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THE BRAHMAVIHĀRAS:

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President's Perspective

LAWYERS IN THE TWILIGHT ZONE

By Amy Noe Dudas

“There is a fifth dimension, beyond which is known to man. It is a dimension as vast as space and as timeless as infinity. It is the middle ground between light and shadow, between science and superstition, and it lies between the pit of man’s fears and the summit of his knowledge. This is the dimension of imagination. It is an area which we call... The Twilight Zone.”

In 1963, our Indiana Supreme Court took us into the twilight zone.

We deal with facts and how the law applies to those facts. There is nothing more real than a real estate transaction gone bad, an alleged criminal act, or the administration of a loved one’s estate. There’s no room for “middle ground,” nor should there seem to be any legal area “between light and shadow, between science and superstition.”

On the other hand, the answer to a “quick” legal question is usually, “It depends.” We lawyers certainly recognize that the law is filled with as much nuance as chaos theory—a butterfly flapping its wings when Ms. Smith starts her car could cause Mr. Jones to T-bone her at an intersection thirty minutes later.

This twilight zone of which the Indiana Supreme Court spoke is the very foundation of what we do—the practice of law.

As we all know, the access to justice gap is growing and has been for decades, despite various efforts to shrink it. These efforts have centered on establishing legal aid clinics, incentivizing more pro bono work, and making official court forms available for use by pro se litigants.

But a couple of really preternatural efforts (at least from most lawyers’ perspectives) have been in the works. One is allowing nonlawyers to own interests in law firms, which requires a complete abrogation of Rule 5.4 of the Rules of Professional Conduct. Another is licensing nonlawyers to provide certain law-related services previously constrained to attorneys.

Utah, Arizona, and Minnesota have programs in which nonlawyers are allowed to provide limited legal services like analyzing a prospective client’s needs, providing legal advice, drafting and filing documents with the court, engaging in negotiations, and even appearing in court. A similar program in Oregon will go into effect in July 2023.

Utah, Arizona, and Minnesota have programs in which nonlawyers are allowed to provide limited legal services like analyzing a prospective client’s needs, providing legal advice, drafting and filing documents with the court, engaging in negotiations, and even appearing in court. A similar program in Oregon will go into effect in July 2023.
In desperate efforts to shrink the access to justice gap, jurisdictions are re-defining the practice of law.

With that, we have entered the dimension as vast as space and as timeless as infinity, a dimension lying between the pit of our fears and the summit of our knowledge. Here’s what our Indiana Supreme Court said in 1963:

Although the practice of law is one of the oldest and most honored professions, the law itself is by no means an absolute science, the practice of which can be accurately and unequivocally defined. For example, under the early English law, some instruments were prepared by scriveners, who were neither barristers nor solicitors, although the preparation of such instruments is now universally considered to constitute the practice of law. On the other hand, persons not admitted to the practice of law are now permitted to represent clients before tax courts, . . .

"In desperate efforts to shrink the access to justice gap, jurisdictions are re-defining the practice of law."

where formerly only attorneys were authorized to appear. These changes have come about because of the exigencies of the particular situation. So it is today with regard to the practice of law. There is a twilight zone between the area of activity which is clearly permitted to the layman, and that which is denied him.

The line is arbitrary, the reason for attorney licensure is based on established character and competence to protect the public “against lack of knowledge, skill, integrity, and fidelity,” and irreparable harm can come to the legal interests of individuals assisted by those who are not qualified to act as attorneys.

Ok, then, Supremes, so what is the practice of law? What abilities are so advanced that only licensed attorneys possess them?

Here’s a groovy clue from 1979:

"The exercise of [examining a case and giving advice on what legal steps to pursue] on
behalf of a client constitutes the practice of law and is restricted to persons who have qualified and been admitted to the Bar.”

In a 2002 case, our Supreme peeps told us that the nonlawyer Respondent was “not trained in interpreting or applying statutes or case law, nor is he trained in identifying, gathering, or introducing admissible evidence, in examining or cross-examining witnesses, or in applying techniques of advocacy in adversarial proceedings.” And in 2010, United Financial was told to chillax based on its nonlawyers’ direct communication with clients and obstruction of its contracting lawyers’ independent judgment.

[Are you tired of my lame efforts to use decade-appropriate slang yet? I get it; I’ll stop now.]

Many of the tasks expressly granted to licensed paraprofessionals have been included in Indiana’s definition of the practice of law. Real estate brokers may not prepare standardized forms (beyond filling in blanks), nor may they give advice or opinions as to parties’ legal rights or the legal effect of instruments. Selecting which immigration form to use and what to insert in the blanks crosses the line.

Instead of responding with a resounding “no” to these efforts, we should better define precisely what qualities lawyers possess—rather than which specific services we render—that should be strictly guarded and exercised only by those with the requisite skills, character, and values. If not, we are not likely to have a seat at the table when these efforts are considered in Indiana.

Let’s start identifying those traits and how we demonstrate them in getting through law school, passing the bar, and representing clients in ways that no one but us should.

Peace out, homies! 🍾

**FOOTNOTES:**

1. The Twilight Zone, Where is Everybody? (CBS television broadcast October 2, 1959).
7. Id. at 715.
16. Id. at 444.
17. Id.
Members, thought leaders, and community leaders gathered on Friday, October 14, for the ISBA’s House of Delegates and Assembly Meetings.

HOUSE OF DELEGATES MEETING

The ISBA House of Delegates Meeting aims to not only discuss and vote on issues important to ISBA and Indiana’s legal community, but to also pose big picture questions and engage in forward-thinking conversations. Topics brought up this year included professional independence, access to justice, civil legal aid, and workforce challenges facing the profession.

The Chief Justice of Indiana presented an annual report on the Supreme Court. Hon. Loretta H. Rush shared that, among other issues, the Court was looking at ways to better address and support mental health, the lawyer shortage, and public trust in the rule of law. “It’s the goal of your court system—the Indiana Supreme Court, the Court of Appeals, trial court judges, the bar—to work
together to instill that trust in the rule of law,” she said. “Because if that cracks, if we lose the ability of people to think they’re not going to get a fair shake with regard to a peaceful dispute and the truth... It’s going to be problematic. So thank you all.”

Representatives from the Indiana Bar Foundation addressed the House of Delegates and led a conversation on new initiatives being considered and implemented by the state’s pro bono providers. Principal among these initiatives is Indiana Legal Help, the Bar Foundation’s new website, and the Pro Bono Opportunity Guide – both programs that providers across the state are working on to better connect pro bono efforts and to make pro bono easier for attorneys to engage in.

The Tax Section presented a resolution asking ISBA to lobby for a Pass Through Entity Tax. The legislation, as presented by Section Chair Matt Ehinger, would be beneficial to many small business owners in Indiana and would make Indiana more competitive in attracting and retaining businesses in Indiana. The resolution was unanimously approved.

