INNOCENCE LOST: INDIANA’S DWINDLING RIGHT TO BAIL AND THE DAMAGING EFFECT ON THE PRESUMPTION OF INNOCENCE

PLUS:

Boomers to Zoomers: Recruiting and Retaining Today’s Workforce
Imposter Syndrome in the Legal Profession
and More
I love LawPay! I'm not sure why I waited so long to get it set up.

– Law Firm in Ohio

Trusted by 50,000 law firms, LawPay is a simple, secure solution that allows you to easily accept credit and eCheck payments online, in person, or through your favorite practice management tools.

- 22% increase in cash flow with online payments
- Vetted and approved by all 50 state bars, 70+ local and specialty bars, the ABA, and the ALA
- 62% of bills sent online are paid in 24 hours

Get started at lawpay.com/inbar 866-730-4140
INNOCENCE LOST

Innocence Lost: Indiana’s Dwindling Right to Bail and the Damaging Effect on the Presumption of Innocence
By Mike Cunningham
BOOMERS TO ZOOMERS

Boomers to Zoomers: Recruiting and Retaining Today’s Workforce
By Joe Skeel

IMPOSTER SYNDROME

Imposter Syndrome in the Legal Profession: Identifying It, Why It May Disproportionately Affect Lawyers, and Overcoming It
By Bradley S. Thomas, LSW and Christina L. Thomas, J.D.
President's Perspective

WE REALLY DO THINK AND ACT AS LAWYERS SHOULD

By Amy Noe Dudas

When COVID hit, the Indiana State Bar Association was in the middle of putting together its next strategic plan. The planning process already had begun to reveal what ISBA members and non-members wanted, expected, and valued from membership organizations, and the pandemic shifted attitudes in ways that were yet (and remain) unknown. But when the report was released to the Board of Governors in late 2020, it was clear lawyers value connecting with others who think and are like them, who seek out knowledge and enjoy collaborating with others, and who place a high level of importance on being involved in influencing the future of the practice of law.

I joined the ISBA as a law student, although at the time I was not particularly interested in making connections with other law students or lawyers. I worked during the day, commuted to IU McKinney (before it was McKinney) for evening classes, and did not need a job post-admission. However, after I began my practice, I sought out opportunities for engagement with other lawyers. While my local bar is filled with terrific people who are involved in the community in their own way, it’s not particularly organized or intentionally structured as a member organization. As a result, I looked to the ISBA to make the professional connections I craved.

I was nominated to be a district representative on the Board of Governors around my fifth year of practice and found myself surrounded by a group of highly engaged and incredibly foresighted colleagues who welcomed a fairly young and unseasoned lawyer. I became good friends with women and men who were old enough to be my parents, or at least young aunts and uncles. I was included in brainstorming, discussions, and debates, without any trace of condescension due to my naïve optimism or inexperience. Even though the insecurities of youth often prevented me from asking “dumb” questions, these mentors treated me with grace and tact when I often clearly didn’t know what I was talking about.

It was mainly for that reason I continued to say “yes” to anything anyone asked me to do with the ISBA. Not only did this work help me feel intellectually engaged in bigger issues than I would deal with in my own practice, but it also gave my heart and soul the connections I needed to find satisfaction in the human race.

All the above seems in some ways to conflict with what I’ve learned about lawyer
I knew all of that, but this year I gained different yet similar insight about my lawyer colleagues. Not only have I personally experienced kindness, grace, and a sincere willingness to engage lawyer-to-lawyer, I was thrilled to realize this phenomenon also extends to engagement with non-lawyers.

Back in March, I joined other women lawyers at the ISBA Women’s Bench Bar Retreat, the first of which I attended all alone as a brand-new baby lawyer back in 2001 in one of my first efforts to network. I met some women there I still consider good friends, most of whom return for the retreat year after year. In fact, at this most recent one, I chatted with Lisa (whom I met at the 2001 retreat) about how our paths likely never would have crossed but for our attendance at this event. To this day, I consider her one of my dearest lawyer friends and know I can call her up for just about anything.

"You’ve been perceptive, compassionate, respectful, tactful, attentive, emotionally mature, patient, conscientious, humble, observant, resourceful, self-aware, curious, passionate, flexible, and kind."

My husband, Andy, is my partner in the truest sense of the word and he accompanies me to almost every bar event I attend. He’s not a lawyer. Heck, he’s not even a college graduate. For many, finding oneself in a room full of lawyers when you project that you have nothing in common with them could be intimidating. The most common question Andy is asked is: “Are you a lawyer, too?” And when he answers in the negative and explains that he works with me in a support role as driver, errand-runner, plumber-
tracks. Instead, you dig in and seek to learn more.

More than once, as Andy navigated a room of women lawyers filled with confidence and poise, I have found one or more of you actively engaged in deep conversation with him. I listened as you asked him pointed questions about his creative writing, offered constructive (and welcome) feedback and genuine encouragement, and even challenged him in non-threatening ways. Kim pushed him to finish his “elevator speech” describing his work, and Aarti thoughtfully dove into ideas about a deeper theme.

My friends, you inspired him with your curiosity, kindness, and sincere desire to connect.

As I observed this with pride in my friends and colleagues, I looked back on the past several years and realized Andy has always come away from these kinds of engagements with the same sense of inclusion that was extended to me by those at the March retreat.

I’ve referenced before the Institute for the Advancement of the American Legal System’s Foundations for Practice, which pared down to five broad categories the traits needed by lawyers, each of which were broken down into several skills and qualities. Many of these qualities are not taught in law school, but rather are already a part of who we are as those driven to the profession, and perhaps some of them are learned as we gain wisdom with experience.

Through these interactions not only with other lawyers but also with nonlawyers, I see in my colleagues many of those qualities and feel confident the good among us do learn them at some point. You’ve been perceptive, compassionate, respectful, tactful, attentive, emotionally mature, patient, conscientious, humble, observant, resourceful, self-aware, curious, passionate, flexible, and kind.

For that, I thank you and remain ever grateful for the lifelong friendships I have formed.

**FOOTNOTES:**

1. You know who you are, Melissa, Carol, Bill, Andi, Mitch, Jim, Marianne, Tom, Patty, Connie, Doug, Susan, Rod (RIP, my friend), Kris, and countless others.
DON’T FORGET TO RENEW YOUR DUES

Your ISBA membership for the 2022-2023 year will end on June 30! If you haven’t already, please renew your membership through June 30, 2024, by visiting www.inbar.org and signing in.

WHAT DO I GET OUT OF MY MEMBERSHIP?

The ISBA is here to help you thrive professionally and personally through our advocacy, education, and connection opportunities. For you, that means:

- Opportunities to deepen your existing relationships and form new connections with attorneys inside and outside your practice area, translating to new referral sources, potential mentors and mentees, knowledge experts who can provide advice and resources, or friends who get the struggle of being a lawyer
Your annual dues fee is based on the type of membership you fall into (you can view the different types of memberships at www.inbar.org/dues). If your membership category has changed and it is not already reflected in your information, please contact Julie Gott (jgott@inbar.org) before renewing your dues. The switch between membership categories must be made manually.

OTHER FAQS

How do I check if I’ve already renewed?
If you’ve signed up for auto-renewal, if your firm handles membership dues, or if you just want to double check, you can see if you’ve already renewed for the 2023-2024 cycle by signing into inbar.org. If you see an invoice for your 2023-2024 dues, then congratulations, you’ve already successfully renewed! If you do not see an invoice, or if there is a “Renew Your Membership Now” link at the top of your Manage Profile page, then you have yet to renew.

The membership category listed no longer matches my position. How do I change my membership category?

Mail your physical dues payment to ISBA's office at 201 N. Illinois St., Suite 1225, Indianapolis, IN 46204.

Or, renew via phone by calling Carissa Long (317-639-5465, ext. 928) or Julie Gott (317-639-5465, ext. 937).

