar of court hearings for the
Based on these requirements, IOCT developed a beta version of the Attorney Dashboard and published it on January 31, 2022. Attorneys who sign into mycase.in.gov can immediately access the dashboard from a link in the upper right corner of the screen. IOCT will continue to work on additional enhancements, including the ability for an attorney to grant access for designated paralegals. Ultimately, attorneys may be able to opt out of receiving e-notices to their inbox.

Questions? Contact the author at mary.deprez@courts.in.gov or 317-234-2604.
THE RESPONSIBILITY OF ETHICAL SPEECH

A well-crafted public message can be a formidable tool in a lawyer’s advocacy arsenal. The power of such messaging is undeniable. But, with power comes responsibility, as not all public speech uttered or written in the hopes of persuading potential jurors or future clients falls within the bounds of ethical conduct.

With social media and press increasingly omnipresent in our lives, more legal disputes are coming to the public’s attention and developing a “high-profile” status. To avoid ethical missteps with respect to pretrial publicity and social media posts about client matters, lawyers need to be conscious of the Indiana Rules of Professional Conduct’s provisions regarding extrajudicial statements.
To assist attorneys in navigating these ethical waters, the Indiana Supreme Court Disciplinary Commission recently issued Advisory Opinion #1-22. The opinion addresses a lawyer’s ethical obligations when making public comments on pending matters and offers advice on how to avoid common pitfalls.

**CLIENT CONSENT – PROFESSIONAL CONDUCT RULE 1.6(A)**

Before making a public statement about a pending legal matter, an attorney should obtain client consent to release the message. Without this consent, an attorney runs the risk of violating Indiana Professional Conduct Rule 1.6(a), which generally prohibits a lawyer from revealing “information relating to the representation of a client unless the client gives informed consent [or] the disclosure is impliedly authorized in order to carry out the representation...”

The recent Oregon case of In re Conduct of Conry demonstrates the ethical perils of attorneys posting social media messages about client matters. In Conry, after a former client lambasted an attorney’s handling of his immigration matter, the attorney issued an online retort in which he revealed the client’s full name and criminal convictions, both of which had not been previously disclosed online. The Oregon Supreme Court publicly reprimanded the attorney, finding the attorney had improperly disclosed information relating to his representation of the client.

While Conry involved the release of confidential information about a former client, the case also serves as a cautionary tale for attorneys handling current clients’ information in the social media realm. Careless social media posts made without client consent may subject an attorney to ethical liability.

**PRETRIAL PUBLICITY – PROFESSIONAL CONDUCT RULE 3.6**

Even with client consent, an attorney still should consider the wisdom of issuing a public statement. To stay within the ethical bounds of Indiana Professional Conduct Rule 3.6, an attorney must be aware of the typical ethical pitfalls that can arise from issuing public statements.

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"But, with power comes responsibility, as not all public speech uttered or written in the hopes of persuading potential jurors or future clients falls within the bounds of ethical conduct."

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**Rule 3.6’s General Framework**

Indiana Professional Conduct Rule 3.6 is divided into four parts. Subsection (a) generally prohibits a participating attorney from making extrajudicial statements about cases that will have a substantial likelihood of materially prejudicing a legal proceeding. For an attorney’s statement to violate this provision:

1. The attorney is or has participated in the investigation or litigation of the matter;
2. The statement is outside the courtroom setting (extrajudicial);
3. The statement is disseminated publicly, and the attorney reasonably should have known that would occur; and
4. The statement is one that the attorney should know has a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

The test for prejudice is not whether actual prejudice results from a public comment, but rather whether there is a likelihood the specific statement, at the time it is made, will cause prejudice. By only restricting attorney extrajudicial speech that will have a substantial likelihood of...
materially prejudicing a proceeding, Rule 3.6 strikes a balance between protecting the right to a fair trial and an attorney’s right of free speech.9

Subjects that are presumptively considered to have a “substantial likelihood of materially prejudicing” a proceeding are listed in subsection (d) of Rule 3.6.10 Subsection (b) then sets forth items that fall into the “safe harbor” of public commentary and do not run afoul of Rule 3.6.11

Subsection (c) of Rule 3.6 allows an attorney to make responsive extrajudicial statements (even about subjects that normally fall into one of the rebuttal presumption categories), but only if: 1) a reasonable attorney would conclude the statements are necessary to combat negative publicity; 2) the negative publicity was not initiated by the attorney’s client; and 3) the statements are limited to only what is necessary to mitigate the adverse publicity.12

