



MARCH 2023

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# RES GESTÆ

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## COVER STORY



### 12 THE ETHICS OF THREATS

*The Ethics of Threats: When Does Advocacy Cross the Line?*

By Jon R. Pactor

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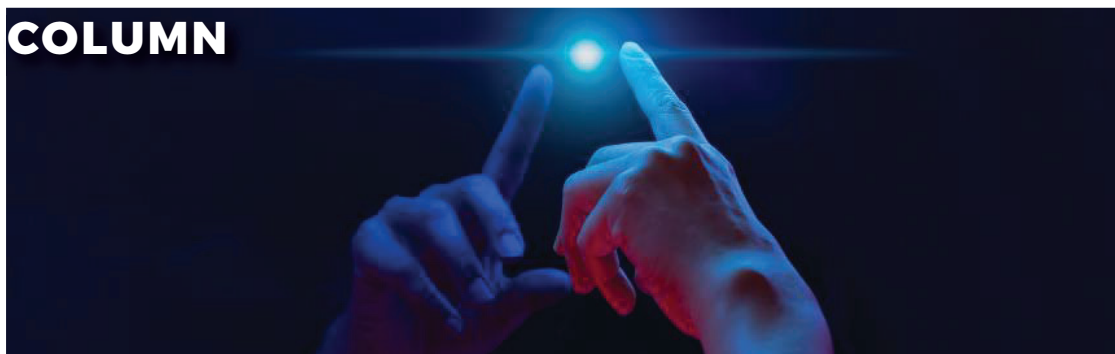
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## President's Perspective

# IF THAT MOCKINGBIRD DON'T SING

By Amy Noe Dudas

### PRESIDENT'S PERSPECTIVE

Last October, when Yankee<sup>1</sup> graced this cover, I considered the changes some states are making to our rules that seem to chip away at the core of attorney values. In doing so, I suggested that we should be open to the discussion, at least so we can save our seat at the table.

How, then, do we ensure that those granted the privilege of practicing law maintain those amorphous but crucial traits like emotional intelligence and self-awareness? How do we know that lawyers will be able to communicate tactfully (and therefore productively) with their clients, opposing counsel, and judges? Even though we have continuing education requirements to stay current in the law (and for those of us of a certain age, we've all seen that guy in the back with the Indianapolis Star spread open in front of him), how can we be sure that those who are admitted to practice really *want* to be life-long learners?

The assessment tools used to predict success as law students and as lawyers, respectively the LSAT and the bar exam, are rightfully being scrutinized and questioned as to whether they are truly equitable measures of aptitude for law school and practice. But these tools are all we have at the moment, at least in Indiana, to ensure that those of us

who aren't disadvantaged by the inequities in the educational and social systems enter the practice with a solid working comprehension of the rules of professional conduct, legal processes, sources of law, and threshold legal concepts. But how do we test for those qualities that can't really be taught but are just as important to good lawyering as regurgitating the elements of negligence?



Well, we do have the Rules of Admission to the Bar and the Discipline of Attorneys, right? Rule 13 tells us that, minimally, one must receive a J.D. from an ABA-accredited law school that includes at least two cumulative semester hours of professional responsibility instruction.<sup>2</sup> And before that new J.D. can even take the bar exam, she must *prove*

that she "possesses the requisite good moral character and fitness to practice law."<sup>3</sup>

Maybe that's how we sort the Finches<sup>4</sup> from the vultures.

What many laypersons don't know (and many lawyers forget), is that we don't get to become lawyers unless our highest court deems us in possession of good moral character and fitness to practice law. Rule 12 tells us that "good moral character" includes "the qualities of honesty, fairness, candor, trustworthiness, observance of fiduciary

responsibility, and the laws of this State and of the United States, and a respect for the rights of other persons and things, and the judicial process.” “Fitness” includes “the physical and mental suitability... to practice law in Indiana.”<sup>5</sup>

That last part’s not vague. *At all.*

Well, keep reading. “In satisfying the requirements of good moral character and fitness, applicants should be persons whose record of conduct justifies the trust of clients, adversaries, courts, and others

with respect to the professional duties owed to them, and whose record demonstrates the qualities of honesty, trustworthiness, diligence, or reliability.”<sup>6</sup>

Your character and fitness interviewer was looking for evidence of crimes, cheating, lying, workplace misconduct, deception, misrepresentation, abuse of legal process, financial neglect, issues of emotional or mental instability, and unaddressed substance dependence, among other things.

That’s why the application to take the bar exam is so very, very, involved. You may recall that you had to disclose “with full candor of

**"The traits that stand between new law school graduates and the bar exam should remain vital as we're considering creative ways to solve the access to justice gap caused by inequitable pipelines, lawyer deserts, and the increasing cost of legal services."**



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any facts which bear, *even remotely*, upon the question of... character and fitness...”<sup>7</sup> And if you don’t disclose? That’s almost worse, even (maybe especially) if you just “forgot.”

That’s why we had to submit documentation of every single traffic citation. Because if you’re twenty-six years old and have already racked up ten speeding tickets, you might be showing a disregard for the law. In fact, a history of frequent traffic infractions may be one of the *best* indicators of good moral character and fitness to practice law. After all, how fast you drive (considering the low likelihood that you’ll be the one pulled over) says a lot about your propensity for following the rules when no one is watching.

So if your past conduct includes instances of multiple infractions, youthful indiscretions, or a pattern of irresponsible spending, those that scrutinize your life in consideration of whether you will be granted the privilege of taking the bar exam may very well take a moment to consider whether, deep down, you embody those nebulous traits that ensure our profession remains a noble one.<sup>8</sup>

We know that the practice of law, in Indiana at least, includes the giving of legal advice, interpreting and applying statutes and case law, gathering and introducing admissible evidence, examining and cross-examining witnesses, acting on behalf of others in legal negotiations, and applying techniques of advocacy in adversarial proceedings.

And the fundamental values of our identity as lawyers include, in part, those qualities that define good moral character and fitness to practice law. The traits that stand between new law school graduates

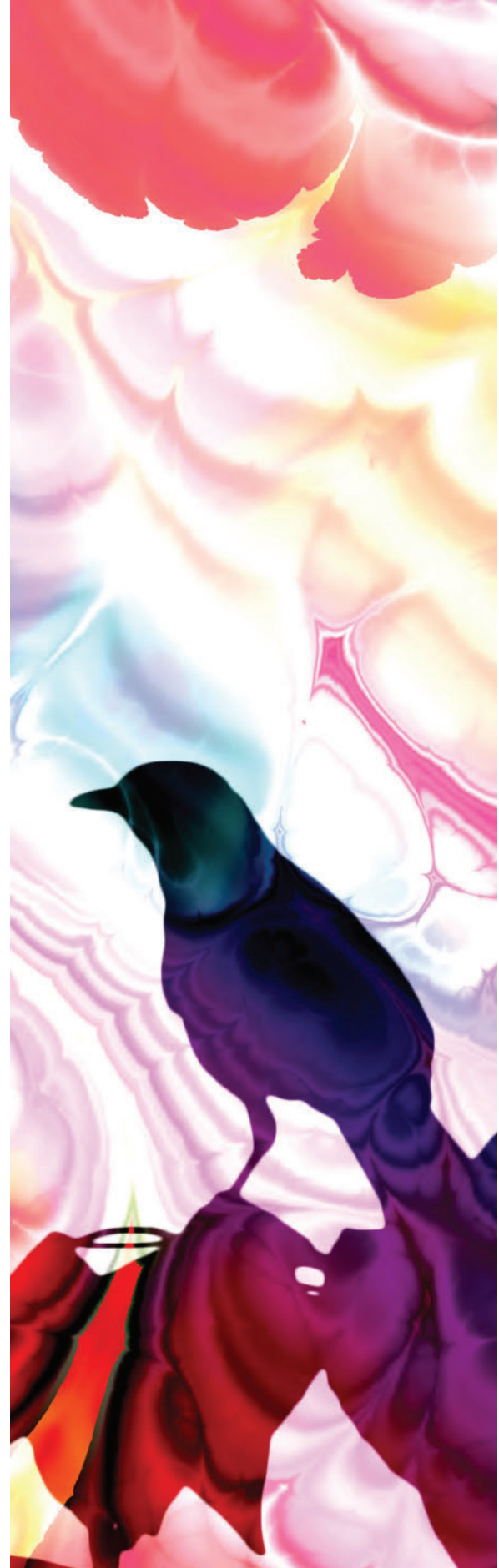
and the bar exam should remain vital as we’re considering creative ways to solve the access to justice gap caused by inequitable pipelines, lawyer deserts, and the increasing cost of legal services. We must not give short shrift to the inherent values we know lawyers must have but aren’t directly taught before making changes to our admissions practices and rules of conduct.

Scout reminded us that it’s a sin to kill a mockingbird. Mama said she’d buy us a diamond ring if that mockingbird wouldn’t sing. Perhaps the looking glass that comes next is where we pause to look back at ourselves and insist the provision of legal services maintains a commitment to those core values.