Joe Skeel, the Executive Director of the ISBA, gave a presentation on legal workforce issues. Attorneys are leaving the profession, he said. This is likely do to both generational expectations and the Great Reassessment, which have led young professionals to place stricter divides between their work and home lives and place importance on meaningful work rather than upward movement. To ensure job satisfaction and provide happiness to these employees, firms need to keep these motivations in mind and adjust accordingly.

The House of Delegates was chaired by Hon. Holly M. Harvey of Bloomington, who passed the gavel to Angka E. Hinshaw of Indianapolis. Séamus P. Boyce was elected to serve as the new chair elect.

**ASSEMBLY MEETING**

The Assembly Meeting is the official member meeting of the ISBA, where members hear from leaders, reflect on achievements for the next year, and articulate their vision for the future.

Michael Tolbert, Past President and Chair of the Nominations Committee, presented the nominations for the open Board of Governors positions. All the nominees were approved through a unanimous vote. (You can view the 2022-2023 slate on page 4.)

Outgoing President Clayton C. Miller presented Presidential Citations (ISBA’s highest recognition) to Zachary M. Lightner, Hon. Cristal C. Brisco, Scott M. Smith, Katie Boren, Charles G. Fifer, Jon Laramore, Freedom S. Smith, Emily A. Storm-Smith, and Mary Louise Dague Buck for their contributions this year.

He then passed the gavel to Incoming President Amy Noe Dudas, who introduced her board appointees and discussed her vision for the upcoming year, before the Assembly was adjourned.
THE BRAHMAVIHĀRAS: MINDFULNESS MEDITATION TO SUPPORT LAWYER, LAW STUDENT, AND JUDICIAL OFFICER WELL-BEING
FEATURE

By Jill S. Carnell

Four recent large-scale studies document the fact that physical, emotional, and psychological suffering in the legal profession is now a widespread epidemic. This suffering begins the moment a student begins law school, afflicts lawyers at every stage of their practice, and affects judicial officers in similar, as well as different, ways. At all stages and roles in our profession, we are becoming increasingly intoxicated, despondent, and self-destructive. There is, however, hope.

Current research shows that relief from such profound suffering may be achieved through simple techniques grounded in mindfulness meditation practices. Studies emerging from the growing lawyer well-being movement document the effectiveness of practices based on various forms of easy-to-learn and easy-to-practice mindfulness-based techniques. These mindfulness meditation practices, whose efficacy is supported by modern scientific research, are grounded in wisdom that has been known in the East for thousands of years.

This article will first survey the literature exposing the depth and breadth of suffering in the legal profession. Second, it will offer a brief history of mindfulness practices making their way into the legal profession. It will conclude with a discussion of the thesis project that I completed in September 2021 as the capstone to the Master of Arts in Mindfulness Studies degree I earned from Lesley University.

WE ARE SUFFERING

The August 2017 report (“Task Force Report”) of the American Bar Association’s National Task Force on Lawyer Well-Being (“Task Force”) is the most comprehensive exploration of American lawyer well-being ever undertaken.1 The task of addressing lawyer well-being is significant, and the Task Force summary of the situation is sobering. In the cover letter of the Task Force Report, Co-Chairs Bree Buchanan and James C. Coyle wrote:

The legal profession is already struggling. Our profession confronts a dwindling market share as the public turns to more accessible, affordable alternative legal service providers. We are at a crossroads. To maintain public confidence in the profession, to meet the need for innovation in how
we deliver legal services, to increase access to justice, and to reduce the level of toxicity that has allowed mental health and substance use disorders to fester among our colleagues, we have to act now. Change will require a wide-eyed and candid assessment of our members’ state of being, accompanied by courageous commitment to re-envisioning what it means to live the life of a lawyer.²

This call to action began by defining “lawyer well-being” as “a continuous process whereby lawyers seek to thrive in each of the following areas: emotional health, occupational pursuits, creative or intellectual endeavors, sense of spirituality or greater purpose in life, physical health, and social connections with others... This definition highlights that complete health is not defined solely by the absence of illness; it includes a positive state of wellness.”³

The formation of the Task Force arose from concerns about the findings in two studies: (1) the 2016 Survey of Law Student Well-Being⁴ and (2) the ABA/Hazelden Betty Ford Study⁵ of 12,825 licensed, employed attorneys from nineteen states. In 2016, little solid research existed on the behavioral health of those practicing in the legal profession. The study found substantial rates of behavioral health concerns, including 20.6% screening positive for hazardous, harmful, and potentially alcohol-dependent drinking,² 28% experiencing symptoms of depression, 19% experiencing symptoms of anxiety, and 23% experiencing symptoms of stress.⁷

Getting sworn into the practice of law is not the beginning of eroding well-being—lawyer well-being starts eroding the minute a person enrolls in law school and continues throughout their legal career. In 2016, Organ et al. published their report regarding law student well-being, which was comprised of a survey of over 3,300 law students at 15 American law schools. In it, the researchers found that 17% of students reported experiencing some level of depression, 14% experienced severe anxiety, 23% reported experiencing mild or moderate anxiety, and 6% reported serious suicidal thoughts in the past year.⁸

In responding to questions about alcohol use, 43% reported binge drinking at least once in the prior two weeks, and 22% reported binge-drinking two or more times during that same period.⁹ One-quarter were categorized as being at risk for alcoholism, so further screening was recommended.¹⁰

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"Getting sworn into the practice of law is not the beginning of eroding well-being—lawyer well-being starts eroding the minute a person enrolls in law school and continues throughout their legal career."
In December 2020, the results of the first large-scale national survey of stress and resiliency in the United States judiciary was published. “Unlike the Lawyer Study and the Law Student Study published in 2016 that examined stress generally, the National Judicial Stress and Resiliency Survey items were designed to highlight the specific experiences of judges and the judicial setting.”¹¹ There are an estimated 18,000 judicial officers across the United States, and the study was based on 1,034 judicial officers who completed and returned the survey, who were 56.5% men and 42.8% women, 84.3% Caucasian/White, 5% Hispanic or African American, and less than 2% Native American, Asian, Pacific Islander/Hawaiian, and Multicultural.¹² Most were state court judicial officers (78.6%), followed by local (10.1%), administrative (8%), and federal, tribal, and military courts (about 2% or less).¹³

The judicial officers reported a variety of stressors, including most frequently: the importance/impact of their decisions (79.7%), their heavy docket of cases (73.2%), presiding over cases litigated by unprepared attorneys (67.6%), self-represented litigants (62.5%), and dealing repeatedly with the same parties without addressing the underlying issues of their conflict (58.1%).¹⁴ Judicial officers reported a variety of effects of this stress, including the top three: fatigue and low energy after hearing several cases in a row (38.8%), a variety of sleep disturbances (36%), and interference with attention and concentration (32.3%).¹⁵