OTHER FAQS

How do I check if I’ve already renewed?
If you’re signed up for auto-renewal, if your firm handles membership dues, or if you just want to double check, you can see if you’ve already renewed for the 2023-2024 cycle by signing into inbar.org. If you see an invoice for your 2023-2024 dues, then congratulations, you’ve already successfully renewed! If you do not see an invoice, or if there is a “Renew Your Membership Now” link at the top of your Manage Profile page, then you have yet to renew.

The membership category listed no longer matches my position. How do I change my membership category?

Mail your physical dues payment to ISBA's office at 201 N. Illinois St., Suite 1225, Indianapolis, IN 46204.

Or, renew via phone by calling Carissa Long (317-639-5465, ext. 928) or Julie Gott (317-639-5465, ext. 937).

YOUR ANNUAL DUES FEE IS BASED ON THE TYPE OF MEMBERSHIP YOU FALL INTO (YOU CAN VIEW THE DIFFERENT TYPES OF MEMBERSHIPS AT WWW.INBAR.ORG/DUES). IF YOUR MEMBERSHIP CATEGORY HAS CHANGED AND IT IS NOT ALREADY REFLECTED IN YOUR INFORMATION, PLEASE CONTACT JULIE GOTT (JGOTT@INBAR.ORG) BEFORE RENEWING YOUR DUES. THE SWITCH BETWEEN MEMBERSHIP CATEGORIES MUST BE MADE MANUALLY.
INNOCENCE LOST: INDIANA’S DWINDLING RIGHT TO BAIL AND THE DAMAGING EFFECT ON THE PRESUMPTION OF INNOCENCE
The presumption of innocence is inextricably tied to the right to bail. The right to be free, before legal guilt has been established, is an essential check on the government’s power to punish people based on accusation alone; and it is critical to one’s ability to assist in their own defense and to maintain their livelihood.

Indiana law requires that all offenses are bailable, except murder or treason, and further provides judges with discretion to balance individual liberty with public safety. But these protections, and the presumption of innocence, are on life support as the legislature considers abolishing the constitutional right to bail for people that “pose a substantial risk” to the public.

To preserve the presumption of innocence, we should reject any changes to the constitutional right to bail. Instead, we should focus on the history and purpose of the longstanding right to bail, and double-down on Indiana’s existing bail laws that already properly balance public safety and freedom.

BRIEF HISTORY OF BAIL AND THE PRESUMPTION OF INNOCENCE

The idea that every individual is shrouded in innocence, unless guilt can be proven, is a requisite principle of individual liberty that has been recognized for thousands of years, dating as far back as the Bible.¹ The principle was said to be embodied in the laws of Sparta and Athens.²

Despite this rich history, the presumption of innocence was often ignored in early England, as monarchs would jail their adversaries “out of prudence rather than after judgment,” to preserve power and to prevent political uprising.³

But the enactment of the Magna Carta in 1215 protected the presumption of innocence and guaranteed the king’s subjects protection against punishment and imprisonment before guilt had been established.⁴
For centuries thereafter, it was understood that a right to bail was essential for ensuring liberty by preventing punishment before guilt had been established. And “relief against abusive pretrial imprisonment was one of those fundamental aspects of liberty which was of most concern during the formative era of English law.”

Indeed, the traditional purpose and function of bail was to ensure the accused appeared for trial, not to assure public safety or to prevent potential future crimes. As the United States Supreme Court noted:

“The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty.”

The Court further stressed that “Without this conditional privilege, even those wrongly accused or deny an accused to bail.” The American framers’ experiences under English rule led them to make laws that limited the power of government (i.e., judicial discretion) to protect individual liberty and the security of the citizenry. Ultimately, early American states scrapped judicial discretion in favor of

an unequivocal right to bail for noncapital offenses. The presumption of innocence and its connection to the right to bail is also deeply rooted in Indiana’s history and founding. In 1787, the Northwest Ordinance, which created the Northwest Territory that included Indiana, promised that: “All persons shall be bailable,

"Despite Indiana’s deeply rooted history of protecting innocence via the right to bail, the Indiana General Assembly has recently taken action to curb that right in response to progressive bail reform efforts across the country that generally focus on eliminating or lessening cash bail."

For centuries thereafter, it was understood that a right to bail was essential for ensuring liberty by preventing punishment before guilt had been established. And “relief against abusive pretrial imprisonment was one of those fundamental aspects of liberty which was of most concern during the formative era of English law.”

While the general rule in early England required offenses to be bailable, some statutes allowed justices of the peace, or even the sheriff, the discretion to admit

Despite Indiana’s deeply rooted history of protecting innocence via the right to bail, the Indiana General Assembly has recently taken action to curb that right in response to progressive bail reform efforts across the country that generally focus on eliminating or lessening cash bail.”
While Thornton recognized some bailed individuals may escape and “the ends of justice may be defeated,” he believed citizens “would be placed on safer ground, as, instead of the accused being incarcerated in prison, upon the mere presumption of guilt, often to the ruin of his health and character, he would be permitted to enjoy his liberty, and have the opportunity of preparing for his defense.”

Ultimately, the delegates removed “capital offenses” and limited non-bailable offenses to only “Murder or treason,” and the provision, as it still reads today, requires “Offenses, other than murder or treason, shall be bailable by sufficient sureties. Murder or treason shall not be bailable, when the proof is evident, or the presumption strong.”

**INDIANA’S RECENT BAIL “REFORM” EFFORTS**

Despite Indiana’s deeply rooted history of protecting innocence via the right to bail, the Indiana General Assembly has recently taken action to curb that right in response to progressive bail reform efforts across the country that generally focus on eliminating or lessening cash bail.

More specifically, the legislature has sought to regulate non-profit organizations like the Bail Project. Despite the Bail Project’s goal of “restoring that fundamental right... which is the presumption of innocence,” by helping people post their bail, the organization has faced intense backlash after two people it assisted in posting bond were later accused of committing murder while on pre-trial release.

During the 2022 session, this prompted legislators to file five bills aimed at curbing the ability of organizations like the Bail Project to effectively operate. And, in the 2023 session, supermajority leaders in the Senate proposed to amend the Indiana Constitution to allow trial judges to “consider dangerousness” and deny bail whenever a person “poses a substantial risk.”

The original language of Senate Joint Resolution 1, which passed out of that chamber, would amend Article I, Section 17 to state “Offenses, other than murder or treason, shall be bailable by sufficient sureties, unless the accused poses a substantial risk to the public. Murder or treason, or if the accused poses a substantial risk to the public, shall not be bailable, when the proof is evident, or the presumption strong.”

The House amended SJR-1 to state: “Offenses, other than murder or treason, shall be bailable by sufficient sureties, unless the accused poses a substantial risk to any person or the community. Murder or treason shall not be bailable when the proof is evident, or the presumption strong. An offense other than murder or treason shall not be bailable if: (1) the proof is evident or the presumption strong; and (2) the state proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community.”

---

**Probate Litigation**

- Will & Trust Contests
- Interference with Inheritances
- Guardianship Disputes
- Co-counsel and Expert Testimony in all Indiana counties

**Curtis E. Shirley**

Telephone: 317.439.5648
1905 S. New Market St., Suite 200, Carmel, IN 46032
Email: curtis@shirleylaw.net | URL: www.shirleylaw.net
PRACTICAL EFFECTS AND CONSEQUENCES OF THE AMENDMENT

While proposals like SJR-1 are well-intended and designed to protect the public from people who may pose a danger, “Experience should teach us to be most on our guard to protect liberty when the government’s purposes are beneficent... The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.” Practically, such a proposal will have a damaging effect on the presumption of innocence, individual liberty, and public safety.

As noted above, proposals like SJR-1 do not comport with our historical understanding of the need for the right to bail, even when a person is accused of a serious crime or “poses a substantial risk.” A change in our constitutional bail language would, therefore, be a seismic shift that would upend centuries of jurisprudence regarding the right to bail, that would ultimately usher in a new era of statutory construction and constitutional interpretation.