But I hear billy goats are kind of fun, too. 🐐

#### FOOTNOTES:

1. Also known on Instagram as “Wiener Dog Extraordinaire” @yankee\_dudas
2. Ind. Admission and Discipline Rule 13(4)
3. Admis. Disc. R. 12(2)
4. Atticus or otherwise. Many thanks to Andy for many things, but today for helping me work that one out.
5. Admis. Disc. R. 12(2)
6. *Id.*
7. *Id.* (emphasis added).
8. Rule 12, Section 3 also makes it clear that those advocating the overthrow of the government by “force, violence, or other unconstitutional or illegal means” have no business practicing law in Indiana.





# ACCOMPLISH YOUR 2023 GOALS THROUGH AN ISBA SECTION OR COMMITTEE

---

**A**s we head further into the new year, it's time to check in on those 2023 goals. Are you meeting your expectations? Have you fallen off the bandwagon? (All those guilty of overestimating how many resolutions you'll actually be able to cross off raise your hands.)

Whether you're still pushing forwards or lagging a little behind, ISBA sections and committees are here to provide you with the connections, education, and leadership opportunities that can help you accomplish your professional goals. And with over 50 total sections and committees, there are many ways to get involved.

Sections are typically related to substantive practice areas. Ranging everywhere from agricultural law to



utility law, sections are where you can find practitioners who understand the ins and outs of your field and who are working to improve it. Members often pay a small dues fee ranging between \$10 and \$25 to help cover the cost of publications, CLE, and events.

Committees are typically related to topics that cross practice areas. These are where you find members passionate about the same topics as you (like diversity, women in the law, legal ethics, and well-being), and who are dedicated to making the profession stronger in these areas. Committees are free for all members to join.

Joining a section and/or committee provides multiple benefits, including the opportunity to:

- Have discussions with members, ask questions, and/or brainstorm solutions through an online discussion board/email distribution list;
- Stay up to date on the profession through email newsletters with practice area updates;
- Fine-tune your knowledge through CLE, group discussions, and more;
- Network with other practicing attorneys through section and committee programs (and often receive larger discounts to those programs);
- And be a leader in your practice area through joining a section's council or volunteering for working groups within a committee. (Council members meet regularly to discuss leadership of the section and consider proposed legislation relevant to the practice area;

committees do not have councils).

So if any of your new professional goals involved learning, connecting, and/or leading more, check out the list of ISBA sections and committees at [inbar.org/sections-committees](http://inbar.org/sections-committees) and see how they can help bring you success in 2023 and beyond.

There you will also be able to find the ISBA staff liaison for each section or committee. If any catch your interest, or if you'd like to get more involved in your current sections and committees, contact that group's liaison.

Best wishes as we move further into the new year! 🌱

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# **THE ETHICS OF THREATS: WHEN DOES ADVOCACY CROSS THE LINE?**



**By Jon R. Pactor**

**T**hreats are common in the practice of law. Attorneys may threaten to bring civil lawsuits, criminal charges, sanctions, grievances against attorneys and judges, and complaints with administrative agencies. Legal ethics draw a line between permissible and impermissible threats. The problem for lawyers is the line is not often bright. While some threats, like the threat to do bodily harm, are obvious ethical violations, others are not. Which threats cross the line and violate the Rules of Professional Conduct? This article offers guidance for attorneys in answering that question.

### WHAT IS A THREAT?

Determining whether a statement or conduct is a threat is a factual question. In most cases, one does not say, "I am threatening you." Instead, the recipient of an expression interprets the statement or conduct to be threatening and replies with umbrage: "Are you threatening me?" or "Don't threaten me!"

The Rules of Professional Conduct do not define "threat." Definitions can be found elsewhere. Two definitions that may inform the analysis are presented here. First, *Merriam-Webster's* online dictionary defines threat as "an expression of intention to inflict evil, injury, or damage." On its face, conduct meeting this definition may appear to invoke a violation of the Rules of Professional Conduct.

Second, the definition of a threat in Indiana's criminal statute on intimidation is also useful because a violation of a criminal statute, even without a conviction, likely violates the Rules of Professional Conduct. This statute, Ind. Code § 35-45-2-1, defines "threat" to mean an expression, by words or action, of an intention to:

- (1) unlawfully injure the person threatened or another person, or damage property;
- (2) unlawfully subject a person to physical confinement or restraint;
- (3) commit a crime;
- (4) unlawfully withhold official action, or cause such withholding;
- (5) unlawfully withhold testimony or information

with respect to another person's legal claim or defense, except for a reasonable claim for witness fees or expenses;  
(6) expose the person threatened to hatred, contempt, disgrace, or ridicule;  
(7) falsely harm the credit or business reputation of a person; or  
(8) cause the evacuation of a dwelling, a building, another structure, or a vehicle. For purposes of this subdivision, the term includes an expression that would cause a reasonable

identify a threat although neither is a prerequisite.

### **CAN DEMAND LETTERS CROSS THE LINE TO IMPERMISSIBLE THREATS?**

It is good practice for attorneys to send demand letters. Careful attorneys who send demand letters advance their clients' interests and decrease the risks of filing groundless suits. An attorney for a potential plaintiff sends a demand letter to a potential defendant that essentially says: "If you do not

**"Often, a verbal threat contains the words 'if' or 'unless.' The use of either word may help to identify a threat although neither is a prerequisite."**

person to consider the evacuation of a dwelling, a building, another structure, or a vehicle, even if the dwelling, building, structure, or vehicle is not evacuated.

Both definitions require an intent to do some harm.

The published disciplinary decisions of the Indiana Supreme Court provide little guidance on what constitutes a threat. The existence of the threat is generally uncontested in those cases. Attorneys can get some guidance, however, from the choice of vocabulary. Often, a verbal threat contains the words "if" or "unless." The use of either word may help to

pay up, my client will sue you," which under the *Merriam-Webster* definition may be an expression to cause injury or damage. States have found that routine demand letters do not violate disciplinary rules, civil law, or criminal law.<sup>1</sup> The Indiana Tort Claims Act even requires pre-suit written demands.<sup>2</sup>

Uncareful attorneys can create impermissible threats in their demand letters. In one Indiana case, an attorney's letter to opposing counsel demanded \$200,000,000 and threatened to file a disciplinary grievance against opposing counsel unless the demand was met. The Supreme Court held her threat to file



a grievance violated Prof. Conduct Rule 8.4(d) because it was prejudicial to the administration of justice. For this and other misconduct, the court suspended her license for at least 30 days without automatic reinstatement.<sup>3</sup>

A leading case from California addressed the criminal nature of a demand letter.<sup>4</sup> Flatley, a famous dancer from Ireland, sued attorney Mauro for extortion and other torts. The attorney sent a demand letter accusing the dancer of raping the attorney's client. The letter demanded \$100,000,000 (later reduced to a minimum of \$1 million) and threatened that information about immigration, taxes, and other matters would be exposed which the media worldwide would enjoy. He threatened to turn over "all pertinent information and documentation" to "appropriate authorities." Press releases would be disseminated to at least two dozen news organizations. The foregoing was a sampling, not a complete inventory, of attorney Mauro's tactics.

In a long and enlightening opinion, the California Supreme Court found Mauro's conduct was extortion as a matter of law and his words were unprotected by the U.S. Constitution or by California statute. His communications threatened to accuse Flatley of crimes and to disgrace him unless he paid a minimum of \$1 million, of which Mauro would receive 40 percent. "Evaluating Mauro's conduct, we conclude that the letter and subsequent phone calls constitute criminal extortion as a matter of law... That the threats were half-couched in legalese does not disguise their essential character as extortion."<sup>5</sup> The last sentence may provide the opinion's best guidance:





using legalese is not a safe harbor for the attorney.

Therefore, attorneys wishing to avoid getting close to the ethical line with their demand letters should not rely on legalese but should ensure they are asserting claims grounded in law and based on facts related to the dispute.

#### **CAN SEEKING DISMISSAL OF A CLAIM CROSS THE LINE TO IMPERMISSIBLE THREAT?**

Defense attorneys often want to resolve cases against their clients quickly. One way is for them to advocate that the plaintiff should dismiss a complaint. When does seeking a dismissal devolve into impermissible threats, trickery, or gamesmanship?

The Indiana Supreme Court recently suspended the license of an attorney who used threats to obtain a dismissal of a woman's pro

**"The lack of explicit prohibition in the current rules does not mean attorneys may ethically threaten criminal prosecution. Instead, the removal of that language from the old rules broadened the prohibition against threats in the new rules. Currently, threats to cause criminal, administrative, or civil action can cross the line."**

se petition for a protective order.<sup>6</sup> The attorney was representing her former boyfriend. He confronted her at her deposition with several 8-by-10 color copies of intimate photos she had sent to the boyfriend during their relationship. The attorney displayed the photos face-up on the table for everyone at the deposition to see. He asked her "why do women who seek the aid of the court send these kinds of pictures to men?"<sup>7</sup> He then asked her whether she still intended to pursue a protective order or whether there would be a "better way" to handle things than for her to be "drug through" and

"exposed in" court. She said she just wanted the man to stop harassing her.<sup>8</sup>

The attorney ended the deposition and falsely told the unrepresented woman the court reporter would prepare the transcript and submit it to the court where it would become a public record. He indicated she could stop the photos from becoming public by dismissing the petition. She replied that she wanted to dismiss the case. The attorney told her how to file for dismissal. She dismissed it immediately after leaving the deposition. The attorney later

bragged to an associate about getting a dismissal by threatening to have the photographs become part of the record.