Two trends in the responses regarding the effects of stress caused the authors of the study concern about depression and anxiety among the study participants. With regard to depression, these responses included: not having the initiative to do things (22.9%), preoccupation with negative thoughts (20%), feeling that work is no longer meaningful (17.8%), looking forward to the day’s work to end (16.7%), depressed mood (15.3%), feeling that there is nothing to look forward to (12.6%), feeling increasingly numb to pleas of urgency (11.2%), and caring little about the outcome of most trials (6.9%).¹⁶ In response to these findings, the authors stated, “Each of these criteria is concerning. The finding that over one in five judges meet at least one criterion for depressive disorder deserves our full attention.”¹⁷ In addition, just over 2% of the judicial officers reported experiencing thoughts of self-harm or suicide, which means that 22 of those responding experienced thoughts of self-harm in the preceding twelve months.¹⁸

With regard to anxiety, fewer participants experienced anxiety than depression, but the numbers were still significant: increased health concerns, such as high blood pressure (27.6%), feelings of apprehension or anxiety (23%), experiencing intrusive thoughts of traumatic images of people or evidence (19%), difficulty asking a respected colleague for a critique of
work (13.3%), difficulty breathing (7.4%), and worrying about panicking or losing control (4.6%). The authors found the percentage of participants experiencing feelings of apprehension or anxiety and those experiencing intrusive thoughts the most concerning.

In June of this year, Jaffe et al. published results from the 2021 Survey of Law Student Well-Being, which asked many of the same, as well as some additional questions, as the 2014 study. The 2021 study was comprised of just over 24,000 students from 39 American law schools, significantly more than the 3,300 students from 15 American law schools in the previous study.

The authors acknowledge that it is difficult to know how the changes between the two studies may have been affected by COVID-19 as opposed to the effect of the lawyer well-being movement. But, among the key takeaways, the authors of the study noted the near doubling of respondents with a diagnosis during their life of depression (32.7%) and anxiety (39.8%), an increase in those needing help for an emotional or mental health issue in the prior year (68.7%), an increase in marijuana use, and an increase in both suicidal thoughts during their lifetime (33%) and during the past year (11%). Binge drinking, cigarette smoking, and sharing of prescription drugs appears to have declined among students, and students reported an increase in the popularity of mental health apps as an additional resource. Finally, the 2021 survey asked about trauma, with over 80% having experienced trauma in at least one category, roughly 70% having experienced two or more types of trauma, and one in five respondents screening positive for PTSD.

MINDFULNESS IN THE LEGAL COMMUNITY GOES MAINSTREAM

My research found there is a nascent and positive view of the potential for mindfulness-based practices to address the crisis in lawyer well-being. Indeed, the remainder of the 73-page Task Force Report recommendations include mindfulness-based practices for all stakeholders—judicial officers, regulators, legal employers, law schools, bar associations, lawyers, professional liability carriers, and lawyer assistance programs. One of the most intriguing and encouraging findings of the study arose from the section about stress management and resiliency activities, and it signaled that mindfulness practices have tremendous potential to gain a widespread following within the legal community.

Swenson’s study revealed that many judicial officers currently practiced or had an interest
in practicing mindfulness. Mindfulness was practiced “a few times a month” to “nearly daily” by 35.9% of participants, and 81.4% of participants were interested in it. This suggests that training and support of mindfulness practices is something that will support judicial officers. Mindfulness was second only to asking for peer support.

The practice of mindfulness meditation is not new to the legal community. In a 1989 law review article Professor Leonard Riskin wrote about a Mindfulness-Based Stress Reduction (MBSR) program offered to trial court judges. Mindfulness meditation continued to spread throughout the legal community, including starting in 1998, various five-day contemplative retreats organized by the Center for Contemplative Mind in Society for law professors, lawyers, and law students from Yale and Columbia; conferences and continuing legal education programs by the American Bar Association, including a preconference mindfulness meditation workshop by the ABA Section of Dispute Resolution at the 2002 Annual Conference; various bar association programs in Boston, Maryland, and Northern California in 2000 and 2001; a mindfulness meditation and other contemplative practices series offered by City University of New York School of Law in 2001; and a group of lawyers who meditated together weekly in Kansas City.

The first law school course to include mindfulness meditation in the United States was offered in 1997 by Professor Cheryl Conner, Director of the Clinical Internship Program at Suffolk Law School. An elective called The Reflective Practitioner, it was meant to support the work of students enrolled in clinical placements and included an exercise to support developing compassion. In spring 2000, Professor Jacqueline St. Joan, Director of Clinical Programs at the Denver College of Law, offered a class to students in field placements, with the hope that she would “introduce students to the fundamentals of contemplative practice as threads to weave together personal and professional lives.”

Rhonda Magee, professor of law at the University of San Francisco and a mindfulness meditation teacher, is a Fellow of the Mind and Life Institute. She incorporates her mindfulness meditation practice into her law school teaching and the practices she developed to incorporate her lived experiences as an African American woman. This practice, which she calls ColorInsight, incorporates lovingkindness and compassion to help understand and work with issues concerning race.
TO THE EDITOR:

I write to address a point I’ve heard echoed numerous times over the years and is raised again in Steven Badger’s “A Call for Change in Civil Litigation in Indiana,” appearing in the July/August 2022 issue of Res Gestae: awarding continuing legal education (CLE) or continuing mediation education (CME) credit to incentivize pro bono service. In Mr. Badger’s article, the specific proposal is “encouraging mediators to volunteer for such service by awarding [CME] credit annually based on free mediation conducted during the calendar year.” (p.17). While referenced only briefly, the issue merits further consideration because the Civil Litigation Taskforce recommends an amendment to ADR Rule 2.5(D) to facilitate that proposal. (p.43).

The awarding of CLE or CME credit to incentivize pro bono efforts is by no means a novel concept. In evaluating this aspect of the taskforce’s recommendation, I am reminded of the words of caution from two notable voices in the Hoosier legal community. In a 2006 article, then-Chief Justice Randall Shepard wrote:

Pro bono publico service is *uncompensated* professional service to those of limited means or to public service or charitable organizations. While granting CLE for pro bono services would not be a fee in the usual sense of the word, the Indiana Rules of Professional Conduct certainly did not intend for this to be the case in Indiana.

A common argument for crediting pro bono service is that legal aid programs and the pro bono services of the bar have not adequately met the legal needs of the poor. Granting CLE credit for pro bono services would give lawyers more incentive to perform such services, thus "killing two birds with one stone." Eight states have decided to provide such incentive and grant CLE credit for approved pro bono services.

While giving CLE credit for pro bono services may improve the quantity of legal representation for the poor, this arrangement would not further the professional competence goals of mandatory CLE. Those attorneys desiring to kill two birds with one stone would miss out on the experience and expertise that comes with using another stone. In other words, these attorneys would not be gaining the professional competence that can flow from attending CLE classes.