“A change in our constitutional bail language would, therefore, be a seismic shift that would upend centuries of jurisprudence regarding the right to bail, that would ultimately usher in a new era of statutory construction and constitutional interpretation.”

in our constitutional bail language would, therefore, be a seismic shift that would upend centuries of jurisprudence regarding the right to bail, that would ultimately usher in a new era of statutory construction and constitutional interpretation.

This is so because the language being proposed has never been a part of the traditional right to bail in this state.

The legislature’s current proposal would establish an arbitrary and unreasonably high rate of speed—a misdemeanor. In that case, a judge may decide he wants to “send a message” and that kid could be held in jail, without bail, to receive that message.

For a real-life example of the devastating consequences of such a scheme, we should consider the case of Kalief Browder who was held on Rikers Island for three years without bail, and without trial, for allegedly stealing a backpack. Browder, who was 16 at the time of his arrest, maintained his innocence and refused to take plea offers that would have released him from incarceration sooner. Ultimately, the state dismissed the case against Browder. Following his release from Rikers Island, Browder committed suicide at the age of 22.

Proposals like SJR-1 would also negatively impact folks who wish to protest government action or speak their mind at a school board meeting or other local government entity seeking to implement controversial policies. Debates get heated. People are passionate. Those people could be charged with disorderly conduct, a misdemeanor punishable by 90 actual days in jail, and because of their particular beliefs, they might “pose a substantial risk.” If the prosecutor shows that risk, the judge must deny bail. Indeed, under the federal constitution, which limits the right to bail, “January 6” defendants and Black Lives Matter protestors have been held without bail for their protests.

The proposed constitutional amendment is also an outlier among neighboring states that restrict the right to bail in that it does not limit the person or offenses that can be denied the right to bail.

For example, the Ohio Constitution requires “All persons shall be bailable by sufficient sureties, except for a person... who is charged with a felony where the proof is evident or the presumption great and where the person poses a substantial risk of serious physical harm to any person or to the community.”

Unlike SJR-1, which would prohibit bail for “offenses [where]... the accused poses a substantial risk,” Ohio’s constitution excludes...
Proposals like SJR-1 will likely have further reaching consequences for Hoosier citizens and taxpayers. The proposal would substantially hinder the presumptively innocent person’s right to prepare a complete defense, to hire counsel of their choosing, and to have a fair trial. When a person is confined, they have far less resources and ability to seek and assist counsel in their own defense. In addition, the constitutional amendment would require judges to make a finding that a person “poses a substantial risk” to the public. As Thornton presciently warned during the 1850 constitutional convention, judges should not be permitted to deny bail “because the merits of the case are of such a [violent or dangerous] character,” for “If there is anything that should be studiously kept out of view it is commenting on the merits of the case of an individual, which is pending for trial in a court of justice,” as it “prevents him from having a fair trial.”

But the state will also face pressure. If more people are held in jail without bail, there will likely be an uptick in speedy trial requests. Under the Rules of Criminal Procedure, an incarcerated person who makes a request for a speedy trial must be brought to trial within 70 days. Failure to do so results in discharge of the defendant. Speedy trial requests ultimately place a significant burden on the state to dedicate resources to bring a defendant to trial. As an example, if a person is held on a misdemeanor offense with no bail, the state—particularly in smaller counties—may be forced to delay their investigation and preparation of more serious cases, like sex or violent offenses, in order to try the misdemeanor defendant.

There will likely be less accuracy and confidence in criminal convictions. Holding someone in jail without bail increases anxiety and can have devastating consequences on a person’s ability to take care of their family or maintain a job. This creates intense pressure to get out of jail at any cost to them, including pleading guilty to a crime they either did not commit, or a crime to which they may have valid legal defenses. The practice also creates leverage for the state in the plea-bargaining process. For example, during the height of the COVID-19 pandemic, the State of Indiana suspended the right to trial by jury. This undoubtedly resulted in hundreds of people across the state who could not afford bail to be held indefinitely until either the right to trial was reinstated, bail was reduced or posted, or they accepted a guilty plea, regardless of their guilt or innocence.

With more people in jail without bail, and a greater stigma caused by branding a person a “substantial risk,” we will have fewer taxpayers, and increasingly fewer “hire-able” people, during a time when businesses are having trouble finding workers. Ultimately, such a proposal would be tough on taxpayers as it would inevitably require greater resources to house people pretrial, rather than release them with sufficient sureties prior to trial.

WHEN USED CORRECTLY: CURRENT RULE OF LAW PROPERLY BALANCES SAFETY AND LIBERTY

While proponents of a bail amendment claim judges need more discretion to consider public safety and the dangerousness of the accused, when setting bail, judges already have it. In fact, despite proposals like SJR-1, Indiana already has a vibrant bail scheme that properly protects the presumption of innocence and public safety.

In its current form, Article 1, Sec. 17 merely establishes which offenses are not bailable (e.g., murder and treason) and then provides a right

Continued on page 35...
By Joe Skeel

As executive director of the Indiana State Bar Association, I have the opportunity to take part in regular conversations with leaders of the legal community. This includes everyone from members of the judiciary, large-firm partners, small-firm practitioners, to those working in the public sector.

Despite the differences of each leader and their positions, they face a similar challenge: hiring and retaining qualified employees.

Many blame the pandemic for this “new” workforce issue. You’ve likely heard the term “The Great Reassessment.” The premise is the pandemic led many to re-evaluate life’s priorities. The result is people opting out of the traditional workforce in exchange for something more conducive to their personal life.

In reality, younger workers were prioritizing personal happiness over career advancement long before anyone ever heard of COVID. Although the pandemic most certainly led to older workers re-evaluating things, it simply supercharged a trend that had been bubbling for the previous 20 years among younger generations.

The good news is every employer can create an environment younger workers will find incredibly appealing, thereby improving their ability to hire and retain.

If you would like to learn more, or have Joe share additional insights and strategies with your firm, you can reach him at jskeel@inbar.org.
UNDERSTANDING GENERATIONAL DIFFERENCES IN THE WORKPLACE

Before we dive into changes your organization might consider, it’s important to understand why these challenges exist. To the surprise of almost no one, the basic answer lies in generational differences and the conflict they inherently create. When discussing generations as a group, it’s critical to remember that every person is unique, with a unique viewpoint, upbringing, and set of circumstances that forms their values and belief systems. For this reason, it might be best to think in terms of generational mindsets, rather than a hard construct based on birth dates. We all know that baby boomer who thinks like a 30-year-old, and vice-versa. But, for the purposes of this article, I am forced to paint with a broad brush.

Let’s start with baby boomers (born approximately 1946-1964). They value workplaces that have hierarchies and formality. They grew up in an environment where professionals started at the bottom and worked their way up. Paying their dues was expected.

For boomers, money and titles are intertwined with personal happiness. They often view their job as their identity. They worked hard when they were younger so they could reap the benefits when they became older.

Generation X’ers (born approximately 1965-1976) adopted the work culture established by boomers, but they don’t necessarily agree with all of it. They like work environments that are positive, fun, fast-paced, and informal.

This was the first generation of latchkey kids, where they often had two working parents. For this reason, they are independent and are more comfortable figuring things out on their own.

Like boomers, career advancement and money are primary drivers, although this is changing as X’ers grow older. The Great Reassessment likely describes Gen X’ers and older millennials more than any other group. Don’t expect X’ers to work until they die.

Millennials (born approximately 1977-1995) changed the game as it
Millennials also watched their parents (or their friends’ parents) lose their jobs and their homes when the stock market crashed in 2008. They viewed this as companies (and to some degree capitalism) being unreliable and/or disloyal. They learned financial security wasn’t guaranteed, even if they worked hard.