The Supreme Court found the attorney's deception "was part of an intentional and purposeful plan he devised to coerce and bully the petitioner into dismissing her case under threat of having her intimate photos exposed."<sup>9</sup> He violated three rules: Prof. Conduct Rule 4.1(a), which prohibits knowingly making a false statement of material fact or law to a third person in the course of representing a client; Prof. Conduct Rule 8.4(c), which prohibits engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; and Prof. Conduct Rule 8.4(d), which prohibits engaging in conduct prejudicial to the administration of justice. The court suspended his license for 90 days with automatic reinstatement.

That recent decision is a reminder the Indiana Supreme Court has denounced gamesmanship in the practice of law whether in the form of threats, tricks, or other conduct. Although the word "gamesmanship" was not used in this opinion, the court had used it in other opinions.<sup>10</sup>

#### **CAN ATTORNEYS IN CIVIL MATTERS THREATEN CRIMINAL CHARGES?**

Can attorneys threaten criminal action to gain leverage in a non-criminal matter? The Code of Professional Responsibility, which was replaced by the Rules of Professional Conduct effective in Indiana on January 1, 1987, had explicitly prohibited attorneys from threatening criminal action "solely" to gain an advantage in civil litigation.<sup>11</sup> That rule's reference to

threats to report criminal conduct implied that threats to bring civil or administrative proceedings might be permissible.

The Rules of Professional Conduct gutted that rule. The new rules did not include an explicit prohibition against making threats of criminal prosecution. The lack of explicit prohibition in the current rules does not mean attorneys may ethically threaten criminal prosecution. Instead, the removal of that language from the old rules broadened the prohibition against threats in the new rules. Currently, threats to cause criminal, administrative, or civil action can cross the line.

For example, an Indiana attorney sent a cease-and-desist letter to an opposing counsel. The letter demanded a suit be dropped and attorney fees be disgorged. He threatened to file a disciplinary grievance against opposing counsel and against the judge. He also threatened a criminal complaint against opposing counsel unless his demands were met. The Supreme Court suspended the attorney for at least one year without automatic reinstatement for violation of several rules, including Prof. Conduct Rule 8.4(d).<sup>12</sup>

Likewise, a prosecutor cannot threaten to bring criminal prosecution to gain a political

**Continued on page 33...**

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# THE Q10 PROJECT: A CONNECTION STORY

*By Derrick H. Wilson*



Last year, our bar association met for the first time coming out of COVID. At that meeting, I really became aware of how disconnected our local bar had become. We were not coming to the office as much. We were not going to court as much. We were not meeting face to face as much. I also realized there were several older lawyers who had passed during COVID without having had the ability to really tell their stories. There were also younger lawyers that I really did not know at all. I decided to reach out and reconnect with some of the attorneys that I knew and connect with some of the lawyers I did not know. I created a list of ten questions I wanted to ask each attorney and started reaching out with the promise of a free lunch and hopefully decent conversation. I called it the Q10 project.

Over the next six months or so, I met with several attorneys from different practice areas and demographics. One attorney had been practicing for a few months. One had been practicing for over forty years. I told everyone that I might use this for a later article, and anything could be off record if they wanted. Almost all of the interviews involved lawyers that I would not consider to be personal friends. I was pleasantly surprised that almost everyone I invited was willing to do this program. I wanted the questions to cover personal and professional topics. I often sent the questions ahead of time so people could think about their answer. Here are the highlights from those interview questions.

## **What keeps you up at night?**

Several lawyers told me that, regardless of their years of practice, they still had anxiety about deadlines and their email inbox.



Some expressed concerns about the amount of time they spent on the business of law versus practicing law. A plaintiff's lawyer told me they were concerned about the impact of constant advertising by large plaintiff's firms. A defense lawyer expressed concern about how the lawyer's opinion about a case seemed to carry a lot less weight than it used to. One lawyer simply said "chili dogs."

**If you weren't a lawyer, what would you be?**

One person could not think of what else they would be; they always knew they would be an attorney. I heard about lawyers who would be biologists, teachers, or work with the media. Most of these other job options related to their work or educational experiences before law school. One lawyer owned a grocery store before law school and used the proceeds from the sale of that store to pay for his law school education. One lawyer said a bartender in Key West.

**What's one thing about you that nobody knows?**

I met a young lawyer who does falconry as a hobby, which I found to be fascinating. I met a lawyer who was a professional video game player in college. One lawyer worked as a television producer and met a lot of famous people in that role. I met a prosecutor who worked as a therapist before law school and would go back to that if he was not a lawyer.

**What are you passionate about—personal or professional?**

Most everyone I spoke with focused on their families and serving clients. Some focused on their hobbies—music or golf.

**What would you change about the profession and/or your job?**

Most people commented about the benefits and disadvantages of technology. They felt that technology had increased our ability to work, but also increased expectations about responding to client requests. They felt that technology means that lawyers are more isolated from their clients and other lawyers because more communications are via text or email, rather than face to face meetings. One lawyer expressed a concern that lawyers do not negotiate any more, simply expecting that mediation will resolve their matter. Not surprisingly, lawyers expressed some concerns about collegiality.

**What is one tip you would give to a new attorney?**

Everyone had great advice. "Work harder than anybody else and be prepared." "Don't procrastinate." "Avoid Debt." "Be Yourself." "Treat people with respect, especially staff." "Find a mentor." "Read the whole case." "Friendships are like gardens—they need to be cultivated." "Scar tissue makes you stronger."

**Tell me your best story about the profession.**

One lawyer, who lives in the country and was working remotely, recently participated in a Zoom hearing and noticed a coyote attacking her chickens in the back yard. She said she was torn between staying with


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the hearing or asking for a brief recess to go out back and shoot the coyote. Unfortunately for the chickens, the client's needs won out. One lawyer told me about a jury trial involving police abuse. One of the plaintiffs had an active warrant out and shortly after receiving a verdict in his favor, the police arrested him in open court a few minutes later. One lawyer simply said that his best story had yet to be written. Several other stories are not ready for public consumption. I was struck by how much passion and excitement everyone had for the profession, whether they had been practicing for months or decades.

At the end of each interview, I asked everyone why they agreed to do the interview. A free lunch is a good incentive, but several attorneys were also interested in making or

re-establishing connections. The price of paying for lunch was a small one to pay because I really enjoyed learning about these people and their experience. That positive feeling is not surprising. As part of this project, I learned that the simple act of having lunch with colleagues can also improve your mental health.

Although I am a JLAP volunteer, I did not really look at this project as a wellness exercise. The research, however, suggests that social connections (such as having lunch with a colleague versus eating alone) make a difference in your mental health. In 2017, a study noted that "There is now considerable evidence, for example, to suggest that the size and quality of one's social network has very significant consequences for one's health, susceptibility to

illness (and even death), wellbeing and happiness."<sup>1</sup> After looking at the data, the author found that "people who eat socially are more likely to feel better about themselves and to have a wider social network capable of providing social and emotional support."<sup>2</sup> Eating alone, by contrast, is harmful for mental health, potentially leading to increased depression and suicidal ideation. A 2021 study noted that "[e]ating with others led to lower odds of depression. Recently, the number of individuals eating alone has been increasing due to the impacts of coronavirus disease 2019 (COVID-19), which can harm the mental health of these individuals."<sup>3</sup> The authors found that eating alone was associated with depressive mood and suicidal ideation.