Similar concerns were raised by then-ISBA President Daniel Vinovich in December 2012:
Another idea I have heard is to give CLE credits to lawyers who provide pro bono services. Sounds good, but we all need to keep current with updates in our profession, don’t we? In fact, the Indiana Judges Association has recently increased its CLE requirements to 55 hours per three-year cycle where Indiana lawyers are only required to have 36 hours. So maybe it’s not such a good idea to reduce the number of CLE hours lawyers must obtain when the judges are going in the other direction.

There’s also a suggestion to increase our Supreme Court registration fees, but we would get some type of rebate for providing a certain number of hours of pro bono services. This reminds me of my kid’s not-so-voluntary little league fundraiser, but with increasing efforts to eliminate or reduce federal funding for the Legal Services Corporation the thought is that something needs to be done to replace lost revenue.

There is no easy fix to this problem, so I implore you to let us know if you have any ideas on how to increase or incentivize pro bono efforts throughout Indiana.

Daniel B. Vinovich, President’s Perspective: Service Above Self, 56 RES GESTAE 5, 5 (Dec. 2012).

The issue raised by Chief Justice Shepard and President Vinovich, which I reiterate here, is not the provision of CLE/CME hours for pro bono training or even the awarding of access to CLE/CME courses in exchange for pro bono service. See, e.g., Marilyn Smith & Martha Blood Wentworth, Pro Bono Publico License: Being of Service in Retirement, 64 RES GESTAE 19, 21 (Mar. 2021). The issue is the awarding of hours as a form of compensation for services rendered. Though the desire to provide some incentive to foster the provision of legal services at low or no cost is certainly laudable, treating CLE/CME hours as commodities, I fear, undermines the very foundation justifying their continued existence.


For those who would defend the continuation of CLE/CME requirements, it is vitally important to not take for granted that the current state of affairs always has been and always will be.

Respectfully,

Colin E. Flora 🎈
TO THE EDITOR:

The legal profession offers lawyers the opportunity to do so much more than plying a trade. It allows us to assist people with problems they couldn’t otherwise solve. Aside from being service professionals, we also connect our clients with the legal system that serves to correct wrongs and prevent injustice.

With great interest, I read “A Call for Change in Civil Litigation in Indiana” by Steve Badger, featured in this publication’s July/August issue. I was excited to see the efforts made by the Indiana Supreme Court and the results of the Court’s Civil Litigation Taskforce’s efforts to improve civil litigation. The taskforce’s recommendations provide insight into how litigation can be streamlined and more efficient. It also recommended additional paths for alternative dispute resolution (ADR).

The taskforce operated under a mandate from the Supreme Court. Its existence demonstrates the Court’s dedication to making the litigation process work efficiently and lightening the burden on litigants. Undoubtedly, these efforts will lead to an improved litigation process with lower costs, but are they enough to make lower dollar claims worth pursuing?

As a junior associate, I often found myself frustrated with the limitations of actually providing the services I aspired to. In particular, initial calls from unsolicited potential clients were a source of discouragement. I would pick up the call and get the basic details of the matter. Sometimes the calls were cranks. Often, however, the calls were valid issues of concern. Many calls included claims for which the law does not provide adequate solutions. The law and lawyers have limits, and I was not disturbed when I could not aid in those circumstances. After all, the legislature and the government are responsible for drafting laws.

What is more troubling is when the law offers a remedy, but the answer to the all-important question of “how much are we talking about?” puts achieving that remedy out of reach. Telling potential clients that their case doesn’t justify an attorney’s involvement is demeaning to them and damages their trust in the legal system. This is not why we become lawyers. Yet, this is what all lawyers must tell clients at times.

While attorneys are officers of the court, we should not simply rely on the courts to develop solutions. The taskforce’s recommendations are ways for the courts to improve, but are there ways that we as practitioners can change how we practice to lower litigation costs and create greater efficiency in our processes?

GETTING ON BOARD

One of the tools that Indiana courts continue to employ is ADR. Generally, those options benefit efficiency and cost but do not provide the same sense of justice as a ruling provided by a judge in a courtroom. They also often rely on the cooperation and reasonableness of the parties to resolve a claim.
It is incumbent on attorneys to make these methods work. Clients must understand that a willingness to mediate or to settle is not giving in but instead a way to achieve their goals in a more convenient and less costly fashion. This alone is not sufficient. Clients also need to understand that no legal system created by man will get the results correctly every time, but ADR provides a genuine path to just outcomes.

The flip side of this point requires acknowledging that some matters cannot be solved without the authority of traditional litigation. Some parties are so embattled that no resolution will be achieved without a judge’s firm rulings and admonishments. Attorneys should have the authority to tell a judge the matter cannot be resolved through ADR. Choosing to force parties into another step in their process erodes confidence in the system and creates greater inefficiency.

**DON’T BE SO DILIGENT?**

As attorneys, we know we should zealously advocate for our clients. But what are the boundaries for our zeal? Interestingly, the Indiana Rules of Professional Conduct does not include the word “zeal” as contained in the American Bar Association Model Rules of Professional Conduct. The Comment to Model Rule 1.3 provides that lawyers must act with zeal in advocacy on a client’s behalf. However, the Comment to Indiana Rule 1.3 does not include this language. While I was unable to determine the significance of this distinction, I believe it serves as a reminder that a range of activities don’t clearly fall within Rule 1.3’s requirement of diligence.

Along these lines, it has been suggested that attorneys reconsider how they represent clients in cases below the small claims court’s limit. Instead of assuming the traditional role taken by litigation attorneys as zealous advocates, lawyers should act as counselors to their clients. Clients should meet with an attorney to discuss their case, receive advice on how to proceed, and represent themselves in court.

The consulting attorney could review the basic facts of the case and assess whether there is any possible merit to the claim, inform the client of the necessary elements to establish their claim, advise them of the strengths and weaknesses of their position, and explain what options may be available for them to strengthen their claim. The attorney could also provide them with an explanation of the process and the procedures that are often a barrier for pro se litigants.

This method would allow attorneys to keep the cost down by only charging for reviewing the case and for their time meeting with the client. Additionally, this approach could qualify for a flat-fee model and not have clients worried about unanticipated bills.

This method certainly has its drawbacks. Aside from the previously mentioned ethical discussion, partially involved attorneys open themselves to malpractice claims. In addition, parties will likely fail to provide crucial information but later blame the attorney when they lose.

I find this suggestion intriguing because it is the attorneys innovating and changing their model, not the courts doing the lifting. As a profession, we favor tradition and precedent. Still, if we want to serve our clients and serve as their connection to the legal system, we need to be asking ourselves how we can innovate and elevate their experience.

If the courts can do it, so can we. 🕊️

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SUPREME COURT DECISIONS

WHEN THE FACTS CHANGE, YOU MAY CHANGE YOUR MIND

Decided nearly 40 years ago and seemingly superseded by both the criminal and trial rules, a few courts were still following the rule set forth in State ex rel. Keaton v. Cir. Ct. of Rush Cnty., 475 N.E.2d 1146 (Ind. 1985). According to Keaton, a judge did not have inherent authority to compel the production of police reports over a prosecuting attorney’s timely claim of work product privilege. Id. at 1148. In Minges v. State, the Court—refusing to be straightjacketed by history—overturned Keaton. 192 N.E.3d 893, 902 (Ind. 2022).