With large amounts of student debt (thanks to the rising cost of tuition) and the experience of their parents or friends’ parents, they don’t necessarily believe they will ever be financially secure. Money matters, but not as much as older people think it should. They need it to pay their debt and live their lifestyle, but their goal isn’t to amass wealth. The goal is to be happy today, not wait until they are 60 years old.

As a result, time is their currency. It’s the thing they value most.

Generation Z (born approximately 1996 to now) are just now entering the workforce. Because the oldest would be about 27 years old, there isn’t a lot of workforce research available. We do know, however, they are true digital natives. They are the first generation that doesn’t know life without a cell phone or the internet. Digital interaction is their first choice. They are more in tune with the global landscape and have a broader base of knowledge than generations before them.

As a result, they have been exposed to more diverse perspectives. This has led them to search for their “truth.” They value individual expression and avoid labels. They push back on social constructs.
that attach roles or labels, such as gender identity, racial constructs, female roles in society, and family structures.

While the millennial generation is sometimes called the “Me Generation,” Gen Z is being called the “True Generation.” They mobilize for causes they believe in. If they don’t understand why they are asked to do something, they are reluctant to do it. Transparency is a key driver.

It’s also important to understand that sense of community is central in their decision making. It influences not only the products they consume or the causes they back, but where they work and what associations they join.

**LEVERAGING GENERATIONAL DIFFERENCES IN THE WORKPLACE**

If you take away nothing else, understand the younger generations value happiness over money and titles. Those concepts aren’t synonymous. Their goal is to make *enough* money. Throwing more money at people who are unhappy in their jobs will be a temporary fix at best.

Additionally, they want their work to matter for the greater good, not just the organization’s bottom line. And they want employers that care about them as people. If they are going to commit to you, they want to know there is something more meaningful than a paycheck.

At the very least, boomers and many Gen X’ers find these expectations to be misguided. At worst, boomers think it could lead to catastrophic results. The private legal ecosystem is built on the notion that young attorneys will bill hours that lead to the financial benefit of older partners. Now we find ourselves in a position where young attorneys push back on this construct. Boomers who worked hard when they were young so they could reap the benefits when they were older are being forced into a different game. And even if finances aren’t the main concern, the future of the business they built might be.

It’s not all doom and gloom, however. Contrary to the common, misguided refrain, younger generations do want to work. And if they are working on things they care about, for a fair pay rate, they absolutely go above and beyond.

They are highly productive because they view their time as well spent and meaningful. This not only contributes to better outcomes, but a strong bottom line as well.

This leads us to the key question: What can organizations do to capitalize on these opportunities? Here are just a handful of ideas:

- Offer remote/flexible work whenever possible. If you struggle with the idea of managing a remote workforce, seek training on how to do it.
- Evaluate the type of work your associates are given. Give them (or allow them to take on) work that is meaningful to them—even if it’s in small doses. This means you should talk to them about it.
- Explain why their daily work is important (beyond the profit margin and paying their dues). Be transparent with your business model. Explain how their work impacts the bottom line.
- Create an opportunity for young employees to have a voice in organizational decisions. Maybe create an associate’s advisory council. At the very least, seek their input on organizational decisions.
• Create an opportunity for associates to collaborate as much as possible.
• Give them leadership opportunities whenever possible.
• Recognize that attorneys of color have perspectives and backgrounds beyond the broad generational lenses. Find out what those are and develop a system of support for each person.
• Invest in their career success and support their professional development. If possible, pay for it. At minimum, allow it to happen during work hours.
• Don’t just be family friendly, be family focused. Make sure your personnel policies reflect these values.

It’s unlikely any organization can make all these things happen overnight. But there are many groups that can help fill the gaps. Seek them out. For example, the Indiana State Bar Association can give your associates the following opportunities:
• Provide them with an opportunity to do meaningful work while gaining experience through pro bono opportunities and involvement (and leadership) in sections or committees.
• Get professional development through CLE programs, both online and in-person, that connect them with peers and subject-matter experts.
• Provide professional development and personal support through programs like the Leadership Development Academy, new mentorship programs, and small-group cohorts.
• Support their growth in a public setting, which can improve your organization’s reputation among their peers and aid in future workforce recruitment and business development.

Regardless how you might feel, expectations of younger employees aren’t going away. And, as we are witnessing, they have the ability to dictate terms. If you don’t offer some of what they want, someone else will.

On the other hand, if your organization listens to their viewpoints and takes steps to support their values, you can set yourself apart as a desirable place to work. It may not stop people from leaving completely, but it’s sure to slow the churn. Most importantly, it will help create a culture that will set you apart from others in the hiring market.

Joe Skeel is the executive director of the Indiana State Bar Association. Through his 20 years as an association leader, he has studied generational trends and their impact on association membership and the workforce.
Imposter syndrome was first described in 1978 by Suzanne Imes, Ph.D., and Pauline Rose Clance, Ph.D., as an observation among high-achieving women who, despite exceptional academic and professional accomplishments, persisted in believing they were phonies. Imposter syndrome can be defined loosely as struggling with feelings of inadequacy despite objective achievements and qualifications. It may manifest as nervousness, restlessness, or negative self-talk. It also is linked to stress and burnout.

Imposter syndrome is prevalent in underrepresented racial and ethnic minorities, women, and younger individuals. However, it can afflict people of any race, gender, and age. It affects as many as 82% of people and disproportionately affects high-achieving people like lawyers. It impacts your well-being, and failure to address it can lead to depression and anxiety, stress, and missed opportunities. It can hold you back by preventing you from accepting credit for your achievements, asking for a raise or promotion, seeking out mentors, maintaining a healthy work-life balance, and from being ‘all in’ in personal relationships.

Lawyers may be more susceptible to this behavioral health phenomenon for several reasons. In the legal field, reasonable minds can differ on almost anything. As
law students, you are taught to respond to nearly every legal question with, “it depends.” There is often no objective right or wrong answer. You are expected to analyze and argue multiple positions and are often allowed to take the best position possible. After graduating and passing the bar, you no longer receive credit for arguing both sides of an issue. Instead, you make the best arguments for your client’s desired outcome. Case law and statutes might not favor your client. Facts might not favor your client. The judge or jury might not favor your client. And unless you win every argument and objection in the courtroom, it may be agonizing riding the waves of the justice system.

"Studies show it takes nearly six positive comments to compensate for every negative one."

Generational differences also may come into play. As a new attorney, you might spend much of your time trying to please multiple supervisors and likely neglecting your own self-care in the process. You may be accustomed to regular feedback and praise only to learn that no news is good news. You might only receive feedback when you make a mistake. Studies show it takes nearly six positive comments to compensate for every negative one. So if your supervisor is not praising you at a ratio of 6:1, it can lead to feelings of failure and inadequacy which you are busy thinking about how it could have been done differently or better, then you deprive yourself of the opportunity to experience and internalize the emotions of fulfillment or pride from having accomplished it.

So, what can you do?

First, understand that if you struggle with imposter syndrome it is likely because you are a smart, high-achieving individual.

Second, accept you did not fake getting into law school, earning your J.D., passing the bar exam, landing your job, or any of the other accomplishments you have achieved.

Third, recognize the only fraud in the room is the voice in your head telling you that you might be a fraud. You need to retrain your brain to think about yourself positively. You can start this by learning to identify and stopping your negative self-talk. Own your achievements—do not give luck the credit. Recognize you can learn anything, and your skills are transferable and valuable. Review and update your résumé when you reach milestones. Talk to a family member, friend, mentor, or therapist that knows you and can reassure you that, while your feelings are normal, they are also wrong. You are not an imposter!

Fourth, set and accomplish goals. Doing so will instill a sense of mastery and build a positive self-image. As you achieve your goals and your confidence increases, your self-criticism and self-doubt will decrease.