Ethical Pitfalls

Of the viable grievances the commission receives regarding Rule 3.6 violations, most involve statements that are rebuttably presumed to be materially prejudicial under Rule 3.6(d). Many of these grievances raise concerns about attorney comments during media interviews (or press conferences) about the credibility of an opposing party or key witness or that express an opinion on the guilt of a criminal defendant (or suspect); both of which fall into the rebuttal presumption category because of their potential to contaminate a jury pool. Likewise, these grievances often detail public statements containing inflammatory language and hyperbole. An attorney’s use of invective language in public statements is especially likely to draw ethical scrutiny.

Another ethical pitfall for attorneys is making extrajudicial comments about inadmissible evidence or test results. Referring to examination results or the refusal to submit to an examination, such as a polygraph, are among the items that are rebuttably presumed to be materially prejudicial. However, an attorney’s statements about such evidence may fall within the safe harbor exception if the information is in a public record. For instance, an attorney could reference a party’s DNA test results if the information was contained in a probable cause affidavit or a publicly accessible state report.

Two cautions for attorneys relying on this exception. Because lawyers often learn through the discovery process damaging information about opponents that would prejudice potential jurors if released in pretrial publicity, an attorney would be wise to verify that a document is in the public record before referencing it in public statements. Information is within the public record if it is of the type “which an ordinary citizen would have lawful access.”13 Accordingly, items filed in case files would be considered “public records,” but material on advanced background checks that can only be accessed through specialized logins or limited access searches would not.

Attorneys also should be careful not to morph a public statement that begins by referencing a public document into one that is overshadowed by the attorney’s opinions about the opposing party’s

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How the Global Pandemic Can Inspire Us to Be Better Attorneys

By Amy Van Ostrand

We all hope for a day when the COVID-19 global pandemic will fully recede into the shadows, allowing the world to take stock of the ordeal’s wrecking-ball impact to personal and professional lives. But what if the crucible the pandemic has forced us through could inspire us to be better attorneys? If we work to build resilience – the capacity to recover from difficulties – in our clients and ourselves, we can emerge from the pandemic with deeper attorney-client relationships and the ability to produce better outcomes for our clients.

The pandemic has caused challenges for attorneys and clients in all areas of law. I represent people who have been injured, and families of people who have died, due to another’s negligence. The pandemic has created extra barriers for them. It’s harder for them to access medical care for their injuries. Their jury trials are postponed (which insurance companies leverage to offer lower pre-trial settlements). More motorists are driving without insurance, due to economic strain, and when they cause injuries, there is often no insurer to compensate the victim. Universal challenges to all areas of law abound, with trials delayed, in-person communications stymied, and, too often, justice deferred.

What’s the solution? It may be, in part, to build our and our clients’ capacity to adapt, grow through adversity, and bounce back from setbacks – namely, to be resilient. As attorneys, we’re taught to anticipate what can “go wrong,” which can descend into pessimism and become the enemy of resilience. The good news, however, is that we can strengthen resiliency skills in ourselves and others. The United States Army developed a “Master Resilience Training Program” in 2009, to teach drill sergeants resiliency skills that they could pass down to soldiers. The program encourages soldiers to use optimism when encountering adversity; to view setbacks as temporary and changeable, as opposed to permanent or out of their control; and to resist engaging in catastrophic thinking. The program emphasizes that resilience is not a “trait,” but rather, a set of skills and practices that we can all grow.

It’s important that attorneys begin by following the advice we learn from flight attendants: we need to put our own oxygen masks on first, before helping the clients who depend on us. We need to strengthen our own resiliency skills. We should remind ourselves that we’re adaptable in how we advance our clients’ interests and can leverage video conferencing and other technology to move their cases forward. We should recognize that the pandemic has given rise to
opportunities for us to represent clients in a way that’s more convenient for them, with many of their depositions, mediations, and court appearances occurring from the safety of their homes. We should seize the moment the pandemic has created for us to be encouragers, as well as advocates, for our clients, leading to deeper and more productive relationships with them.

As attorneys, we have several tools in our arsenal to help clients build their resiliency skills as well.