Minges was a routine prosecution for operating while intoxicated. It turned less routine when the state refused a request to produce the arresting officer’s narrative report. Relying on Keaton, the state claimed
the report was privileged work product. The trial court agreed.

The Supreme Court reversed. *Id.* The Court concluded *Keaton* was decided in a different era and without the benefit of the Trial Rules. See *Id.* at 899. Since that case was decided (but still over a quarter century ago), the Supreme Court amended Criminal Rule 21 to incorporate the Trial Rules for all criminal proceedings. Moreover, *Keaton* was inconsistent with existing discovery practices. See *Id.* at 898-901. Specifically, the rationale of *Keaton* does not track the applicable definition of work product, *Id.* at 898, and does not afford the discretion necessitated by the “liberal discovery” policy of the rules. *Id.* at 899.

As the Court observed, *Keaton* established a blanket work-product privilege. But a police report cannot be the work product of the prosecutor unless it was prepared by or for the prosecutor or the prosecutor’s representative or agent. And a police officer is not necessarily an agent of the prosecutor before the prosecution is involved in a case. Thus, the privilege does not automatically attach but must instead be determined on a case-by-case basis.

Importantly, *Minges* does not hold that a police report is never work product. Nor does *Minges* dismiss the state’s concern for the dangerous spread of confidential information. Instead, *Minges* makes clear that a claim of work product is governed by Trial Rule 26(B)(3), and the Court is confident the Trial Rules provide an adequate means for controlling the dissemination of confidential information.

**THE SUBJECTIVE INTENTIONS OF POLICE OFFICERS STILL DON’T MATTER**

Hoosiers have a unique right when placed in police custody. Pursuant to Article I, Section 11 of the Indiana Constitution, a person in custody must be informed of the right to counsel before he may give valid consent to search his person, house, papers, or effects. See *Pirtle v. State*, 263 Ind. 16, 28, 323 N.E.2d 634, 640 (1975). When a defendant claims he didn’t receive the so-called *Pirtle* advisement, the ensuing litigation usually turns on whether the defendant was in custody. The question is an objective one. For the court, it doesn’t matter if the officer intended to take the suspect to jail or intended to let him go about his way. The salient point is whether a reasonable person would feel free to refuse the entreaties of the police. In other words, the subjective intentions of the police don’t matter. In *McCoy v. State*, the Supreme Court reaffirmed it is committed to this objective test.

*McCoy* presented a twist on the normal custody analysis. McCoy was both a victim and a suspect when he was placed in handcuffs. He claimed he had been robbed, so the arresting officer asked if McCoy would escort him inside the house to document the stolen items. McCoy, who was still in handcuffs, agreed to the request. The officer’s walk through the house revealed evidence of a crime,
but it was not robbery. Instead, the officer developed reason to believe McCoy was in possession of various contraband items. This suspicion led to a warrant, and the execution of the warrant led to the discovery of drug paraphernalia.

The officer had not given McCoy the *Pirtle* warning, so he moved to suppress the evidence found inside his home. The trial court looked at the subjective intentions of the officer. In particular, the court was impressed that the officer was not looking for evidence incriminating McCoy. The officer was simply attempting to confirm his robbery allegations. Therefore, the trial court denied the motion.

The Supreme Court reversed. *McCoy v. State*, No. 22S-CR-294, 2022 WL 3715039, at *3 (Ind. Aug. 29, 2022). The Court’s reasoning was straightforward. Because no one—not the State, not the trial court, not the Court of Appeals, and certainly not McCoy—disputed that the defendant was in custody, there was no need to “inquire into the arresting officer’s subjective views of whether McCoy was a victim or a suspect.” *Id.* at *3. Instead, the officer should have given the *Pirtle* advisement, and the evidence should have been suppressed.

Interestingly, the decision in *McCoy* drew a separate opinion challenging the reasoning of *Pirtle*. *Id.* at *4* (Massa, J., concurring). Justice Massa was unsparing in his criticism, stating, “[I]f a lawyer today tracked *Pirtle*’s reasoning in a brief to support an independent state constitutional basis for its result, we would find waiver for lack of cogent argument.” *Id.*

Still, his was a lonely voice, and because *Pirtle* is a long-standing, well-established rule of Indiana constitutional law, Justice Massa was compelled to concur in the result. See *Id.* at *5* (“Ultimately, *Pirtle* is what it is—‘good law’ until overruled. Accordingly, I concur in result.”)

**COURT OF APPEALS DECISIONS**

**A MISCARRIAGE OF JUSTICE CORRECTED**

Free-standing claims of fundamental error are rarely successful in post-conviction proceedings. Generally, to obtain relief, a petitioner in such proceedings must show ineffective assistance of counsel. *Newcomb v. State* is the atypical case.

In *Newcomb*, No. 22A-PC-318, 2022 WL 3651798 (Ind. Ct. App. Aug. 24, 2022), the petitioner was convicted of Class B felony dealing in methamphetamine. However, the proof at trial showed only that petitioner was in possession of precursors, a Class D felony. This resulted in a loss of 13 additional years of liberty. Petitioner’s trial and appellate counsel had more or less pointed this out in the trial court and on direct appeal, but it was to no avail. Finally, on appeal from the partial denial of his petition for post-conviction relief, the Court of Appeals granted relief.

The court concluded Newcomb received effective assistance at his trial and on direct appeal but was nonetheless not guilty of the crime charged. There is hardly an error more fundamental than convicting a man of a crime he did not commit; therefore, the court vacated the Class B felony conviction and remanded with instructions to

**Continued on page 37...**
ETHICS
By Adrienne Meiring

COMPLYING WITH THE ATTORNEY BYPASS RULE

Critical to our adversarial system of justice is preservation of the attorney-client relationship. This goal underlies Indiana Professional Conduct Rule 4.2 (popularly known as the “attorney bypass rule”), which requires that:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law or a court order. ¹

In two recent decisions, Matter of Steele² and Matter of Martin,³ the Indiana Supreme Court emphasized the rule’s important purpose and provided further guidance regarding its application to self-represented lawyers and to peripheral legal proceedings.

SELF-REPRESENTED LAWYER AS “CLIENT” AND “ATTORNEY”

In Matter of Steele, the Indiana Supreme Court found the self-represented respondent had violated Indiana
Professional Conduct Rule 4.2 by communicating directly with the represented opposing party against the instruction of opposing counsel. The matter began when a dispute between respondent and a friend about responsibility for payments for an educational program led respondent to email a demand letter to the friend and the friend’s attorney. In a reply email, opposing counsel directed respondent to send all further communications through counsel and to cease communicating with the friend. One week after filing a lawsuit against the friend, respondent sent an email to the friend, threatening to visit him in person and demanding the friend bypass his attorney and discuss the situation directly with respondent. Respondent did not have the consent of the friend’s attorney to engage in such communication.