Fifth, recognize that imposter syndrome is a behavioral (mental) health phenomenon. Research suggests there are psychological issues that can co-exist with imposter syndrome such as depression, anxiety, low self-esteem, somatic symptoms, and social dysfunctions. It is important to not dismiss any psychological issues that may be involved. Reach out to a mental health professional or to the Indiana Judges and Lawyers Assistance Program (JLAP) if you need help.

Finally, if you do not wrestle with imposter syndrome, take a moment

Continued on page 37...
The Indiana Supreme Court issued opinions addressing jury selection procedures and interlocutory appeals—the first two opinions authored by Justice Molter—as well as a divided opinion on belated appeals. Opinions from the Court of Appeals reversed a contempt finding and found Snapchat evidence relevant in a reckless homicide driving case.

**VOIR DIRE IS NOT JUST FOR JUDGES**

Trial Rule 47(D) provides: “The court shall permit the parties or their attorneys to conduct the examination of prospective jurors, and may conduct examination itself.” For decades that provision has been applied in courtrooms across the state to allow lawyers—and not simply the judge—to question prospective jurors.

In *Doroszko v. State*, 201 N.E.3d 1151, 1154 (Ind. 2023), the trial judge informed the parties he “ask[s] the voir dire,” although he welcomed them to submit questions for the court’s consideration. The parties agreed this procedure violated Rule 47(D).

A new trial was ordered. An error under Trial Rule 47(D) “is not harmless if it deprives a party of an adequate opportunity to exercise peremptory or for-cause challenges to prospective jurors based on a key, disputed aspect of the case.” *Id.* at 1158. The trial court not only denied the defendant “the opportunity to conduct his own examination, it also inadequately examined the
prospective jurors on controversial legal principles relevant to his claim of self-defense” with the “cursory nature” of its questioning of six “yes” or “no” questions. *Id.* at 1157.

The unanimous opinion provides useful reminders and broader guidance, including that trial courts have discretion in imposing time limitations or limits on repetitive, argumentative, or improper questions by lawyers. Judges may also question jurors—but not to the exclusion of questions from counsel:

As part of its own examination, the court may, but does not have to, include questions the parties submit to the court in writing. If the court elects to examine the prospective jurors, it is within its discretion to decide whether its examination or the parties’ examination will occur first, but whenever the trial court examines the prospective jurors, it must allow the parties an opportunity to supplement the court’s inquiry by posing their own additional questions directly to the prospective jurors.

*Id.* at 1156.

**DISMISSAL OF DISCRETIONARY INTERLOCUTORY APPEALS SHOULD REMAIN RARE**

In *Means v. State*, 201 N.E.3d 1158, 1161 (Ind. 2023), the Court of Appeals motions panel accepted jurisdiction over a discretionary interlocutory appeal of an order in limine, “but then a different Court of Appeals panel assigned to consider the merits dismissed the appeal sua sponte, reasoning that orders in limine are only tentative rulings, so the appealed order was not ripe for appellate review.”

The defendant sought transfer, and the Indianapolis Bar Association Appellate Practice Section filed an amicus brief seeking guidance about the procedural issues presented in acceptance and sua sponte dismissal of interlocutory appeals, which occurred here after months of delay and extensive briefing. The Indiana Supreme Court granted transfer to provide that guidance, reasoning in part that the “writing panel’s authority to revisit the decision to accept an interlocutory appeal and then dismiss the appeal as improvidently granted is simply a specific application of the court’s more general power to reconsider its rulings.” *Id.* at 1164. Nevertheless, while a writing panel may reconsider a motions panel’s decision to accept a discretionary interlocutory appeal, the practice is appropriately disfavored. The same efficiency concerns motivating the final judgment rule and the exception for certain interlocutory appeals have restrained the Court of Appeals to rescind its acceptance of interlocutory appeals on only rare occasions. Trial courts and parties can therefore continue to expect that, generally, when the trial court certifies an interlocutory appeal and the Court of Appeals accepts it, the Court of Appeals will ultimately decide the appeal.

*Id.* at 1165.

Finally, the Supreme Court disagreed with the Court of Appeals’ view that “all orders in limine are ineligible for interlocutory review,” explaining instead that the “tentative nature” of such orders “is why our appellate courts have long reviewed orders in limine through interlocutory
appeals.” *Id.* (citing *McClain v. State*, 678 N.E.2d 104, 106 (Ind. 1997) (interlocutory appeal reviewing a trial court’s order granting the State’s motion in limine to exclude certain expert testimony)).

**DIVIDED COURT ALLOWS BELATED APPEAL**

Indiana Post-Conviction Rule 2(1) (a) allows an eligible convicted defendant to “petition the trial court for permission to file a belated notice of appeal of the conviction or sentence if;

1. the defendant failed to file a timely notice of appeal;
2. the failure to file a timely notice of appeal was not due to the fault of the defendant; and
3. the defendant has been diligent in requesting permission to file a belated notice of appeal under this rule.”

In *Leshore v. State*, 203 N.E.3d 474 (Ind. 2023), a divided Indiana Supreme Court vacated a divided Court of Appeals opinion, allowing a defendant who pleaded guilty to felonies in 1999 the opportunity to pursue a belated appeal based on his discovery of new information in 2021.

First, in concluding that the defendant was not at fault for the delay, the majority noted the mistaken advice provided in 2005 by his public defender meant he had “no reason to appeal his sentence when he was never aware of his right to do so.” *Id.* at 479. The court also pointed to “equitable factors weighing in his favor: he was nineteen years-old when sentenced, he had limited education and contact with the legal system, and no experience with appellate law and its many rules.” *Id.*

Second, the majority found that diligence was “best measured from the time when Leshore learned of his rights,” from another inmate in 2021, “to the filing of his permission to file a belated notice of appeal,” nineteen days later. This nineteen-day-delay was diligent; “while we decline to draw a line for when diligence must always begin, we can say Leshore was prompt enough.” *Id.*

Justice Goff, joined by Justice Slaughter, dissented. In their view, Leshore did not demonstrate diligence in pursuing an appeal when he “gave up any pursuit of post-conviction relief for a period of sixteen years. Had he proceeded with sentencing claims via Post-Conviction Rule 1 in 2005, he would probably have discovered much sooner that he needed to seek a belated appeal.” *Id.* at 481.

**COURT OF APPEALS’ OPINIONS**

**CONTEMPT FINDING REVERSED**

In *Knowles v. State*, 202 N.E.3d 1165, 1169 (Ind. Ct. App. 2023), the Court of Appeals reversed a contempt finding and accompanying loss of credit time based on the defendant's failure to participate in the completion of the PSI report. Because the trial court had no personal knowledge of the disobedience, a finding of direct contempt was not sustainable. Nor could the defendant be found in indirect contempt when “the trial court did not comply with, or even appear to consider, Indiana Code section 34-47-3-5,” which “codifies the due-process requirements for notice and opportunity to be heard on an indirect-contempt allegation.” *Id.* at 1170.
SNAPCHAT, DISTRACTED DRIVING EVIDENCE RELEVANT IN RECKLESS HOMICIDE DRIVING CASE

In Singh v. State, No. 22A-CR-1316, 2023 WL 2092285 (Ind. Ct. App. Feb. 20, 2023), a man slowly backed his semi-trailer truck, with hazard lights flashing, on a four-lane highway after overshooting his turn at an intersection. A speeding SUV collided into the back corner of the truck when the driver did not activate her brakes. The SUV driver died, and the truck driver was charged with reckless homicide.

At trial defense counsel sought to admit evidence that the SUV driver was composing Snapchat messages to friends on her phone while speeding in the left lane, arguing the evidence was relevant because (1) her SUV would have hit the truck “even if he were simply slowing down to enter the left turn lane rather than creeping backward in the left lane, so his conduct was not a proximate cause of her death” and (2) “the Snapchat evidence made the collision less foreseeable.” Id. ¶ 17.

The Court of Appeals agreed and remanded for a new trial. Reckless homicide requires the State to prove the defendant plainly, consciously, and unjustifiably disregarded the risk of death of another person.