I hope to keep this project going and plan to reach out to some of these lawyers to keep those connections. I encourage other lawyers to re-engage with their colleagues. These little steps are good for the profession and our individual wellbeing as well. Stay connected! 🌱

#### FOOTNOTES:

1. R.I.M. Dunbar, *Breaking Bread: The Functions of Social Eating*, 3 *Adaptive Human Behavior and Physiology*, 199 (2017). <https://doi.org/10.1007/s40750-017-0061-4>.
2. *Id.* at 206
3. Joonyoung Park and Gyeongsil Lee, *Association of Eating Alone with Depressive Symptoms and Suicidal Ideation among Korean Adults*, 42 *Korean Journal of Family Medicine*, 223-224 (May 2021). 10.4082/kjfm.20.0128

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# SUFFICIENCY CLAIMS AND REMOTE HEARINGS DOMINATE THE DECEMBER DOCKET

**The Indiana Supreme Court issued opinions finding sufficient circumstantial evidence for a conviction and clarifying the requirement of “good cause” for a remote hearing. Cases from the Court of Appeals addressed a variety of sufficiency claims and the prejudice requirement when *Brady* material is withheld.**

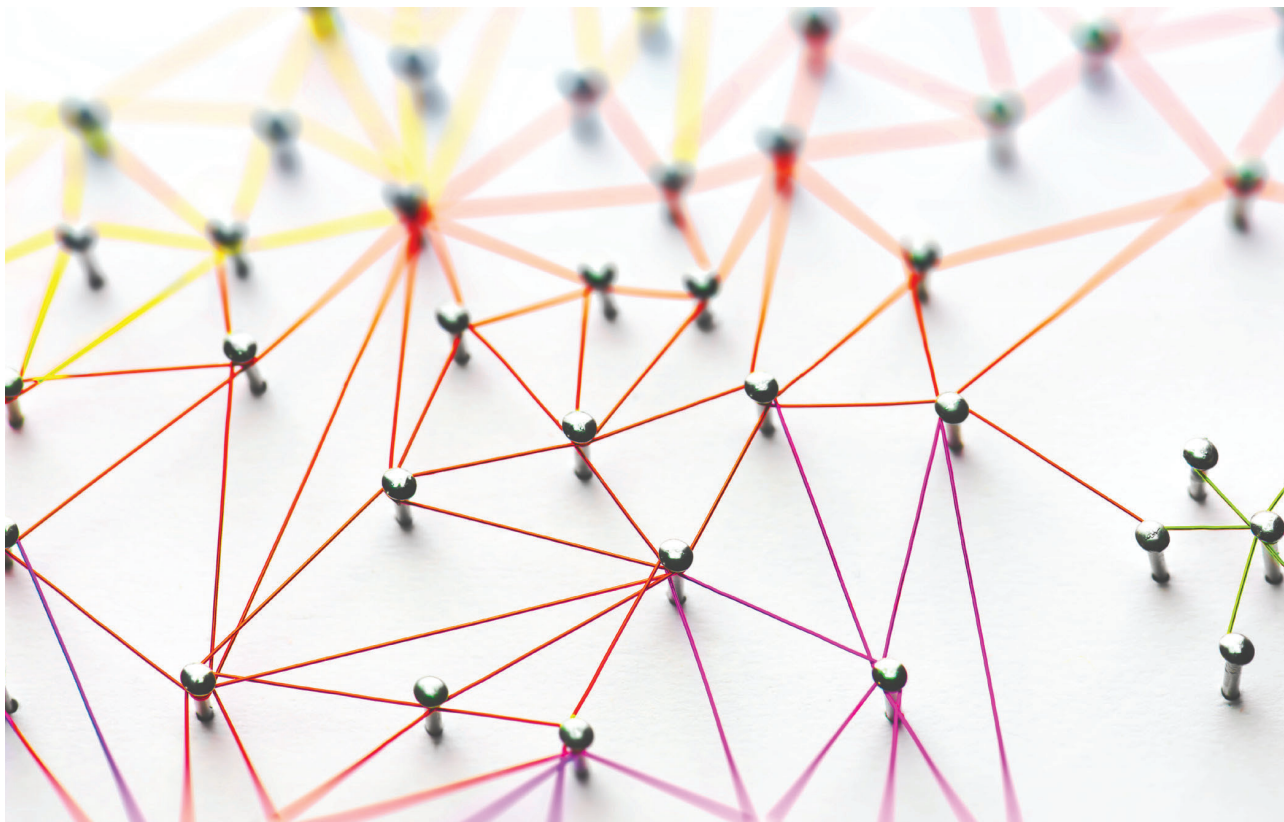
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## SUFFICIENCY REVIEW IS DEFERENTIAL

A recent Criminal Justice Notes column summarized notable sufficiency cases, including one in which a divided panel reversed murder and other convictions because the circumstantial evidence came “nowhere close to proof beyond a reasonable doubt.” *Young v. State*, 187 N.E.3d 969, 976 (Ind. Ct. App.), *vacated*, 198 N.E.3d 1172 (Ind. 2022). See Joel M. Schumm, *Reversals for Continuance Denial, Insufficient Evidence, Res Gestae*, July/August 2022, at 23.

In December, the Indiana Supreme Court disagreed with the majority, found sufficient evidence, and affirmed the convictions. Convictions may result from





circumstantial evidence alone, and appellate courts must look at the aggregate of evidence or “whole picture”—not individual pieces of evidence; a jury may be convinced, beyond a reasonable doubt, by looking at “a web of facts in which no single strand may be dispositive.” *Young v. State*, 198 N.E.3d 1172, 1176 (Ind. 2022). In

summarizing the circumstantial evidence sufficient to affirm the conviction under its customary deferential review, Justice Goff wrote for the unanimous court: the jury could reasonably have inferred that Young spotted the victims at the gas station, drove somewhere nearby with alleyway access,

tossed his cigarette in the alleyway, ran to the gas station to carry out the shootings, walked back up the alleyway to get away, and later looked up how to clean the weapon he had used. His deactivated location data suggested he was concealing his activity. No single “smoking gun” was presented, but we cannot say that a reasonable fact-finder was unable to draw the conclusion that Young was guilty.

*Id.* at 1178.

### **FINDINGS OF “GOOD CAUSE” FOR REMOTE HEARINGS MUST BE PARTICULARIZED AND SPECIFIC**

Administrative Rule 14 permits trial courts the ability to conduct remote or virtual proceedings under some circumstances. Although a non-criminal case, the holding in *B.N. v. Health & Hosp. Corp.*, 199 N.E.3d 360, 362 (Ind. 2022), is applicable

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to any type of proceeding that requires a trial court to make a “good cause” finding for proceeding remotely when a party objects.

There, the unanimous court made clear that “good cause requires particularized and specific factual support.” *Id.* Merely stating “the COVID-19 pandemic” failed to meet that standard, although the error was ultimately found harmless. *Id.*<sup>1</sup>

## COURT OF APPEALS’ CASES

### CHILD MOLESTING CONVICTION REDUCED FOR INSUFFICIENT EVIDENCE

Child molesting by fondling is usually a Level 4 felony while molestation involving “other sexual conduct” committed by a defendant who is at least twenty-one is a Level 1 felony. Ind. Code § 35-42-4-3. Other sexual conduct includes “an act involving. . .the penetration of the sex organ or anus of a person by an object.” Ind. Code § 35-31.5-2-221.5(2).

*Austin v. State*, No. 22A-CR-1240, 2022 WL 17974652, at \*1 (Ind. Ct. App. Dec. 28, 2022), found insufficient evidence of penetration necessary to support the charged Level 1 felony offenses. The child testified that Austin used his “whole hand” to rub “up and down” on the “outside” of her “private part” and that it made her feel “tingly.” That evidence failed to establish even “the slightest penetration of the sex organ, including penetration of the external genitalia” necessary to prove “other sexual conduct.” *Id.* The court ordered the convictions reduced to Level 4 felonies. *Id.*

### THEFT CONVICTIONS REVERSED FOR TRAVELING ELECTED OFFICIAL LIVING IN CAMPER

In June 2020, an elected township trustee sold her home and moved furniture and personal possessions into another home in the same township. *Teising v. State*, No. 22A-CR-548, 2022 WL 17685350, at \*1 (Ind. Ct. App. Dec. 15, 2022). In the early months of the COVID-19 pandemic, she purchased a camper and traveled while working remotely. She communicated with

her officer manager, who kept the office open. Months later, the county prosecutor began investigating the matter, and the trustee was indicted on twenty-one counts of Level 6 felony theft for taking her salary as trustee while not residing in the township. *Id.*

The Court of Appeals reversed all the convictions for lack of

**"There, the unanimous court made clear that 'good cause requires particularized and specific factual support.' Merely stating 'the COVID-19 pandemic' failed to meet that standard..."**

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evidence regarding a change in residence. The court summarized the statutory provisions on residence as reflecting the “long-held understanding that every person has a residence somewhere and that a person does not lose the one until gaining one in another place.” *Id.* at \*6. A change of domicile requires “the intention to abandon the old domicile; the intention to acquire a new one; and residence in the new place in order to accomplish a change of domicile.” *Id.* (quoting *State Election Bd. v. Bayh*, 521 N.E.2d 1313, 1317 (Ind. 1988)). Put another way, “a residency determination requires consideration of all the

circumstances in a given case of which physical presence is but one circumstance to consider.” *Id.*

When she sold her residence, the trustee changed her voter registration to an address within the township and later filed her application for an absentee ballot using the same address. *Id.* at \*7. She could not lose her residency in the township until she established a new residence elsewhere. *Id.* Although not physically present in the township for several months, the court emphasized the context, an ongoing worldwide pandemic during which many people worked remotely. *Id.*

The trial court erred in finding the trustee guilty of theft when the State failed to prove she had abandoned her township residence. *Id.*

### PERJURY CONVICTION UPHeld AGAINST POLICE OFFICER FOR PCA STATEMENT

A person commits perjury when he “makes a false, material statement under oath or affirmation, knowing the statement to be false or not believing it to be true[.]” Ind. Code § 35-44.1-2-1(a)(1). The State must show that the defendant: “(1) made a false statement under oath; and (2) said statement was material to a point in the case.” *Lawson v. State*, 199 N.E.3d 829, 835 (Ind. Ct. App. 2022).