After the Disciplinary Commission filed a complaint alleging respondent violated Professional Conduct Rule 4.2, respondent asserted the rule did not apply to his conduct, arguing its prefatory language—“in representing a client”—requires representation of another, and he was representing himself. He then cited to partial commentary to the rule that states parties generally “may communicate with one another” to further his argument that he was entitled to communicate directly with his former friend as a party.

A majority of the Supreme Court disagreed with respondent, relying on its precedent finding violations by pro se lawyers of other Indiana Professional Conduct Rules with similar language to the prefatory clause in Rule 4.2. The Court reasoned these cases implicitly recognize that “self-representation is still representation, and an attorney who proceeds in a matter functionally occupies the roles of both attorney and client.” The Court noted that policy considerations also supported a violation, as Rule 4.2’s principal purposes are to prevent lawyers from taking advantage of laypersons and to preserve the integrity of the lawyer-client relationship.

In his dissent, Justice Slaughter disagreed that the rule applies to lawyer conduct during self-representation, relying on the rule’s plain language that it is triggered by conduct while “representing a client.”

APPLICATION TO RELATED AND PERIPHERAL PROCEEDINGS

In Matter of Martin, the Court approved the hearing officer’s report...
finding respondent violated Rule 4.2 by taking part in the deposition of a witness without notifying the witness’s attorney. The Court declined to accept this proposed interpretation, noting the plain text of Rule 4.2 reflects that it protects “a ‘person’ and not just a party,” and there is no direct support in the rule’s language or its commentary to limit application to a specific proceeding. The Court then pointed out that respondent’s interpretation is contrary to the rule’s purpose of protecting the rights of a represented person with respect to the subject of the representation and preserving the integrity of the attorney-client relationship: “This need is equally important whether the representation involves the same proceeding, a different proceeding, multiple proceedings, or no proceeding at all.”

PRACTICAL APPLICATION OF RULE 4.2

While the Court left open certain questions regarding application of Rule 4.2, Matter of Steele and Matter of Martin demonstrate the Court’s unwillingness to narrowly construe Rule 4.2, especially when such interpretations run counter to the rule’s purpose. At a minimum, these decisions should give practitioners pause about speaking directly to a represented person (without prior consent from representative counsel), regardless of whether the attorney is negotiating on his/her own behalf or the subject matter of the sought consultation involves a different proceeding.

To ensure compliance with Rule 4.2, the ethically minded practitioner should take the following precautions before questioning or negotiating with an opposing party, witness, or third party.

- When a person is known to be represented, a lawyer interested in questioning the individual should coordinate with representative counsel as to how questioning will occur (e.g., by deposition, taped statement, informal interview—with or without representative counsel present).
- If the lawyer obtains consent to speak with the individual without representative counsel present, the consent should be confirmed in writing.
- When an individual’s representation status is unknown, the lawyer should inquire whether the individual is represented by counsel before initiating substantive questioning.
- If the answer is affirmative, an inquiry into the name and contact information of representative counsel is appropriate, but all other questioning should cease.
- The lawyer then should notify representative counsel that the lawyer contacted the individual, but no questioning regarding substantive matters occurred.
- A request to speak to the
relevant person can then be made of representative counsel. Any consent obtained to speak without representative counsel present should be confirmed in writing.

- Even if consent has been obtained, if the questioned individual indicates reluctance at any point to speak without representative counsel present, the lawyer should cease questioning until representative counsel can be present.

By adhering to this checklist, a lawyer can safely maintain compliance with Rule 4.2.

Adrienne Meiring is the executive director of the Indiana Supreme Court Attorney Disciplinary Commission.

FOOTNOTES:

2. 181 N.E.3d 976 (Ind. 2022).
3. 166 N.E.3d 345 (Ind. 2021).
4. 181 N.E.3d at 977.
5. Id.
6. Id.
7. Id.
8. Id. at 978.
9. Id.
10. Id.
11. Id. at 979, citing to Matter of Dempsey, 986 N.E.2d 816 (Ind. 2013), and Matter of Richardson, 792 N.E.2d 871 (Ind. 2003)(Court found that pro se lawyer-litigants violated Rule 4.4(a), which provides that “in representing a client” an attorney shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person), and Matter of Thomas, 30 N.E.3d 704 (Ind. 2015)(Court found an attorney violated Rule 3.3(a)(1) for dishonesty in his pro se bankruptcy filings, even though the commentary to that rule indicates it governs the conduct of an attorney “who is representing a client”).
12. Id.
13. Id.
14. Id. The Court noted that the commentary to Rule 4.2 also supports that conclusion, and that respondent’s reliance on one clause in Comment 4 was misplaced, as the language immediately before and after respondent’s citation “delineate[s] what a party’s counsel may or may not do in connection with the parties’ own direct communication, when the parties are entitled to make that communication.” Id; see Ind. Prof. Cond. R. 4.2, cmt 4.
15. Id. at 981.
17. Id.
18. Id.
19. Id.
20. Id.
21. Id.
22. Id.
23. Id.
24. Id.
25. Id.
26. Id.
27. Id.
28. See Matter of Steele, 181 N.E.3d at 980, fn. 3 (“The application of Rule 4.2 to an attorney who occupies solely the role of a party [because he or she is represented by separate counsel] presents a different issue, and one we need not address today.”
AUGUST CASES ADDRESS CHURCH-AUTONOMY DOCTRINE, NOTICE BY PUBLICATION

In August 2022, the Indiana Supreme Court issued two civil opinions and the Indiana Court of Appeals issued 10 published civil opinions.

INDIANA SUPREME COURT DECISIONS

UNANIMOUS SUPREME COURT HOLDS THE “CHURCH-AUTONOMY” DOCTRINE OF THE FIRST AMENDMENT REQUIRED DISMISSAL OF LAWSUIT AGAINST THE ARCHDIOCESE OF INDIANAPOLIS

Cathedral High School (“Cathedral”) employed plaintiff Joshua Payne-Elliott as a languages and social studies teacher. After Payne-Elliott married his same-sex spouse, the Roman Catholic Archdiocese of Indianapolis, Inc.—which exercises “significant control” over Cathedral—ordered Cathedral to fire Payne-Elliott or Cathedral would lose its status as a Catholic school. Cathedral did so and Payne-Elliott sued the archdiocese, alleging it had committed intentional and unjustified interference with his contract and employment with Cathedral.