Reckless-homicide-via-vehicle cases are incredibly fact-sensitive. Here, without the introduction of the Snapchat evidence or the evidence about distracted driving, the jury did not have the full picture of this tragic situation. We cannot expect a jury to fulfill its duties in a vacuum. The law requires that the jury receive this relevant evidence to weigh alongside other critical evidence to then determine whether Singh’s conduct was a proximate cause of [the SUV driver’s] death, whether he unjustifiably disregarded a risk of death, and ultimately whether Singh is guilty of reckless homicide.

Id. ¶ 19. 

That’s why you need our experienced team at your table. When you put Parr Injury attorneys on your side, you can be as involved as you want from start to finish — and with equitable co-counsel arrangements. A free consultation with you and your client is just one call away.

TRUCK ACCIDENTS DEVASTATE LIVES NOW AND DOWN THE ROAD.

John McLaughlin, Tony Patterson and Paul Kruse

PARR RICHEY
INJURY ATTORNEYS

INDIANAPOLIS, IN | LEBANON, IN | 317.269.2509 | WWW.PARRINJURY.COM

28
RES GESTAE • INDIANA STATE BAR ASSOCIATION
Here’s a topic that is constantly on my mind: money. And I have a feeling that I am not the only one.

People love to talk about money. They talk about how much they have, how much they don’t have, who has the most, and how they need “just a little bit more.” Pink Floyd thinks it’s a gas, Cyndi Lauper thinks it changes everything, and Dire Straits is a little upset that rock stars get it for nothing.

Apparently, lawyers care about it as well. I am told by (our wonderful) ISBA staff that questions about money, fees, and ethics come up frequently in CLE presentations. So, in case you missed those seminars, I would like to give you eight Great Ethical Truths about ethics and money.

1. YOUR FEE MUST BE REASONABLE.

We have all read Rule 1.5 of the Indiana Rules of Professional Conduct and we know that our fee must be reasonable, but do we know what “reasonable” really means? The Rules give us factors to determine the
reasonableness of a fee, including “the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.” See Ind. Professional Conduct Rule 1.5(a)(1). However, this guidance may not give a lawyer what he or she needs to avoid a fee dispute.

To understand the concept of a “reasonable fee,” it may be easier to see what the Supreme Court of Indiana has said is NOT reasonable. For example, “charging a minimum of ¼ hour for any work (including such tasks as review of short email) is unreasonable.” Matter of F.Z, 911 N.E.2d 572, 537 (Ind. 2009). In addition, charging “for work that did not benefit the client” and “charging and collecting” nonrefundable flat fees have also been deemed unreasonable. Id.; Matter of H.O., 942 N.E.2d 799, 807 (Ind. 2011).

On the other hand, sometimes it just depends. While the commission conceded that “a 33 1/3% contingent fee is ordinarily reasonable in conventional tort cases,” the Supreme Court of Indiana noted that in “some medical malpractice cases, a total fee of 32-35% may be unreasonably high.” Matter of Stephens, 867 N.E.2d 148, 155-6 (Ind. 2007). Hopefully, we will know an unreasonable fee when we see it.

**2. SPEAKING OF CONTINGENCY FEES, YOUR CONTINGENCY FEE MUST BE IN WRITING AND SIGNED BY THE CLIENT. BUT YOU ALREADY KNEW THAT.**

Rule 1.5(c) of the Indiana Rules of Professional Conduct gives a lot of guidance on what needs to be in a contingency fee agreement. The written fee agreement should include “percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated.” Prof. Cond. R. 1.5(c). In my travels, I have learned that other states actually have issued a “standard” template for lawyers to use for contingency fee cases. However, this rule seems clear enough that such a template would not be necessary.

**3. SPEAKING OF WRITTEN FEE AGREEMENTS, IF YOU SHARE A FEE WITH ANOTHER FIRM, THAT FEE ALSO HAS TO BE IN WRITING AND “CONFIRMED” BY THE CLIENT. BUT WAIT. THERE’S MORE.**

If you want to ensure that your fee sharing arrangement is sound, you need to look at Rule 1.5 of the Indiana Rules of Professional Conduct one more time. This time, look to Rule 1.5(e) and make sure that the fee arrangement is “confirmed in writing” and that the division of the fee is in “proportion to the services performed by each lawyer” or “each lawyer assumes joint responsibility for the representation.”

**4. CONTINGENCY FEES GET COMPLICATED WHEN THE LAWYER IS TERMINATED BEFORE THE FEE IS EARNED.**

Every time I see a big jury verdict I reflect on my life’s choices and remind myself why I didn’t become a plaintiff’s lawyer. To make me feel better, I remind myself that the life of a PI attorney isn’t always private jets and vacation homes. Sometimes it is messy.

For example, things get messy when a client leaves his or her original lawyer and hires a new one on a contingency fee case. What happens then? Will the first lawyer get paid for all of the work he or she did (assuming there is a recovery)? In theory, yes.
In the event the second lawyer brings the case across the goal line and achieves a recovery, that lawyer will get paid on a “quantum meruit” basis. That means the first lawyer’s fee will be “measured by the proportion of the total fee equal to the contribution of the discharged lawyer’s efforts to the ultimate result.” Galantis v. Lyons & Truitt, 715 N.E.2d 858, 860 (Ind. 1999). While that is a good standard, two lawyers won’t always be able to agree on their efforts and, in fact, may overvalue their contributions to the matter. (I know. That’s hard to believe.) If there is no agreement, the value of the efforts may need to be determined by a court.

6. WHEN CHARGING A FLAT FEE, HAVE A CLEAR AGREEMENT WITH THE CLIENT AS TO THE OWNERSHIP OF FEES.

If you have any questions about flat fees, you need to review ISBA Legal Ethics Comm. Op. No. 3 (2015). It is available on the Indiana State Bar Association’s website, and it is a wonderful resource. This opinion makes clear that a “true” flat fee is treated as earned upon receipt and, therefore, should be placed in the attorney’s operating account. Nevertheless, that does not mean that the fee is “non-refundable” and that point should be made clear to the client in an engagement letter.

6. WHEN CHARGING A FLAT FEE, HAVE A CLEAR AGREEMENT WITH THE CLIENT AS TO THE OWNERSHIP OF FEES.

In most circumstances, the answer will be yes, BUT only if the lawyer follows Rule 1.8(a), which requires “fair and reasonable” terms in writing and written advice of the “desirability of seeking” the advice of independent counsel. Comment [1] to Prof. Cond. R. 1.8(a) makes clear that Rule 1.8(a) applies “when a lawyer seeks to renegotiate the terms of the fee arrangement with the client after representation begins in order to reach a new agreement that is more advantageous to the lawyer than the initial fee arrangement.”

8. EXPENSES CANNOT BE PROFIT CENTERS.

Lawyers can recoup expenses for services performed in the office. For example, lawyers can pass on out of pocket costs for copying and legal research. However, these expenses cannot exceed the actual costs to the client. In addition, a lawyer “may not charge a client more than her disbursements for services provided by third parties.” ABA Comm. on Ethics and Prof’l Resp., Formal Op. 93-379.

CONCLUSION

There are many ethical issues that come into play when lawyers seek to be paid for their services. The list given above does not come close to all the issues that can arise, including issues involving trust accounts and when a lawyer may have to forfeit his or her fee. Hopefully, this list provides a quick refresher on some of the ethical considerations involved when attorneys are establishing and charging a fee.
COURT OF APPEALS ADDRESS ACCESS TO PUBLIC RECORDS ACT, BIAS

In February, the Indiana Supreme Court issued no civil opinions and the Indiana Court of Appeals issued 12 published civil opinions. Three select Court of Appeals decisions are summarized below.