First, we can reassure clients that we’re adaptable, and that we’ll use video conferencing technology, phone calls, e-mails, texting, online document signing services, and other technology to meet their needs as effectively as we did before the pandemic. For many clients, the online legal services model that the pandemic has necessitated is welcome, as it allows clients with health concerns to participate in meetings, depositions, mediations, and hearings from the safety of home, avoiding the costs and anxiety many clients associate with traveling to a lawyer’s office or courthouse. We can share our confidence with clients that the pandemic will not prevent us from achieving the best possible outcome for their case.

Second, we can nourish our relationships with clients, to fortify them as we handle their case during these unprecedented times. It is more important than ever that our clients are able to reach us easily, that we communicate with them clearly and frequently, and that we take the time to truly learn their stories and understand how their legal issues are affecting their lives. Clients often call us not for legal counsel, but for an ear. In actively listening to them, we can help them be resilient in weathering the extra challenges the pandemic has posed.

Third, we can suggest to clients that they focus on being solutions-oriented in the way they experience their case, rather than allowing the pandemic to foster a feeling of helplessness. For example, when personal injury clients express worry that they may be exposed to COVID-19 if they seek out treatment for the injuries their accident caused, we can recommend they focus on solutions, such as requesting virtual medical appointments, obtaining a vaccine before pursuing treatment, and wearing a mask at medical appointments.

Finally, we can help our clients build resilience by nudging them to take breaks from thinking about their cases and to trust that we are taking care of their legal matters. Taking time to focus on things that give their lives meaning will help sustain them through the extra stressors the pandemic has introduced.

Metaphors for resilience can be found all around us. One of my favorite novels is, “A Tree Grows In Brooklyn,” which Betty Smith wrote in 1943. It’s about a young woman growing up in poverty in a tenement apartment in Brooklyn, New York, under the shade of a tree that becomes a symbol for resilience. Smith writes that the tree receives no sun, only receives water when it rains, and grows out of “sour earth,” yet grows lushly and thrives, “because its hard struggle to live is making it strong.” Like the eponymous tree in the novel, we and our clients can use resilience during and beyond the pandemic to take root, bloom, and rise.

Amy Van Ostrand handles wrongful death and personal injury cases at Rowe & Hamilton in Indianapolis. She has worked as a litigator in Indiana for more than 20 years.
MARCH CASES DISCUSS MECHANIC’S LIENS, MEDICAL PROVIDERS, AND MARITAL PROPERTY

In March, the Indiana Supreme Court decided 6 civil cases and granted transfer in one civil case. The Indiana Court of Appeals issued 14 published civil opinions.

INDIANA SUPREME COURT

A MATERIAL SUPPLIER CAN HAVE A MECHANIC’S LIEN WHEN IT FURNISHES MATERIALS FOR A PROJECT, REGARDLESS OF WHETHER THE PROJECT TAKES PLACE

In Service Steel Warehouse Co., L.P., v. United States Steel Corp., – N.E.3d –, No. 21S-CC-408, 2022 WL 713361 (Ind. March 10, 2022), the Indiana Supreme Court held the mechanic’s lien statute requires only that a supplier furnish materials for a project to assert a lien on the project.

United States Steel contracted with Carbonyx, Inc., to build facilities in Indiana. Troll Supply contracted in turn with Carbonyx to fabricate steel for the project. Service Steel Warehouse then sold steel to Troll Supply for the project, but Troll Supply never performed work at the project site and never paid Service Steel for the steel.

Service Steel sued U.S. Steel to foreclose on a mechanic’s lien against the project site. The trial court granted
summary judgment for U.S. Steel, finding the lien to be supplier-to-supplier based. The Court of Appeals reversed the trial court, finding the mechanic’s lien statute does not require subcontractors to perform on-site work. The Indiana Supreme Court affirmed the appellate court’s decision. The court disapproved of a line of other appellate court decisions, finding that a supplier’s lien rights, as broadly established by statute, do not depend on whom it supplies.

**AS A MATTER OF FIRST IMPRESSION, A NON-HOSPITAL MEDICAL ENTITY HOLDING ITSELF OUT AS A HEALTH CARE PROVIDER MAY BE HELD VICARIOUSLY LIABLE FOR THE NEGLIGENCE OF ITS APPARENT AGENTS**

Harold Arrendale went to American Imaging to get MRIs. American Imaging is not a hospital but an outpatient diagnostic imaging center that contracts with radiologists to read MRIs on an independent contractor basis. Under this contract, American Imaging sent Arrendale’s MRIs to one of those independent radiologists for review and interpretation. The radiologist was never present at American Imaging, but his reports and conclusions appeared on American Imaging letterhead, giving no indication of his independent contractor relationship. Arrendale later sued American Imaging for failing to diagnose and treat his condition. American Imaging moved for summary judgment, arguing it was not liable for Dr. Boutselis’s actions because apparent agency principles only apply to hospitals. The trial court granted American Imaging’s motion.