In *Lawson*, a police officer who prepared a probable cause affidavit for a delinquency case included a false statement that another officer saw the juvenile throw a punch. Charged with perjury, the officer argued that the false statement about the punch was immaterial and could not constitute perjury because the juvenile was charged with disorderly conduct, not battery. *Id.* at 836. The appellate court disagreed, noting the statement about throwing a punch was a clear indication the juvenile had “engaged in fighting or in tumultuous conduct” to satisfy Indiana Code section 35-45-1-3(A) (1), although the juvenile’s other behavior did not necessarily satisfy the statute. *Lawson*, 199 N.E.3d at 836. The Defendant’s claim that he did not include a false statement “knowingly” was “a request for this court to reweigh the evidence and judge his credibility,” which the appellate court refused to do. *Id.* at 837.



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### SUPPRESSION OF BRADY MATERIAL DISAPPROVED BUT FOUND NON-PREJUDICIAL

Finally, outside of the sufficiency realm, in *State v. Parchman*, No. 21A-CR-447, 2022 WL 17840201 (Ind. Ct. App. Dec. 22, 2022), the trial court granted a defense motion to correct error because the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), when it failed to disclose the juvenile delinquency history of one of its witnesses. The State appealed.

A *Brady* violation requires three things: (1) the evidence at issue must be favorable to the accused, either because the evidence is exculpatory or because it is impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). The State conceded in *Parchman* that it inadvertently suppressed the juvenile delinquency history of a witness, which was impeachment evidence. The sole issue on appeal was prejudice or materiality. “Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Parchman*, 2022 WL 17840201, at \*4.

In reversing the trial court, the Court of Appeals held the impact of the witness’s “ten-year-old juvenile delinquency adjudication is negligible, at best.” *Id.* at \*5. On trial for shooting two men and killing one of them, the Defendant had argued self-defense. But the testimony of the witness/victim with the juvenile adjudication was

cumulative of other testimony that Parchman was standing over one-hundred feet away from the victims when he began shooting at them and cumulative of other evidence that the victims had been shot on their “back side.” *Id.*

Although the convictions remained intact, the trial court was “rightfully displeased” with the State’s noncompliance with discovery. *Id.* at \*5 n.6. The appellate court “disapprove[d]” of the State’s failure to provide the witness’s complete criminal history; “whether evidence is prejudicial or inadmissible is within the discretion of the courts, not the State.” *Id.* ☹

### FOOTNOTE:

1. Weeks earlier, the Court of Appeals rejected a challenge to a remote proceeding in a juvenile delinquency case on a different basis. In that case, the Respondent failed to object to the remotely proceeding or acknowledge the Supreme Court’s emergency orders on remote hearings from 2020 and 2021. *M.H. v. State*, 199 N.E.3d 1240, 1247 (Ind. Ct. App. 2022). His argument was not cogent, and any error was not fundamental. *Id.*

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# ISBA MEMBER DIRECTORY PROMOTED AS TOOL FOR HOOSIERS TO HIRE LAWYERS

**By Res Gestae Staff**

**H**oosiers seeking to hire lawyers are now being directed to an Indiana State Bar Association member directory. ISBA members are encouraged to review and update their directory profiles. Read on to learn more about how Hoosiers reach out with legal needs, and how ISBA and the Indiana Bar Foundation are helping.

## HOOSIERS NEED HELP FINDING A LAWYER

Many Hoosiers don't know where to find a lawyer. Their journey begins through one of these channels:

- Calling the Indiana State Bar Association
- Visiting [IndianaLegalHelp.org](http://IndianaLegalHelp.org) on a computer
- Visiting one of the Indiana Bar Foundation's [IndianaLegalHelp.org](http://IndianaLegalHelp.org) kiosks located around the state

## HOOSIERS DECIDE TO HIRE A LAWYER

Each of these three channels prompts the Hoosier to decide if they would like to hire a lawyer or first pursue options for legal aid.

**Hoosiers pursuing legal aid are directed to a section of the [IndianaLegalHelp.org](http://IndianaLegalHelp.org) website.**

The [IndianaLegalHelp.org](http://IndianaLegalHelp.org) website, which has seen over one million visits since its launch, includes legal forms, instructional videos, referrals to free and low-cost legal services, and a statewide calendar of free legal advice clinics.

Hoosiers can access the site online or via any of the 120 legal information kiosks being deployed throughout the state. Installation of kiosks is ongoing, with at least one kiosk planned for each of our 92 counties. The Indiana Legal Help kiosk program is made possible through a

partnership between the Foundation and the Indiana Housing and Community Development Authority.

**Hoosiers ready to hire a lawyer are directed to [Locate Your Lawyer](#).**

[Locate Your Lawyer](#) is a public directory of all ISBA members. It shares some of the basic information about members that they have listed in their ISBA profiles as "public," such as their name, employer, address, and practice areas.

[Locate Your Lawyer](#) makes it easy for Hoosiers to contact ISBA members directly.

A basic profile has already been created for all active and eligible ISBA members. The basic profile includes contact information, title, up to three practice areas, a photo, and education history.

## UPDATE YOUR LOCATE YOUR LAWYER PROFILE

Because Hoosiers are now being driven to [Locate Your Lawyer](#) to find a lawyer, review the information you have listed on your ISBA profile:

- Visit [inbar.org/profile](http://inbar.org/profile) and log in using your ISBA credentials
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# ETHICAL CONSIDERATIONS FOR UNBUNDLING LEGAL SERVICES

**W**ith growing client demand for alternative fee arrangements and certainty with respect to fees, you may find yourself considering limited scope engagements, or “unbundled” legal services, with increasing frequency. Whether motivated by cost management or harnessing a specific expertise for one aspect of a broader representation, limited scope representation can serve the best interests of clients and lawyers, so long as lawyers carefully adhere to the ethical obligations imposed by Indiana Rule of Professional Conduct 1.2(c) and ensure that their clients understand the risks and benefits of limited scope engagements. Rule 1.2(c) specifically permits Indiana lawyers to provide limited scope legal services “if the limitation is reasonable under the circumstances and the client gives informed consent.”

## INFORMED CONSENT

The element of informed consent is a relatively concrete concept. “Informed consent” is agreement provided

after the client has received “adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” Rule 1.0(e).

Ordinarily, [informed consent] will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client. . . of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client’s. . . options and alternatives. In some circumstances, it may be appropriate for a lawyer to advise a client. . . to seek the advice of other counsel.

Rule 1.0, Cmt. 6. In other words, in order to explain the risks of unbundled legal services to a client, a lawyer should discuss potential outcomes and the potential that the client will require representation in a later phase of the representation. The lawyer should explain that there may be increased overall costs if the client



engages different lawyers for different phases or aspects of a representation. While neither Rule 1.0 or 1.2(c) require informed consent in writing for limited scope engagements, written consent is advisable. Not only does a written consent ensure a meeting of the minds as to the scope, it could serve as important evidence that a lawyer has fulfilled the obligations imposed by Rule 1.2(c).

### REASONABLE LIMITATION

Determining whether a limitation is “reasonable” under Rule 1.2(c) requires a working knowledge of the legal needs that could arise with respect to a particular matter. It is commonplace to limit the scope

of a representation to a particular dispute or transaction. It is less common, but permissible, to limit the scope of a representation to a single phase of litigation (e.g., conducting expert discovery) or a single aspect of an asset purchase (e.g., advising as to employee benefits obligations). The comments to Rule 1.2 provide helpful explanation to determine whether a limitation is reasonable.

Comment 6 explains, “[w]hen a lawyer has been retained by an insurer to represent an insured... the representation may be limited to matters related to the insurance coverage” and that this limitation may be appropriate because the client has limited objectives. The comment also notes that the terms

of representation “may exclude specific means that might otherwise be used to accomplish the client’s objectives.” These limitations may be actions that the client believes are too expensive or that the lawyer believes are “repugnant, unethical, or imprudent.”

Whether a limitation in scope of representation is reasonable is highly contextual. For instance, a brief phone call may suffice for a lawyer to ascertain the relevant facts and render legal advice to a client. This is often the case when a client wants advice about compliance with a particular regulation impacting the client’s business. However, Comment 7 cautions that limiting your conversation to a brief phone call would not be reasonable if the phone call did not allow sufficient time for the lawyer to understand the relevant facts and render reliable advice. *See also* Rule 1.2, cmt. [8] (reminding that agreements concerning the scope of representation must comply with other disciplinary rules, such as Rule 1.1, which requires competent representation). Ultimately, a limitation that serves a client’s interest is likely to be reasonable so long as the lawyer can provide competent representation.