A unanimous Supreme Court in Joshua Payne-Elliott v. Roman Catholic Archdiocese of Indianapolis, Inc.,
49D01-1907-PL-027728 (Ind. 2022) (Slaughter, J.), held the “church-autonomy” doctrine of the First Amendment prevents courts from interfering with a religious institution’s “right to autonomy in making decisions regarding [its] own internal affairs, including matters of faith, doctrine, and internal governance.” Noting this doctrine “is not unlimited,” the Supreme Court held it must undertake a “fact-sensitive and claim specific” assessment as to whether a plaintiff’s complaint asks a court to “(1) penalize via tort law (2) a communication or coordination among church officials or members (3) on a matter of internal church policy or administration that (4) does not culminate in a criminal act.” Applying this test, the Supreme Court held the church-autonomy doctrine barred Payne-Elliott’s case and, consequently, dismissed the lawsuit.

UNANIMOUS SUPREME COURT HOLDS A STATUTORY REQUIREMENT FOR NOTICE BY PUBLICATION VIOLATED DUE PROCESS WHEN THE GOVERNMENTAL ENTITY KNEW HOW TO PROVIDE PERSONAL NOTICE

The Gary Housing Authority acquired 624 Broadway, LLC’s property through an administrative taking, but it provided notice of its taking and upcoming remonstrance hearings by publication only, despite knowing how to provide personal notice to 624 Broadway. The Housing Authority then took the property and awarded 624 Broadway $75,000 in damages even though an appraiser later valued the property at $325,000.

A unanimous Supreme Court in 624 Broadway, LLC v. Gary Housing Authority, 193 N.E.3d 381 (Ind. 2022) (Massa, J.), held that even though Indiana Code only requires notice of condemnation proceedings by publication, this practice violated due process: “Notice that may technically comply with a state statute does not necessarily comport with due process. Certainly, a statute can provide more protection than the Constitution. But when a statute provides less, the government must do more.”

UNANIMOUS SUPREME COURT HOLDS A STATUTORY REQUIREMENT FOR NOTICE BY PUBLICATION VIOLATED DUE PROCESS WHEN THE GOVERNMENTAL ENTITY KNEW HOW TO PROVIDE PERSONAL NOTICE

"Notice by publication may be sufficient where it is not reasonably possible or practicable to give more adequate warning, like when the intended recipient is missing. But it is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question."

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SUPREME COURT CIVIL TRANSFER GRANTS


SELECT COURT OF APPEALS DECISIONS

• Duke Energy Indiana LLC v. Bellwether Properties, LLC, 192 N.E.3d 1003 (Ind. Ct. App. 2022) (Shepard, S.J.) (holding that an energy company which informed a landowner that the landowner’s planned building design violated electrical safety codes adopted by the Indiana Utility Regulatory Commission, thereby compelling the landowner to build a smaller-than-intended building, did not constitute an inverse condemnation, especially when the regulations at hand had a purpose of protecting persons and property from the risk of harm associated with constructing buildings too closely to electric transmission lines)
• *Card v. Sprinkle*, 2022 WL 3417954 (Ind. Ct. App. 2022) (Mathias, J.) (holding that homeowners whose home and shed sat on land originally owned by landowners acquired title to the land upon which the house and shed sat because the homeowner’s predecessor-in-title satisfied each element of adverse possession, including control, intent, notice, and duration, and thus transferred title of the property to the homeowners when the predecessor-in-title sold the property to them)

• *Lockerbie Glove Company Town Home Owner’s Association, Inc. v. Indianapolis Historic Preservation Commission*, 2022 WL 3723511 (Ind. Ct. App. 2022) (Tavitas, J.) (in considering whether a local homeowner’s association and residents of nearby townhomes had standing to seek declaratory and injunctive relief to halt nearby construction, the court held that in light of the homeowner’s association and resident’s concession that they had not been injured by the actions of the commission—a constitutional requirement—the homeowner’s association and residents lacked standing to bring an action)

• *Sims v. Buttigieg*, 2022 WL 3330976 (Ind. Ct. App. 2022) (Friedlander, J.) (affirming the St. Joseph Circuit Court’s decision dismissing the complaint of a prisoner convicted in 1995 who brought suit against city, county, and county officials alleging those officials conspired against him via police misconduct and concealment of evidence who failed to abide by pre-filing screening requirements related to the alleged conspiracy)

We further note that the General Assembly requires the BMV to keep all records open for public inspection except for ‘personal information.’ Personal information includes a driver’s social security number, license number, name and address, but not ‘information about vehicular accidents, driving or equipment related violations, and driver’s license or registration status.’"

- Doe v. Indiana Department of Insurance, 2022 WL 3905226 (Ind. Ct. App. 2022) (Altice, J.). (affirming an order of summary judgment in favor of the Indiana Department of Insurance and the Indiana Patient’s Compensation Fund on the grounds the underlying sexual battery claims of a Jane Doe, who had been sexually assaulted by her nurse while she was hospitalized, were not covered by Indiana’s Medical Malpractice Act, and therefore, she was not entitled to additional compensation from the Indiana Patient’s Compensation Fund).

- EF v. St. Vincent Hospital and Health Care Center, 2022 WL 3584826 (Ind. Ct. App. 2022). (Najam, J.) (holding that in a moot appeal, the existence of issues of great public interest warrant a review of claims on the merits, and that the appellee hospital presented “sufficient evidence to support” an order of temporary involuntary commitment when the hospital proved by clear and convincing evidence the appellant was gravely disabled and unable to function independently.)

- Indiana State Police v. Estate of Damore, 2022 WL 369845(Ind. Ct. App, 2022) (Tavitas, J.) (“The trial court abused its discretion by excluding evidence of Michael’s driving behavior in the minutes before the collision. The trial court also abused its discretion by striking the entirety of
an accident reconstruction expert]’s testimony based on a minor violation of a motion in limine that posed no serious risk of prejudice to the Estate. The trial court further erred by failing to give the Defendants’ Proposed Instructions... as those instructions were correct statements of law, were supported by the evidence, and the substance of these instructions was not covered by other instructions. Lastly, the evidence was insufficient to establish that [personal representative] was a dependent of [decedent] for the purpose of the GWDS, and her recovery must therefore be limited to the amounts permitted by the AWDS.”)

- Bassett v. Scott Pet Products, Inc., 2022 WL 3904559 (Ind. Ct. App. 2022) (Riley, J.) (affirming a partial order of summary judgment when there were no genuine issues of material fact showing that employee benefits did not supply new consideration to support a modification of an employment agreement, evidence designated by defendants showed they did not partially perform obligations under an interest agreement, and plaintiffs presented no authority to show detrimental reliance in support of their claim for promissory estoppel.)

- Serbon v. City of East Chicago, 2022 WL 3348998 (Ind. Ct. App. 2022) (Tavitas, J.) (“The Plaintiffs do not live in the City; they do not pay taxes to the City; they are not affected in any way by the Ordinance that only operates in the City. The Plaintiffs have not shown how the ordinance has caused any harm to them or the public... Because the Plaintiffs do not have standing to Challenge the Ordinance, we reverse the judgment of the trial court and remand with instructions that the trial court dismiss the Plaintiffs’ complaint for lack of standing.”)