The Court of Appeals reversed, holding for the first time that apparent agency principles may apply to non-hospital diagnostic imaging facilities. The Indiana Supreme Court granted transfer and came to the same conclusion in *Arrendale v. American Imaging & MRI, LLC*, 870879 (Ind. March 24, 2022): apparent agency principles apply to non-hospital medical entities that provide patients with healthcare. The Supreme Court declined to apply its holding prospectively, reasoning that patients’ increased reliance on non-hospital medical entities necessitated a change to agency law.

Darci Wilson sued the physician group, Athletico, and the physical therapist for malpractice after receiving care and therapy at the physician group’s facility while being unaware that Athletico employed the therapist. The trial court entered summary judgment for the physician group, finding it could not be held liable for the therapist’s actions without evidence of an employment or contractual relationship. The Court of Appeals affirmed, and the Indiana Supreme Court granted transfer.

In *Wilson v. Anonymous Defendant*, 871368 (Ind. Mar. 24, 2022), the Supreme Court held that although a physician group cannot be held vicariously liable for the physical therapist’s alleged negligence absent evidence of any legal relationship, apparent authority principles apply in the context of hospitals and non-hospital medical centers. Thus, the physician group could be liable for the physical therapist’s alleged negligence if its communications led Wilson to believe the physical therapist was providing treatment as an agent of the physician group.

**AS A MATTER OF FIRST IMPRESSION, A MEDICAL PROVIDER MAY BE HELD LIABLE FOR THE ACTS OF AN APPARENT AGENT WHO CAUSES A THIRD PARTY TO RELY ON SUCH A RELATIONSHIP**

In September 2008, an orthopedic physician group and a physical therapy provider executed a staffing agreement requiring the physical therapy provider to supply qualified personnel to staff the physician group. Athletico then acquired the physical therapy group and continued operating under the same agreement.

**A TRIAL COURT DOES NOT ABUSE ITS DISCRETION SO LONG AS IT EXPRESSLY CONSIDERS ALL MARITAL PROPERTY AND OFFERS SUFFICIENT JUSTIFICATION TO REBUT THE PRESUMPTION OF EQUAL DIVISION**

In *Roetter v. Roetter*, 182 N.E.3d 221 (Ind. 2022), the Indiana Supreme Court held the trial court did not abuse its discretion in its award of spousal maintenance or in its division of property.

Elizabeth and Michael Roetter married in May 2014. Five years
later, in divorce proceedings, the parties disputed spousal maintenance and distribution of the marital estate. The trial court granted Elizabeth’s request for spousal maintenance and awarded her 55% of the “net marital estate,” which the trial court found was an appropriate departure from the presumptive equal division.

The Court of Appeals affirmed in part and reversed in part, finding the trial court abused its discretion in creating a “gross disparity” that “skewed” in Michael’s favor when dividing the marital estate, because allocations from retirement accounts and student-loan debt resulted in a 75/25 split in the husband’s favor. The Indiana Supreme Court granted transfer and although it suggested it had a better approach, it could find no abuse of discretion because the record showed that the trial court considered all assets and liabilities and offered sufficient findings.

"...the Indiana’s Racketeering Forfeiture Statute does not permit the court to order seized funds released to the forfeiture defendant..."

Lake Imaging provided radiology services to patients of Franciscan Alliance under a contract providing for Lake Imaging to indemnify Franciscan from alleged liability resulting from Lake Imaging’s negligence. Shaughnessy, a patient at Franciscan, died after Lake Imaging interpreted his CT scans. Franciscan settled claims brought by Shaughnessy’s sons and then sought indemnity from Lake Imaging. The trial court dismissed Franciscan’s claim, finding it lacked subject-matter jurisdiction because the Medical Malpractice Act required Franciscan to present its claim to the Department of Insurance before filing suit. The Court of Appeals affirmed.

The Supreme Court granted transfer in *Lake Imaging, LLC v. Franciscan Alliance, Inc.*, 182 N.E.3d 203 (Ind. 2022), holding that breach of contract claims for failure to indemnify need not follow the procedures contained in the act because it applies only to a patient or patient representative who has a claim for bodily injury or death resulting from malpractice. The Supreme Court noted that neither the text of the act nor precedent supports categorizing Franciscan as a “patient” and expanding the act’s applicability to a contract claim at issue conflicts with the act’s purpose.