**"Ultimately, a limitation that serves a client’s interest is likely to be reasonable so long as the lawyer can provide competent representation."**

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### PRACTICAL APPLICATION OF RULE 1.2(C)

Application of Rule 1.2(c) by courts is consistent with the notion that the Rules of Professional Conduct are a consumer protection code and will be interpreted in a manner that protects the most vulnerable consumers of legal services. Relevant guidance on the practical application of Rule 1.2 is provided by two Federal Bankruptcy Court cases: *In re Bowman*, No. 19-04789-JJG-7, 2020

Bankr. LEXIS 298, at \*4 (Bankr. S.D. Ind. Jan. 30, 2020), and *In re Collmar*, 417 B.R. 920, 922 (Bankr. N.D. Ind. 2009).

In *In re Bowman*, a firm attempted to unbundle “heavily litigated” or “heavily contested” matters. The U.S. Bankruptcy Court for the Southern District of Indiana held that the ambiguity of those phrases made it impossible for a client to give informed consent and thus, attempting to include such a limitation violated Rule 1.2(c). In addition to a lack of informed consent, the court also held that this limitation violated Rule 1.2(c) because it was unreasonable. “To allow such an exclusion could potentially deprive debtors of their counsel’s services when such services are most needed... Allowing an attorney to walk away when the going gets tough is a representation step that cannot be skipped.” *Id.* at \*5.

In *Collmar*, the attorney represented a client in a bankruptcy matter and attempted to limit the scope of his representation to exclude reaffirmation agreements. The U.S. Bankruptcy Court for the Northern District of Indiana ruled that the proposed limitation was not reasonable because “assistance with the decision [to reaffirm an otherwise dischargeable debt] is part of the services that make up the competent representation of a chapter 7 debtor” and “the Bankruptcy Code places the responsibility for advising a debtor about the reaffirmation process and evaluating the effect of each agreement on debtor’s counsel.” *Id.* at 924.

**Continued on page 37...**







# CASES ADDRESS REMOTE PROCEEDINGS, GENDER MARKERS, AND MORE

**The Indiana Court of Appeals issued seventeen published civil opinions in December 2022. The Indiana Supreme Court issued one civil opinion during this time and did not grant transfer in any other cases.**

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## **SUPREME COURT OPINIONS**

### **SUPREME COURT HOLDS “GOOD CAUSE” STANDARD FOR A REMOTE HEARING REQUIRES PARTICULARIZED AND SPECIFIC FACTUAL SUPPORT.**

A patient was admitted for inpatient treatment after medical professionals sought her emergency detention. After an evaluation, her physician petitioned the court for a temporary or regular commitment. The commitment hearing moved to a virtual setting, but the patient objected and wanted to appear in person. The trial court denied the in-person request, citing the COVID-19 pandemic.

A unanimous *B.N. v. Health and Hospital Corporation*, 199 N.E.3d. 360 (Ind. 2022) (Rush, C.J.), reviewed what constitutes “good cause” for remote proceedings under Indiana Administrative Rule 14. The Supreme Court held a trial court must cite more than “COVID-19” as “good cause” to conduct the hearing virtually. Specificity and particularity—as are required in other contexts

requiring a finding of “good cause”—are the standard for finding “good cause” under Administrative Rule 14. Without more specific facts, such as a lack of room for social distancing, a bare mention of “COVID-19” fails to meet the standard for good cause. Further, the Court noted, when a party’s liberty is at stake—such as during a commitment hearing—in-person hearings are crucial.

Despite the Court’s finding that the trial court abused its discretion and did not have “good cause” to deny the request for an in-person hearing, the Court found that the error was harmless. The patient fully participated in the hearing, had effective counsel who litigated skillfully and zealously on her behalf, and the witnesses at the hearing provided significant evidence to support the trial court’s decision.

## **SELECT COURT OF APPEALS DECISIONS**

### **TWO DIFFERENT COURT OF APPEALS PANELS SPLIT ON ENFORCEABILITY OF ARBITRATION PROVISIONS IN PROPOSED CLASS ACTIONS RELATED TO OVERDRAFT FEES.**

The Court of Appeals issued a pair of published opinions on the same day dealing with motions to compel arbitration in proposed class actions regarding overdraft fees, but each panel reached a different result.

In *Neal v. Purdue Federal Credit Union*, 2022 WL 17998808 (Ind. Ct.App. 2022) (Crone, J.), the court held Purdue Federal Credit Union's motion to compel arbitration should have been granted because the plaintiff acknowledged receiving an arbitration provision from the Credit Union in writing as an amendment to his account terms and did not opt out of the arbitration provision within the required thirty days. The court also rejected plaintiff's arguments that the Credit Union had waived its right to compel arbitration and that the proposal to amend the account agreement violated a duty of good faith and fair dealing.

In contrast, in *Land v. IU Credit Union*, 2022 WL 17998807 (Ind. Ct.App. 2022) (Baker, Sr. J.), the panel reversed the grant of IU Credit Union's motion to compel arbitration where the Credit Union sent the plaintiff written notice of an arbitration provision via mail and email. The plaintiff did not recall receiving the email and it did not include language proposing new terms. The mailed notice also was not included in an account statement. The court therefore held there was no meeting of the minds and that plaintiff's failure to opt out of the arbitration provision did not constitute acceptance.

**PARENT MAY NOT USE STATUTE PROVIDING FOR MODIFICATION OF BIRTH CERTIFICATES TO CHANGE GENDER MARKER OF MINOR CHILD.**

A mother sought a name change and gender marker change for her transgender child. The trial court denied both requests because the mother did not show that the requests were in the best interest of the child. The Court of Appeals in *In*

*the Matter of K.G.*, 2022 WL 17420468 (Ind. Ct. App. Dec. 6, 2022) (Bradford, C.J.), noted there was a split in Court of Appeals decisions as to whether Indiana Code §16-37-2-10—governing changes to birth certificates—permits a parent to have a child's gender marker changed. *Compare*

*Matter of A.B.*, 164 N.E.3d 167, 169–71 (Ind. Ct. App. 2021) (permitting modification) *with In re H.S.*, 175 N.E.3d 1184, 1187 (Ind. Ct. App. 2021) (denying modification).

The panel concluded that the statute did not provide a mechanism for a

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gender marker change for a minor child and further noted that the Indiana General Assembly has yet to address this issue. But the court remanded for additional factual findings as to why a name change is not in the child's best interests.

## OTHER SELECTED DECISIONS

- *Morgan v. Dickelman Insurance Agency, Inc.*, 2022 WL 17998801 (Ind.Ct.App. 2022) (Crone, J) (upholding a grant of summary judgment in favor of the insurance agency because no genuine issues of material fact existed as to the details surrounding plaintiffs' insurance policy, given that plaintiffs accepted unambiguous and easy-to-read policy renewal certificates).
- *Noblesville, Indiana Board of Zoning Appeals vs. FMG Indianapolis, LLC*, 2022 WL 17952573 (Ind.Ct.App. 2022) (Bailey, J.) (directing that a decision of the Board of Zoning Appeals ("NBZA") be reinstated because FMG failed to meet its burden to demonstrate that the NBZA's issuance of a Stop Work Order and Notice of Violation based on a nonconforming use of property was invalid).
- *Jones v. Lofton*, 2022 WL 17840259 (Ind.Ct.App. 2022) (Crone, J.) (after a motor vehicle accident in which one motorist was uninsured, the uninsured driver, who had a prior motor vehicle offense in Illinois, was not barred from the recovery of noneconomic damages because the relevant statute barring such recovery did not apply to out-of-state violations at the time that the collision occurred).
- *Indiana Farmers Mutual Insurance Company v. HomeWorks Management Corporation*, 2022 WL 17825975 (Ind.Ct.App. 2022) (Brown, J.) (after a child suffered lead poisoning by residing in a rented property from HomeWorks, the child's parents sued HomeWorks, who, in turn, sought indemnification from their insurer. The court reversed the grant of summary judgment in favor of HomeWorks after finding an explicit and unambiguous exclusion for lead in the policy issued by Indiana Farmers Mutual Insurance Company to HomeWorks).
- *Paul Terrault and Garry Community School Corporation v. Scheere*, 2022 WL 17684992 (Ind.Ct.App. 2022) (Brown, J.) (affirming an entry of partial summary judgment in favor of a bidder who won a model Picasso statute at the auction of a school designated as a distressed political subdivision despite failure to notify the mayor of the city, as is directed by the statute governing the sale of assets of distressed political subdivisions).
- *Albertson v. Cadwell*, 2022 WL 17660547 (Ind.Ct.App. 2022) (Mathias, J.) (holding that the existence of a "neighborly agreement" allowing one neighbor to access the other neighbor's property for the purposes of, for example, backyard maintenance, that did not establish a true recorded easement did not entitle the neighbor to an easement by necessity).
- *Shoaff v. First Merchants Bank*, 2022 WL 17574686 (Ind.Ct.App. 2022) (Foley, J.) (affirming the trial court in part, but reversing in part based on the trial court's abuse of discretion in calculating damages, when the calculation was done based on a methodology that did not comply with the unambiguous terms of the contract between the parties).
- *Ayers v. Stowers*, 2022 WL 17491771 (Ind.Ct.App. 2022) (Najam, S.J.) (holding that a one-time seller of a personal vehicle was not considered a merchant under the UCC, and therefore the buyer was not entitled to the remedy of revocation of acceptance under the UCC).
- *Duke Energy Indiana, LLC v. City of Noblesville, Indiana*, 2022 WL 17491769 (Ind.Ct.App. 2022) (Weissmann, J.) (noting that the Indiana Utility Regulatory Commission has exclusive jurisdiction only over those matters involving utility "service[s]" or the location and use of a utility "facility" but holding utility projects did not involve these). ☞