SELECT COURT OF APPEALS DECISIONS

BECAUSE COVID-19 VIRUS PARTICLES DID NOT CAUSE PHYSICAL LOSS OR DAMAGE TO PROPERTY, AN INSURED DID NOT QUALIFY FOR BUSINESS-INCOME COVERAGE UNDER ITS PROPERTY INSURANCE POLICY

The Indiana Court of Appeals affirmed a summary judgment in favor of the Cincinnati Casualty Company in Indiana Repertory Theatre, Inc. v. The Cincinnati Casualty Co., No. 21A-CP-2848, 2023 WL 1950974 (Ind. Ct. App. Feb. 13, 2023). In March 2020, during the early stages of the COVID-19 pandemic, Indiana Repertory Theater, Inc. (IRT) decided to temporarily close its downtown Indianapolis theater to protect the health of its patrons, staff, and artists, although it continued to use the facility for limited purposes. The IRT submitted an insurance claim for business-income coverage under its property insurance policy with the Cincinnati Casualty Company (Cincinnati). The policy defined “loss” as “accidental physical loss or accidental physical damage.”

Cincinnati denied IRT’s claim on the basis there must be direct physical loss or damage to the covered property—such as deformation, permanent change in physical appearance or other manifestation of physical effect. The IRT sought declaratory judgment. First, the IRT asserted the loss of the use of the theater presented by the COVID virus constituted a physical loss regardless of whether the virus was physically present in the theater. In March 2021, the trial court granted summary judgment on this theory of loss, concluding the policy required physical alteration to the property, and the IRT’s loss of use did not “have any physical impact on the property.” The IRT appealed this order, and the Court of Appeals affirmed.
The IRT then pursued an alternative theory that the virus was present in the theater and physically altered the air and surfaces. In December 2021, the trial court granted Cincinnati summary judgment a second time, concluding even if the virus was present, it did not physically alter the air or surfaces. The trial court noted the fact the virus can be removed by cleaning or dies over time on its own established it does not cause physical, structural alteration. The IRT appealed a second time.

The Court of Appeals adopted the trial court’s conclusions that the presence or potential presence of the virus inside the theater does not equate to the necessary physical alteration to the property under the policy language. The Court of Appeals noted the trial court’s decision is consistent with the great weight of authority from around the country. Many courts have considered similar physical-alteration arguments and the large majority have rejected them. See e.g. Verveine Corp. v. Strathmore Ins. Co., 489 Mass. 534 (2022); Colectivo Coffee Roasters, Inc. v. Socy Ins., 401 Wis.2d 660 (2022); Circle Block Partners, LLC v. Fireman’s Funds Ins. Co., 44 F.4th 1014, 1020 (7th Cir. 2022). Therefore, although the IRT undoubtedly lost income like many other businesses during the early stages of the COVID-19 pandemic, this loss was not covered by the IRT’s insurance policy because there was no physical alteration to the property under the policy.

**INDIANA ACCESS TO PUBLIC RECORDS ACT DOES NOT AUTHORIZE A FEE TO INSPECT PUBLIC RECORDS**

In Tutt v. Evansville Police Dep’t., No. 22A-MI-1723, 2023 WL 2092283 (Ind. Ct. App. Feb. 20, 2023), the Court of Appeals reversed and remanded a grant of summary for the defendant Evansville Police Department (department) in a Public Records Act dispute, with instruction to enter summary judgment for the requesting party, plaintiff Jennifer Tutt.

Tutt went to the department and asked to inspect an accident report without paying a fee. A department employee informed her that she could access the report via a website that charges $12 for accident reports. Tutt clarified she did not want a copy of the report—she just wanted to inspect the report. The department still denied her request. Tutt then sued the department for a violation of the Indiana Access to Public Records Act (APRA), Indiana Code chapter 5-14-3. The trial court entered summary judgment for the department and Tutt appealed.

APRA provides “it is the public policy of the state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees.” Ind. Code § 5-14-3-1. APRA is liberally construed to implement this state policy with the public agency bearing the burden to justify denying access. Furthermore, APRA requires public agencies to maintain records of crimes and accidents and bars public agencies from charging fees to inspect public records. Ind. Code § 5-14-3-8(b)(1).

The department acknowledged it qualifies as a public agency, an accident report is a public record, and no exception applied. Yet the department asserted Title 9 of the Indiana Code allows a fee to inspect an accident report and these statutes control. Ind. Code 9-26-2-1. Tutt acknowledged Title 9 authorizes a fee for obtaining accident reports, but Title 9 said nothing regarding the inspection of a report. The department relied heavily on an advisory opinion of the Public Access Counselor, Carroll Cnty., E911 v. Hasnie, 148 N.E.3d 996, 1004 (Ind. Ct. App. 2020), but the Court of Appeals found it is not bound by such opinions. The Court of Appeals agreed with Tutt, finding neither APRA nor Title 9 authorize a fee to merely inspect an accident report.

**CLEAR BIAS BY PRESIDING JUDGE VIOLATED PLAINTIFF’S RIGHT TO DUE PROCESS, ENTITLING PLAINTIFF TO A NEW JUDGE ON REMAND FROM SUMMARY JUDGMENT ORDER**

In reversing a summary judgment order, the Court of Appeals found the presiding judge’s bias entitled plaintiffs to a new judge on remand in Chappey v. Storey and Complete Auto & Tire, LLC, No. 22A-CT-979, 2023 WL 1949938 (Ind. Ct. App. Feb. 13, 2023).

In July 2018, plaintiff Penny Chappey called Complete Auto & Tire, responded to the call with his flatbed tow truck. At some point, as Storey was preparing the SUV for towing, Chappey walked to the back of the flatbed, stepped onto the flatbed, and fell off the flatbed several feet onto the ground, sustaining injuries. The parties disputed why Chappey stepped onto the flatbed. Chappey claimed Storey told her to get on the flatbed, a claim Storey denied. Chappey did not know why she fell, but she alleged it was a “tight space” between the SUV and
the edge of the flatbed. She and her husband sued the towing company and its employee for negligence. The trial court granted summary judgment in favor of defendants and the plaintiffs appealed.

At a hearing on the defendants’ motion for summary judgment, the trial court judge expressed skepticism about the merits of the lawsuit stating: “frankly I wouldn’t be suing in this situation” and he did not think the lawsuit was a “valuable use of limited judicial resources” because Chappey could not explain why she fell off the flatbed. The judge stated: “Okay, we understand that she’s somehow on this flatbed.

I live in Carroll County, I know JP Storey, I don’t know the Chappey’s.” The judge went on to acknowledge he had “improperly interjected at every turn,” but he asked the parties not to take his “unnecessary indulgences in the wrong way.”

The judge then issued his order entering summary judgment for the defendants on April 5, 2022. The order outlined the judge’s issues with the “legal fiction” of insurance companies and the “broken” judicial system. He went on to state, “[p]lease, take this case to the Supreme Court. Let the people know how our system works and why it is broken and then see if this judicial officer is wrong.”

A month later, the trial court sua sponte ordered “all dicta stricken” from the summary judgment order.

The Court of Appeals readily found the question of fact as to why Chappey got in the flatbed precluded summary judgment. The court further found the judge had demonstrated the clear bias necessary under Indiana Trial Rule 76(C)(3), and his demeanor “crossed the barrier of impartiality and torpedoed the Chappeys’ case.” Thus, the Chappeys were denied due process by the judge and were entitled to a new judge pursuant to Indiana Trial Rule 76(C)(3).
to bail in all other offenses “by sufficient sureties.” The legislature has provided trial court judges with a wide array of discretion in setting bail under the Indiana Code.

For example, Ind. Code § 35-33-8-3.2(a) already allows judges to consider public safety, and they may impose restrictions to “assure the public's safety,” including money bail, restriction on movements and associations, no-contact orders, or requiring pretrial supervision and monitoring. If judges don’t like any of those options, then they may “impose any other reasonable restrictions designed to assure the... physical safety of another person or the community.”