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

Cameron S. Trachtman is an associate in the Indianapolis office of Frost Brown Todd practicing business and commercial litigation. She joined the firm in January of 2021 after graduating magna cum laude from IU McKinney School of Law.
Richard Reuben, professor of law at the University of Missouri, is an expert in conflict resolution who founded the Mindfulness in Law Society. In an article about his role as a law professor, he wrote that his mindfulness meditation practice made him a better professor by supporting his present moment awareness, which allowed him to respond to his students rather than get tangled up in what he was going to say next.40 Scott Rogers writes in both academic and bar association journals about introducing law students to the practice of mindfulness meditation.41 Rogers is the Founder and Director of the University of Miami’s Mindfulness in Law Program, where he has been teaching mindfulness-based courses since 2008. In addition, he serves as the Co-President of the Mindfulness in Law Society. Charles Halpern was meditating and exploring how to cultivate inner wisdom and foster mindful social activism in the 1980s as he practiced and taught law.42

Finally, The National Judicial College offers a four-day Mindfulness for Judges training to support judicial officers in developing and using mindfulness meditation.43

In November 2017, four Indiana judicial officers attended the four-day Mindfulness for Judges training in Sedona, Arizona. One of which is Senior Judge Tom Felts, who wrote about the training and how he continues to practice:

Over the four days of the course we talked about mindfulness, including the neuroscience underlying mindfulness and the effect of mindfulness on work-related skills and behaviors. We practiced meditation in several ways (guided, solitary, etc.), practiced yoga, and had open and safe conversations about judicial stress (professional and personal) and how we could use what we learned to help us make better decisions...I initially actively practiced meditation daily for several months and now set aside meditation periods a couple of times a week. Additionally, I have incorporated the essence of meditation—clearing aside troublesome thoughts, searching for an inner calm—when I am running or biking by myself as well as in church before Mass begins. Situationally, when I am trying to make a difficult decision or search for a solution to a problem, both as a lawyer and as a judge, the ability to bring calm to my present situation through meditation tools is truly a blessing. It remains a challenge but definitely worth the effort.44
As I completed my internship with JLAP and continued the coursework in the Master of Arts program (during Fall 2020 semester), it occurred to me that lawyers, law students, and judicial officers might also find support in the brahmavihāras. The brahmavihāras, sometimes called the “divine abodes” or “sublime attitudes,” are the Buddha’s heart teachings.45 There are four of them: kindness or lovingkindness (metta), compassion (karunā), empathetic joy (muditā), and equanimity (upekkhā), and each works in concert with the others.46

The brahmavihāras each have their own traits, while also working together to keep each in balance, a kind of Middle Way. Kindness is the bedrock of compassion and acts to protect compassion from edging toward either despair or partiality. Kindness ensures equanimity does not tip toward indifference. Compassion protects kindness from becoming sentimental and protects joy from forgetfulness. Compassion turns kindness into healing action. Joy tempers the raw edges of sorrow and pain and guards the compassionate heart from being overwhelmed with sorrow. Equanimity brings patience and steadiness to kindness and compassion and balances joy from becoming exuberant. Joy softens equanimity. And “[e]quanimity allows us to act without becoming preoccupied with the results and outcomes of our actions.”47

The brahmavihāras add emotional depth to mindfulness meditation practice. As I discovered through practice and study, mindfulness meditation affected more than my mind, e.g., improving concentration, or making my lawyer brain “sharper” or less stressed. Mindfulness practices helped me to access a more embodied sense of present moment awareness, connecting the heart with the mind. I discovered that to be in balance, to find a Middle Way, I need both my heart and my mind to work together. Professor Rhonda Magee, as well as other scholars, like Leonard Riskin, write approvingly about the relevance and effectiveness of lovingkindness and compassion.

This idea led me to complete a creative thesis project, which is comprised of an academic support paper that dives even deeper into the data in this article and a seven-module asynchronous online course called An Introduction to the Brahmavihāras: For Lawyers, Law Students, & Judicial Officers. I hope you will consider engaging with the training program that I have created, which is freely available at thought-kitchen.com.

The work we do is full of suffering, and to do it to the best of our abilities, we need support in reconnecting our hearts with our minds so we can integrate the wisdom of both into our way of being in the world. This is my offering to you, grounded in my love for each of you and for every being who is in community with us.

May our practice benefit all beings. ☯

Jill Carnell is an attorney who is dedicated to living a more contemplative life. After spending over 15 years in state and local government, she cofounded Thought Kitchen in August 2021, where she is chief contemplative officer.
FOOTNOTES:


2. Id. at 1.

3. Id. at 9, 10.


6. Id. at 48.

7. Id. at 51.

8. Organ et al., supra, at 136, 137.

9. Id. at 128.

10. Id. at 131.


12. Id. at 6, 7.

13. Id.

14. Id. at 11.

15. Id. at 13.

16. Id. at 12.

17. Id.

18. Id.

19. Id.

20. Id. at 13.

21. David Jaffe, Katherine Bender, and Jerome M. Organ, “It Is Okay to Not Be Okay”: The 2021 Survey of Law Student Well-

22. Id. at 11.

23. Id. at 42.

24. Id. at 23.

25. Id. at 24.

26. Id. at 23.

27. Id. at 20.

28. Id. at 27.

29. Id. at 43.

30. Id. at 27.

31. Id. at 27.

32. National Task Force on Lawyer Well-Being, supra, at 18, 52.

33. Swenson et al., supra, at 16.

34. Id.

35. Id. at 17.


37. Id. at 39.

38. Id. at 40.


44. Email from Tom Felts to Jill Carnell, September 13, 2022


47. Id. at 3.
Judge Bradford dissented and wrote separately. He argued the majority had raised the fundamental error claim *sua sponte* and reminded his fellow panel members that the Supreme Court has recently discouraged *sua sponte* decisions.

**DEFENDANT’S OBLIGATION TO REGISTER AS A SEX OFFENDER FOR LIFE WAS NOT UNCONSTITUTIONAL**

The sex offender registry seems to be an ever-evolving concept. In 2004, a person convicted of sexual battery involving the use or threat of the use of force was required to register as a sex offender for life. In 2007, the General Assembly amended the Indiana Code to require offenders convicted of sexual battery to register for only 10 years. At issue in *Smith v. State* was whether the 2007 amendment relieved a person convicted of sexual battery in 2004 of the lifetime registration requirement.

The court also rejected challenges under the Indiana Constitution. With respect to the equal privileges and immunities clause in Article 1, Section 23, the court found "to the extent Smith is being treated differently from other sex offenders, it is the direct result of his own choices." *Id.* The court also found no "due course of law" violation under Article 1, Section 12 because Smith was given due process before the registration obligation was imposed on him.

Continued from page 24...

enter a conviction for the Class D felony.

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