*a freeze*

INFORMATION RE FTP ACT

Daniel Pulliam is a partner in the business litigation group at Faegre Drinker Biddle & Reath LLP. He graduated from Butler University in 2004 and Indiana University Robert H. McKinney School of Law in 2010, after which he clerked for Judge John Daniel Tinder on the U.S. Court of Appeals for the Seventh Circuit.

Maria Downham is an associate in the business litigation group at Faegre Drinker Biddle & Reath LLP. She graduated from University of Indianapolis in 2015 and University of Virginia School of Law in 2020. After graduating from UVA, she served as a law clerk in the U.S. District Court for the Southern District of Indiana to the Honorable James Patrick Hanlon.
Continued from page 15...

5. DON’T BE PARTIAL

Conduct a fair and impartial investigation. An investigation that will withstand challenges and publicity typically embraces the following characteristics:

1. **Neutrality.** The investigator must not prejudge the outcome or have an actual or apparent conflict of interest or bias.
2. **Fairness.** Fairness depends on the circumstances, but at a minimum, parties must have the opportunity to provide all relevant information and have the investigator consider it.
3. **Thoroughness.** The investigator should make every reasonable effort to uncover all information necessary to reach and support the correct conclusion. 

6. BE PROPER

Untrained investigators often make the mistake of applying the wrong legal standard by improperly placing a burden on the complainant to identify eyewitnesses or “hard” evidence such as emails or text messages. In other words, these investigators are looking for proof beyond a reasonable doubt. In the absence of such proof, these investigators may incorrectly report findings as inconclusive “he said – she said” situations. This ignores that the complainant is a witness and harassment often occurs when others are not present.

The appropriate standard is the one a judge or jury would apply to the complainant’s allegations – preponderance of the evidence (more likely than not). It is the investigator’s responsibility to apply this standard, seek out corroboration, and make credibility determinations when faced with conflicting statements. The EEOC offers the following factors for making credibility determinations:

- **Inherent plausibility.** Is the statement believable on its face? Does it make sense?
- **Demeanor.** Did the person seem to be telling the truth or lying?
- **Motive to falsify.** Does the person have a reason to lie?
- **Corroboration.** Are there witnesses to the events or who otherwise corroborate the events (such as people who saw the person soon after an alleged incident or with whom the

"Effective action leads to confidence in the policies and an organization’s commitment to eradicating harassment and discrimination..."
person discussed the incidents)? Is there physical evidence that corroborates a party’s statement?

- **Past record.** Does the alleged perpetrator have a history of similar behavior in the past?

No single factor is determinative. For example, the absence of eyewitnesses to alleged harassment does not defeat the complainant’s credibility since harassment often occurs behind closed doors. Similarly, the fact that an alleged perpetrator engaged in similar behavior in the past does not necessarily mean he or she did so again.  

### 7. BE PRACTICAL

If the investigation reveals inappropriate conduct, an organization must take effective steps reasonably likely to end it. In other words, it must enforce its policies. When the complainant alleges harassment, an employer is legally obligated to take reasonable steps to prevent future harm. Actions likely to end harassment depend on the circumstances and gravity of the conduct alleged. Steps that would be reasonable in response to taunting or insults would likely be unreasonable in response to death threats or physical violence. Measures that stop the harassment will generally be considered effective unless they disadvantage the complainant. For example, a transfer of the complainant to a position with less pay or promotional opportunity is not effective even if it stops the harassment.

Effective action leads to confidence in the policies and an organization’s commitment to eradicating harassment and discrimination, which leads to people being comfortable speaking up, which allows the organization to address issues before they move outside the organization and into court, social media, or the front page.

Catherine Duclos is an Indianapolis attorney whose practice is dedicated to conducting investigations of workplace harassment, discrimination, and employee disputes. She has over 25 years of human resources and employment law experience.

### FOOTNOTES:


4. See Cooper, “‘The library is run like a plantation’; Indianapolis Public Library leadership accused of racism,” *Indianapolis Recorder* June 2, 2021; Contreas, “‘Racism is concentrated at the top’: Workers demand resignation of Indy Public Library CEO,” *Indianapolis Star*, June 22, 2021.