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### Continued from page 17...

advantage. In a 1997 case, the Supreme Court suspended the license of a prosecutor for 30 days with automatic reinstatement and reprimanded his deputy because they threatened to renew a dormant criminal investigation against a potential candidate for prosecutor.<sup>13</sup> Their conduct violated Rule 8.4(d). The Supreme Court wrote:

[T]his Court does not seek to impair the exercise of prosecutorial authority or discretion. The key element of culpability in the respondents' actions was their use of the prosecutorial powers to further their self-interests. Holmes used his prosecutorial discretion and authority to further his interest in retaining his elected position. Christoff, who worked directly for Holmes, actively assisted him in doing so. Use of prosecutorial authority becomes improper when the sole or overriding motivation for exercising it is the prosecutor's personal benefit or gain, and not to further the public interest of effective law application and enforcement.<sup>14</sup>

### CAN ATTORNEYS THREATEN TO BRING GRIEVANCES AGAINST LAWYERS?

Threats to file a grievance against opposing counsel or successor counsel are subject to discipline, although Indiana's Rules of Professional Conduct do not expressly prohibit such threats. The Supreme Court has addressed this issue several times. The court has disciplined an attorney who threatened to file a grievance to obtain a settlement proposal in a prospective civil action,<sup>15</sup> an attorney who threatened to file a grievance to get a continuance,<sup>16</sup> and an attorney who threatened to file a grievance to get a change of venue.<sup>17</sup> Such threats violated Prof. Conduct Rule 8.4(d) as against the administration of justice.

### CAN ATTORNEYS MAKE THREATS AGAINST THEIR OWN CLIENTS AND FORMER CLIENTS?

Some attorneys have violated the Rules of Professional Conduct by threatening their own clients or former clients. An attorney threatened to sue his client for defamation if she pursued a disciplinary action against him.<sup>18</sup>

The Supreme Court suspended the attorney's license stating:

We pause to comment on respondent's defense that his threatened defamation suit against his client was a legitimate attempt to protect his reputation. Such defense is spurious in light of Ind. Admission and Discipline Rule 23, Section 20, which provides immunity from civil prosecution for written statements made without malice to the Commission. Further, in light of the confidential nature of Commission investigations, respondent's threat served only to try to intimidate his client, not protect his reputation.<sup>19</sup>

Another attorney sent a letter deemed to be a threat to a former client.<sup>20</sup> The letter said: "Please do NOT EVER in your life send me another letter. If you do, I will have to make trouble for you while you are locked up!"<sup>21</sup> This letter was in response to the client's request for his file. For this threat and other misconduct, the attorney's license was suspended for 12 months without automatic reinstatement.

In another case, a threat to reveal confidential information of former clients contributed to an attorney's disbarment.<sup>22</sup> The attorney induced two former clients to invest in a restaurant venture. The venture never happened. When they asked the attorney for the return of their money, the attorney said he did not have it and threatened to reveal confidences if they persisted in their efforts to regain it.

In another case, a former client threatened to file a disciplinary grievance. In retaliation, the attorney threatened to reveal the former client's conviction for child molesting to the client's fellow inmates.<sup>23</sup> The Supreme Court suspended the attorney's license for this threat and other misconduct.

Threatening the adverse party can also cause suspension of an attorney's license.<sup>24</sup>

These cases underscore that it is the attorney's threats, not the recipients of the threats, which takes the attorney over the line.

### **CAN ATTORNEYS MAKE THREATS TO REPORT AN ADVERSE PARTY TO ADMINISTRATIVE AGENCIES?**

Suppose the opposing party is a health care provider, teacher, real estate agent, CPA, or other licensed professional. Can attorneys threaten to file complaints with administrative agencies to jeopardize their professional licenses to gain an advantage for their own clients?

The Legal Ethics Committee of the Indiana State Bar Association issued a lengthy advisory opinion addressing this question in 2008. The committee concluded such a threat might be permissible under Indiana's

Rules of Professional Conduct but stated:

The reader is cautioned that threats to report an adverse party to an administrative or professional licensing agency are fraught with danger. Most jurisdictions that have addressed the issue have prohibited such threats. The Indiana Supreme Court has not yet ruled upon the issue.<sup>25</sup>

Fifteen years later, Indiana still has no case directly on point, but the Supreme Court probably would

### **"Can attorneys threaten to file complaints with administrative agencies to jeopardize their professional licenses to gain an advantage for their own clients?"**

find it to be another impermissible threat.

### **CAN ATTORNEYS THREATEN TO INFLICT BODILY HARM?**

Unsurprisingly, threatening bodily harm violates the Rules of Professional Conduct. An attorney named Burns received a suspension for abusive, insulting, and threatening behavior during a recess at a pretrial conference.<sup>26</sup> He threatened bodily harm to an opposing party, who was a former attorney. This exchange occurred:

BURNS: You'll communicate through me or you won't communicate at all. Do you understand me?

FORMER ATTORNEY: Are you threatening me physically?

BURNS: Oh, you've got it. You are exactly correct. I'm threatening you physically. You'll either follow the rules or you'll have to deal with me. Do you understand? And if I have to tell you that again, you're going to go out of here in a hospital van. Don't press your luck. . . Don't press your luck. Because you're not going to like me if I'm angry. You won't walk away from it, I guarantee you. Don't look grave to me, because if you do, you're a . . . (obscurity). I swear to God.

FORMER ATTORNEY: You'd better kill me.

BURNS: Oh, believe me, I will. Believe me, I will. And I will get a medal for it.<sup>27</sup>

He did not get a medal; he got a 30-day suspension. The Supreme Court found that Burns' conduct violated Prof. Cond. Rule 4.4 and Rule 8.4(d) but did not find that he had committed the crime of intimidation, which would have violated Rule 8.4(b).<sup>28</sup> The court said:

Effective, professional representation does not include abusive, insulting, and threatening behavior. We are not unmindful that in the heat of conflict emotional outbursts are

possible. However, the aggressive nature of the comments and acts made by Respondent in this case clearly goes beyond acceptable standards of professionalism. It was contrary [to] the Oath of Attorneys which requires abstention from offensive personality; it undermines public confidence in and respect for the legal system; and it is prejudicial to the administration of justice.<sup>29</sup>

### CAN ATTORNEYS USE THIRD PARTIES TO MAKE THREATS?

Attorneys do not have a safe harbor if they employ third parties to make threats they themselves cannot permissibly make. Indiana's Prof. Conduct Rule 8.4(a) makes it professional misconduct for an attorney to violate or attempt to violate the rules "through the acts of another."

The Oklahoma Supreme Court recently faced such a situation.<sup>30</sup> It suspended the license of an attorney who had pled guilty to misdemeanors charging three violations of 18 U.S.C. § 3, Accessory After the Fact in relation to 18 U.S.C. § 875(d) (communication of an extortionate threat in interstate commerce). The attorney admitted he paid a third party for "reputation management services." The third party transmitted a flood of emails to certain companies and demanded negative information about the attorney be removed from their websites. The e-mails threatened to target their advertisers.

### CAN ATTORNEYS MAKE THREATS OUTSIDE OF THE ACTUAL PRACTICE OF LAW?

Indiana's criminal statute and some of the cited cases demonstrate that a lawyer who makes threats when not

practicing law could be in trouble with the Disciplinary Commission.

Such groups as the Indiana State Bar Association have also become concerned with threats. Without defining "threat," the ISBA bans "threatening conduct" and "threats directed against others" at its events or online.<sup>31</sup>

### WHAT IS THE LINE BETWEEN PERMISSIBLE ADVOCACY AND IMPERMISSIBLE THREATS?

The foregoing examples illustrate impermissible threats. What makes a threat permissible advocacy under the Rules of Professional Conduct? There is no definitive answer, but here are some useful guides to keep attorneys on the right side of the line.

First, attorneys should avoid using the words "if" and "unless" in the context where an opponent, client, or former client might perceive a threat.

Second, comply with various ethical rules. Comply with Prof. Conduct Rule 3.1, which requires that claims and contentions be meritorious, meaning they must be supported by facts and law.