Additionally, Ind. Code § 35-33-8-3.5 provides for stricter bail conditions for sexually violent predators. Ind. Code § 35-33-8-3.6 provides an automatic no-contact order for violent offenses. Ind. Code § 35-33-8-6.5 requires no bail for 8 hours if a person is arrested on a domestic violence charge.

Moreover, courts have power to revoke bail under Ind. Code § 35-33-8-5 in certain circumstances. This means if a person originally posts bail but then goes on to commit a new crime while on pre-trial release, their bail can be revoked and they can be made to sit behind bars until their case is resolved. This is a powerful tool to protect public safety.

The courts also have gone to great lengths to balance public safety with the rights of the accused through its utilization of risk assessment tools and the implementation of Criminal Rule 26, which also was codified by the legislature under Ind. Code § 35-33-8.3.8.

Criminal Rule 26 encourages the use of evidence-based risk assessment tools to determine whether a person should be released without money bail. These tools aim to assist courts in evaluating the likelihood of a defendant committing a new criminal offense or failing to appear. While the rule is focused on reducing pretrial detention, the rule also allows for judges to protect public safety in setting bail. In fact, the Indiana Supreme Court recently held “when a person poses a risk of flight or a risk to public safety, Criminal Rule 26 in no way hinders a trial court's ability to set bond in an amount sufficient to curtail such risks,” and further upheld a $50,000 bond for an 18-year-old high school student after she allegedly acted as a getaway driver in attempted burglary. The court found bond was appropriately set because the state had “met its burden of proof in showing that [the defendant] posed a flight risk and a risk to the [victim's] physical safety, and because the trial court applied the appropriate procedural safeguards.”

It is clear Indiana law already appropriately prioritizes public safety and gives trial judges a great deal of discretion in setting bail. The natural result, and unintended consequence, of restricting the constitutional right to bail through proposals like SJR-1 would be to eliminate the right to be presumed innocent before guilt has been proven.

**CONCLUSION**

More than 70 years ago, the United States Supreme Court made the powerful observation that “Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.” The presumption of innocence in the State of Indiana is in grave danger, as our representatives seek to limit the centuries-old right to bail. History teaches us we should approach any such proposals with a great deal of caution, as these proposed changes necessarily limit liberty and expand the power of government. Consequently, to preserve our time-tested principles, we should insist upon a renewed focus on the history and principles of the right to bail and a commitment to the rule of law that already properly balances liberty and safety. And we must reject any changes to our constitution to rescue innocence and Indiana’s dwindling right to bail.

Mike Cunningham is chair of the Indiana State Bar Association’s Criminal Justice Section and practices criminal defense in southeast Indiana.
FOOTNOTES:

1. See Deuteronomy Chapter 19:15 (One witness shall not rise up against a man for any iniquity, or for any sin, in any sin that he sinneth: at the mouth of two witnesses, or at the mouth of three witnesses, shall the matter be established.).
4. Supra n. 4 at 11.
6. Id. at 8.
7. Footo, supra, n. 6 at 975.
8. Ind. Const. Art. I § 17 (1850) (“That all persons shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident, or the presumption great; and the privilege of the writ of habeas corpus shall not be suspended, unless, in case of rebellion or invasion, the public safety may require it.”).
10. Id.
11. Ind. Const. Art. I § 14 (1816) (“That all persons shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident, or the presumption great; and the privilege of the writ of habeas corpus shall not be suspended, unless, in case of rebellion or invasion, the public safety may require it.”).
12. Id.
14. Id.
15. Ind. Const. Art. I § 17 (1850)
18. Olmstead v. United States, 277 U.S. 438 (1928) (Brandeis, J., dissenting)
25. Ind. Crim. Rule 4(B)
29. See, generally Ind. Code § 35-33-8-3.2(a)
30. Ind. Code § 35-33-8-3.2(a)(9)
31. Senate Bill 158 (2023) seeks to increase this hold from 8 hours to 24 hours. See, Senate Bill 158, available at https://iga.in.gov/legislative/2023/bills senate/158.
32. Ind. Crim. Rule 26
33. DeWees v. State, 180 N.E.3d 261 (Ind. 2022)
34. Id.
to reflect and ask yourself why. Perhaps you are not a member of a marginalized community that has traditionally struggled for acceptance and opportunities or perhaps you have overcome self-criticism and self-doubt by surrounding yourself with supportive family, friends, and mentors. Think about how you can be an ally to others in the legal profession struggling with imposter syndrome. Important steps include affirming those who are struggling with it by recognizing their accomplishments and strengths, and fostering a culture of inclusion where everyone’s contributions are appreciated and acknowledged.

Bradley S. Thomas is a Licensed Social Worker and a Registered Domestic Relations Mediator. He works as a Crisis Therapist for Aspire Indiana and provides therapeutic services through Counseling Partners LLC. He received his MSW from Loyola University Chicago.

Christina L. Thomas is an Attorney and the Executive Director of Tippecanoe County Court Appointed Special Advocate (CASA). She focuses her career on ensuring marginalized communities have access to the justice system. She earned her J.D. from Indiana University Robert H. McKinney School of Law.

FOOTNOTES:

4. Bravata, supra note ii.
8. Id.
9. Chrousos, supra note v.
12. https://google.com (search “analysis paralysis) (returning over 49,000,000 results).
SPECIAL SERVICES

Fiduciary Services

ARROW FIDUCIARY SERVICES is now taking new clients. We focus on being your appointed
• Attorney-in-Fact,
• Guardian,
• Trustee, and
• Executor.
Please contact Kate Borkowski, JD, at Arrow Fiduciary Services, Kate@ArrowFiduciaryServices.com, 317-840-6525, ArrowFiduciaryServices.com.

INDIANA ATTORNEY seeks professional or co-counsel positions with Indiana attorneys in the practice of immigration law. Over 25 years experience in immigration. Will handle adjustment of status, change of status, labor certificates and other matters. Also, will attend interviews at Indianapolis Immigration Office.
Thomas R. Ruge, Lewis & Kappes
P.C., 317-639-1210, SMiller@lewiskappes.com

INDIANAPOLIS IMMIGRATION attorney seeks positions with Indiana attorneys in the practice of immigration law. Over 25 years’ experience in immigration. Will handle adjustment of status, change of status, labor certificates and other matters. Also, will attend interviews at Indianapolis Immigration Office.

FLORIDA PROBATE & PROPERTY AV Rated Attorney. Member ISBA. Ancillary probates, real estate transactions, real estate development and litigation. Robert J. Stanz, Esq., 5121 S. Lakeland Dr., Lakeland, FL 33813; 888 478 2695; rjstanz@stanzlaw.com

EMPLOYMENT DESIRED

General Civil Practice

CALIFORNIA LAWYER since 1966. AV rated. Member ISBA. Father and brother practiced in Marion. Enjoys interacting with Indiana lawyers. Handles transactions, ancillary probates and litigation in CA and federal courts.
John R. Browne III, a Professional Corporation; 2121 N. California Blvd. Ste. 875, Walnut Creek, CA 94596; 925-433-7225; jbrownelaw@gmail.com; www.johnbrownelaw.com

WORKER’S COMPENSATION attorneys seek referrals on Worker’s Compensation cases statewide.
Tel., 317-973-5282 or 844-415-1461.

600+ appeals
30+ years experience

Stone Law Office & Legal Research
26 W. 8th St., P.O. Box 1322
Anderson, IN 46015
765/644-0331 800/879-6329
765/644-2629 (fax)
info@stone-law.net

David W. Stone IV  Cynthia A. Eggert
Attorney Paralegal

PROFESSIONAL MARKETPLACE
LEWIS WAGNER
ATTORNEYS

Lewis Wagner is thrilled to welcome the Hewitt team and is excited to merge our extensive experience and talents—positioning the firm as a probate practice leader in Indiana.
CHANGE SERVICE REQUESTED