5. Dunn v. Washington County Hospital, 429 F.3d 689, 691 (7th Cir. 2005). See also Faragher v. City of Boca Raton, 524 U.S. 775, 118 S. Ct. 2275, 2292 (1998) (Title VII’s primary objective “is not to provide redress but to avoid harm.”)

6. Dunn v. Washington County Hospital, 429 F.3d 689 (7th Cir. 2005).

7. See, e.g., United States Equal Employment Opportunity Commission v. Washington County Hospital, 376 F.3d 541 (7th Cir. 2004).
Commission, “Pancake Chain IHOP to Pay $700,000 to Settle Sexual Harassment and Retaliation Lawsuit,” EEOC Press Release, February 20, 2022 (employer policy required written complaint to corporate office within 72 hours of the harassing incident, which EEOC alleged deterred reporting, removed responsibility of local supervisors to correct harassment, and emboldened harassers).

8. See Lambert v. Peri Formworks Sys., Inc., 723 F.3d 863, 867-868 (7th Cir. 2013) (knowledge of lead sufficient to put employer on notice).


10. See, e.g., Hall v. City of Chicago, 713 F.3d 325 (7th Cir. 2013) (summary judgment for employer reversed where supervisor took no action in response to employee’s earlier complaints and labeled her a troublemaker); EEOC v. Management Hospitality of Racine, Inc., 666 F.3d 422 (7th Cir. 2012) (rational jury could have found employer’s policy and complaint mechanism were not reasonably effective in practice because managerial employees did not perform their duties under the policy, often ignored employee complaints, and delayed investigations).


12. Porter v. Erie Food International, Inc., 576 F.3d 629, 637 (7th Cir. 2009). See also Cooper-Schut v. Visteon Auto. Systems, 361 F.3d 421, 428 (7th Cir. 2004) (employer’s actions reasonable when it promptly began an investigation that included interviewing employees in plaintiff’s department and retaining expert to analyze handwriting); Savino v. C.P. Hall Co., 199 F.3d 925, 933 (7th Cir. 1999) (employer reasonably attempted to correct and prevent harassment when it promptly investigated and sought to remedy the problem); Hunt v. Wal-Mart Stores, Inc. (employer’s actions reasonable when it promptly investigated and took remedial action); Dunn v. Washington County Hospital, 429 F.3d 689, 690 (7th Cir. 2005) (proof of reasonable care is an affirmative defense).


14. See, e.g., Casiano v. AT&T Corp., 213 F.3d 278 (5th Cir. 2000) (summary judgment affirmed for employer who suspended alleged harasser in part as a result of using two “specialists” to conduct its investigation); Smith v. First Union Nat’l Bank, 202 F.3d 234 (4th Cir. 2000) (summary judgment for employer reversed on finding of inadequate investigation where investigator had never before conducted a sexual harassment investigation).

15. See Porter at 637 (“A prompt investigation is the hallmark of
16. See U.S. v. Ortland, 109 F.3d 539, 544 (9th Cir. 1997) (“The privilege which protects attorney-client communications may not be used both as a sword and a shield.”); Williams v. United States Environmental Services, LLC, No. 15-168, 2016 WL 617447, at *5 (M.D. La. Feb. 16, 2016) (“Defendant has cited to the investigation . . . to show that it exercised reasonable care to promptly correct any harassing behavior . . . . By relying on its investigation to defend against Plaintiff’s allegations, Defendant has waived any applicable privilege with respect to not only the investigative report, but any underlying documents.”); Angelone v. Xerox Corp., No. 09-6019, 2011 WL 4473534, at *2 (W.D.N.Y. Sept. 26, 2011) (when a defendant affirmatively invokes a defense premised, in whole or in part, on the results of an internal investigation, the defendant waives the attorney-client privilege and work product protections for not only the report itself, but for all documents, witness interviews, notes, and memoranda created as part of and in furtherance of the investigation); Reitz v. City of Mt. Juliet, 680 F. Supp. 2d 888, 892–93 (M.D. Tenn. 2010) (defendant cannot use the report as a sword by premising its defense on the report, then later shield discovery of documents underlying the report by asserting privilege or work-product protection); Musa-Muaremi v. Florists’ Transworld Delivery, Inc., 270 F.R.D. 312, 317–18 (N.D. Ill. 2010) (even assuming, arguendo, that investigation documents are attorney-client privileged or protected work product, any such protection was waived by the defendant’s assertion of the investigation as part of its defense); Walker v. County of Contra Costa, 227 F.R.D. 529, 535 (N.D. Cal. 2005) (“Where a party puts the adequacy of its pre-litigation investigation at issue by asserting the investigation as a defense, the party must turn over documents related to that investigation, even if they would ordinarily be privileged.”)