Comply with Prof. Conduct Rule 3.4, which requires fairness to opposing clients and counsel, meaning there must be a connection between the threat and the legal matter at issue. For example, the California Supreme Court in *Flatley* ruled that threats to disclose criminal activity entirely unrelated to the scope of the attorney's representation were themselves evidence of extortion.<sup>32</sup>

Comply with Prof. Conduct Rule 4.4(a), which prohibits attorneys who represent clients from using



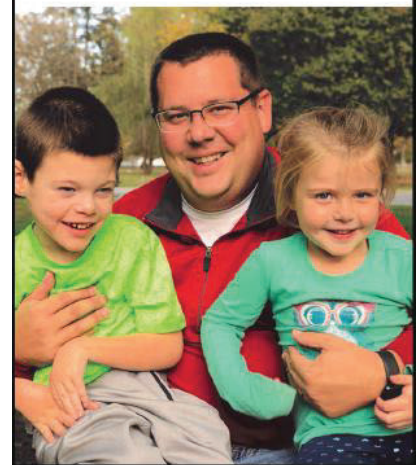
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“means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.”

Comply with Prof. Conduct Rule 8.4(d), which requires that conduct should not be prejudicial to the administration of justice.

Those four rules teach that attorneys can avoid crossing the line by making sure their statements are supported by facts and law, that their statements are reasonably linked to the issue at hand, and that their statements are not being made to substantially embarrass, delay, or burden a third person or violate the legal rights of such a person.

Finally, attorneys can stay on the right side of the line by asking themselves: “Is there a better way to express myself so that I am not making an actual or perceived threat?”

## CONCLUSION

If attorneys do not pay attention to what they say, they could run into disciplinary troubles. That is no idle threat. ☹

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

## FOOTNOTES:

1. *People v. Knox*, 467 P.3d 1218 (Colo. App. 2019), *cert. denied*, 2020 WL 4345742 (Colo. July 27, 2020) (A laywoman was not criminally guilty for

extortion for her demand text threatening a suit for damages resulting from a personal injury).

2. Ind. Code §§ 34-13-3-6 through -13.
3. *Matter of Campanella*, 56 N.E.3d 631 (Ind. 2016); *see also* G. Michael Witte, Survey of the Law of Professional Responsibility, 50 IND. L. REV. 1333, 1357-1359 (2017) (discussing *Campanella*).
4. *Flatley v. Mauro*, 39 Cal.4th 299, 139 P.3d 2 (Cal. 2006).
5. *Id.* at 330
6. *Matter of Stout*, 179 N.E.3d 465 (Ind. 2022).
7. *Id.*
8. *Id.*
9. *Id.* at 466
10. *See, e.g., Whitaker v. Becker*, 960 N.E.2d 111 (Ind. 2012).
11. Disciplinary Rule 705-1(A); *Matter of Strutz*, 652 N.E.2d 41 (Ind. 1995).
12. *Matter of Cheesebourough*, 169 N.E.3d 127 (Ind. 2021).
13. *Matter of Christoff*, 690 N.E.2d 1135 (Ind. 1997).
14. *Id.* at 1141
15. *Matter of Dimick*, 969 N.E.2d 17 (Ind. 2012); *Matter of Campanella*, *supra*.
16. *Matter of Lehman*, 861 N.E.2d 708 (Ind. 2007).
17. *Matter of Halpin*, 53 N.E.3d 405 (Ind. 2015).
18. *Matter of Whitney*, 820 N.E.2d 143 (Ind. 2005).
19. *Id.*
20. *Matter of Freeman*, 835 N.E.2d 494 (Ind. 2005).
21. *Id.* at 498
22. *Matter of Tew*, 703 N.E.2d 1049 (Ind. 1998). The court’s opinion did not include the words constituting the threat.
23. *Matter of Geller*, 777 N.E.2d 1099 (Ind. 2002). The court’s opinion did not include the

words constituting the threat.

24. *See, e.g., Matter of Hanson*, 53 N.E.3d 412 (Ind. 2016) (The attorney sent a threatening and obscene private social media message to his client’s ex-husband.).
25. Opinion No. 1 of 2008 34 *Res Gestae* • June 2008, *Attorney’s threat to report adverse party to professional licensing commission*
26. *Matter of Burns*, 657 N.E.2d 738 (Ind. 1995).
27. *Id.* at 739.
28. Rule 8.4 (a) and (b): “It is professional misconduct for a lawyer to:
  - (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
  - (b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects;”
29. *Matter of Burns*, 657 N.E.2d at 740. *See also Matter of Smith*, 97 N.E.3d 621 (Ind. 2018) (Court disbarred the attorney after his felony conviction of intimidation for threatening to kill his wife with an ax and showing up at her residence with an ax.).
30. *State ex rel. Oklahoma Bar Ass’n v. Pistotnik*, 477 P.3d 376 (Okla. 2020).
31. *See ISBA Event Code of Conduct*, <https://www.inbar.org/page/CodeofConduct>
32. *Flatley v. Mauro*, 39 Cal.4th 299, 139 P.3d 2



### Continued from page 29...

*Bowman* demonstrates that whether a client provided “informed consent” will be judged from the perspective of the client, and that specificity is important in obtaining adequate informed consent. Attorneys seeking to limit the scope of their representation should define which specific claims and tasks are included in the scope and which are excluded from the scope. As with any contract, clearly defined contract language will prevent disputes as to the meaning, and it will be easier to enforce restrictions on scope.

Both *Collmar* and *Bowman* demonstrate that courts are likely to view some services as indivisible, especially if the clients involved are unlikely to find other counsel to handle other unbundled services. Unlike the context of a subject matter expert appearing in litigation to handle a particular procedural dispute or joining a transactional

team to advise on a specific area of the law, lawyers may have a difficult time limiting their services to certain phases of litigation. This is consistent with Rule 1.16, which allows lawyers to withdraw from ongoing representation only if the withdrawal can be completed without “material adverse effect on the client’s interest.” See Rule 1.16, cmt [7].

Despite the risk that a limited scope may be found unreasonable, unbundled legal services are valuable and should be encouraged. Unbundled legal services may afford more clients access to services they could not otherwise afford. They also provide the opportunity for attorneys and clients to set matching expectations as to fees and plan accordingly. Attorneys engaging in limited scope representation should communicate the scope carefully, in detail, to their clients. Attorneys

should plan to spend time explaining to clients issues that may arise and will not be covered by the scope of the engagement, and, if possible, they should advise their clients as to the additional cost should the client ask them to provide representation on those issues in the future. Above all, these communications should be memorialized in writing to ensure a meeting of the minds and to protect clients and lawyers. Ⓐ

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**WITH 25 YEARS OF EXPERIENCE** as a business appraiser and business advisor, Chris Hirschfeld joined Tim Roy in partnership at Capitale Analytics to lead and grow its Business Appraisal and Business Advisory practice. With Tim's experience in machinery and equipment appraisals and Chris' experience in business appraisals, Capitale Analytics is poised to become one of the preeminent appraisal and advisory firms in Indiana and the Midwest.

Based out of Indianapolis, Capitale Analytics' business appraisal team serves clients not only within the State of Indiana, but also throughout the United States. They serve attorneys who focus on marital dissolution, estate and gift tax, mergers and acquisitions, and business litigation.

There are several reasons why Chris decided to venture out and lead his own practice. First, professional appraisal standards require independence and objectivity.

"We don't offer legal, tax, or assurance services to business clients," Chris noted. Second, Chris had the opportunity to acquire an existing business appraisal practice with strong brand recognition among banks focusing on SBA (Small Business Administration) lending. Third, one of Chris' strengths is training his employees. For years Chris has successfully trained other firms' appraisers for the benefit of those firms. He decided, "I have a vested interest in the development of our team. Why not train them while building an independent practice?"

Equally important to his decision was his ability to find a business analyst to join him. "I was able to lure my son, Doug, away from his current employer to join me." Doug is an IU/Kelley graduate with a double major in Finance and Supply Chain Management. Chris believes having Doug on his team is valuable because of Doug's degree from a top business school while also bringing strong technology and social media skills to the team. "It's an honor and a challenge to encourage your child to join you in business," Chris admitted. "But I also recognize the appraisal professionals in our field are aging. Having a young professional join me will fill a necessary void of qualified appraisers in the near future. I hope this practice will be his one day."

Business appraisals are subjective to a degree. Chris commented, "The ability to provide not only mathematical accuracy, but objective, empirical support for one's opinion, including a thorough analysis of the company's performance, industry trends and general economic outlook, is the difference between an appraisal that meets business standards and one that will stand up to a cross examination (whether that cross examination is by an attorney in a court room, a regulator, or a buyer's due diligence team). I believe my MBA from Chicago was some of the best training I could have received to bring sound economic principles to our appraisals and differentiate me as an appraiser."

Finally, Chris admitted, "One of the biggest challenges of an appraisal practice is generating referrals for other professionals." It is for this reason that Chris is building exit and succession planning into his practice. Succession planning often starts with a business appraisal. However, many business owners also need to get their financial statements and corporate governance in order before a transition can be successful. Chris welcomes the opportunity to be introduced to businesses thinking about their succession. This will create opportunities to refer business to CPAs and attorneys.

Chris is an Accredited Senior Appraiser (ASA) with the American Society of Appraisers and holds an MBA degree from the University of Chicago, Graduate School of Business. He serves on local charitable boards as well as state and national leadership committees within his professional trade associations.



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