18. See, e.g., Castelluccio v. Inter. Bus. Machines Corp., 2013 WL 6842895 (D. Conn. Dec. 23, 2013) (employee’s motion to exclude employer’s internal investigation granted because report was unduly prejudicial in that it was one-sided, failed to include evidence favorable to employee, and appeared to have been undertaken for the purpose of exonerating the employer rather than determining if the employee was treated fairly).

19. See, e.g., May v. Chrysler Group, LLC, 716 F.3d 963 (7th Cir. 2013) (jury had ample evidence to conclude employer did not adequately respond to harassment where investigator did not interview any witnesses on employee’s list).

20. See, e.g., Hunt v. Wal-Mart Stores, Inc., 931 F.3d 624, 630 (7th Cir. 2019) (summary judgment for employer affirmed where investigation was prompt and thorough).


22. See Artis v. State of Ind., 19 F.3d 21 (7th Cir. 1994) (the plaintiff in a Title VII case must establish by a preponderance of the evidence the existence of discrimination).

23. Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, U.S. Equal Employment Opportunity Commission, June 18, 1999, Section V, Subsection C (“If there are conflicting versions of relevant events, the employer will have to weigh each party’s credibility. Credibility assessments can be critical in determining whether the alleged harassment in fact occurred.”)


25. Porter v. Erie Foods Int’l., Inc., 576 F.3d 629, 637 (7th Cir. 2009) (“In assessing the corrective action, our focus is not whether the perpetrators were punished by the employer, but whether the employer took reasonable steps to prevent future harm.”); Saxton v. AT&T Co., 10 F.3d 526, 536 (7th Cir.1993) (Title VII requires steps reasonably likely to stop the harassment.)


27. May at 971.


29. See, e.g., Hostetler v. Quality Dining, Inc., 218 F.3d 798, 811 (7th Cir. 2000) (“A remedial measure that makes the victim of sexual harassment worse off is ineffective per se. A transfer that reduces the victim’s wage or other remuneration, increases the disamenes of work, or impairs her prospects for promotion makes the victim worse off.”)
Continued from page 27...

character or conduct. The best approach is to limit remarks to quoting directly from the public record.

Lastly, attorneys can avoid ethical mishaps by being circumspect about responsive statements, both in social media postings and to the traditional press. Although the Rules of Professional Conduct grant attorneys latitude to make public statements to counteract adverse publicity, attorneys’ responsive statements should be limited to what is necessary to mitigate the effects of the negative publicity. Attempts to expand or escalate the matter likely will draw ethical scrutiny.

SPECIAL RESPONSIBILITIES OF A PROSECUTOR – RULE 3.8(F)

Because of their unique role in the criminal justice system, prosecutors have additional ethical responsibilities with respect to public statements. Indiana Professional Conduct Rule 3.8(f) prohibits prosecutors from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused. Under this provision, prosecutors are permitted to make public statements, even if they have negative consequences for a defendant, if the information is necessary to inform the public about the prosecutor’s actions or has a legitimate law enforcement purpose.

CLOSING

When considering whether to make an extrajudicial statement to the public, an attorney should be cognizant of the importance of maintaining client confidences and preserving the fair and impartial adjudication of legal disputes. Reviewing Advisory Opinion #1-22 can help lawyers maintain their responsibility to ethical speech.

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

FOOTNOTES:

2. Ind. Prof. Cond. R. 1.6(a); see also Ind. Prof. Cond. R. 1.9(c)(2) for the duty of confidentiality owed to former clients.
3. 491 P.3d 42, 60 (Or. 2021).
4. Id. at 53.
5. Id. at 60.
7. Ind. Prof. Cond. R. 3.6(a).
10. Ind. Prof. Cond. R. 3.6(d).
11. Ind. Prof. Cond. R. 3.6(b)
12. Ind. Prof. Cond. R. 3.6(c)
14. In Brizzi, 962 N.E.2d at 1246, the Indiana Supreme Court noted, “A prosecutor’s opinion of guilt is particularly likely to create prejudice, given that his or her words carry the authority of the government and are especially persuasive in the public’s eye.”
15. Ind. Prof. Cond. R. 3.8(f).
16. Id
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