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STATE OF THE JUDICIARY

Indiana Courts: Fulfilling Our Constitutional Responsibilities
By Hon. Loretta H. Rush

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President's Perspective

JACKIE ROBINSON, DIVERSITY, AND RACE HATE

By Clayton C. Miller

I recently re-watched the 2013 feature film 42, about Jackie Robinson’s rookie season with the Brooklyn Dodgers in 1947. The late actor Chadwick Boseman portrayed the baseball legend, who was the first African American allowed to play for a major-league team in the modern era. Robinson was Rookie-of-the-Year his first season in the big leagues, and just two seasons later was the starting second baseman on the All-Star team and the National League MVP. He retired from baseball in 1956, and it was several years after his premature death in 1972 at age 53 that I became aware of his barrier-breaking Hall-of-Fame career. His powerful story still resonates today. Exceptionally talented and hard-working (he had been a four-sport varsity athlete at UCLA and was the 1940 NCAA champion in the long jump), he was also a civil rights pioneer.

The movie offers an unflinching view of the obstacles Robinson faced as a Black athlete from teammates, umpires, and racist baseball fans. I also recommend the Ken Burns documentary of Robinson’s life, which includes interviews with his now (as of this writing) 99-year-old widow Rachel. This audience of lawyers also may be interested to know during his pre-baseball stint as an Army officer he was court-martialed in 1944 for, among other things, insubordination. His arrest arose from his interaction with military police at Ft. Hood, Texas, after he swore at a civilian bus driver on the Army base and refused to comply when the driver told Lt. Robinson, in contravention of Army regulations, to move to the back of the bus because of the color of his skin. This was eight years before Rosa Parks’ famous defiance of a similar directive on a public bus in Montgomery, Alabama. Fortunately for Robinson and future baseball fans, he was acquitted on all counts. An excellent write-up of the incident can be found at www.americanheritage.com/court-martial-jackie-robinson, which includes a brief treatment of the challenges finding lawyers for the many Black soldiers who
pushed back against racist attitudes in the Jim Crow South and elsewhere during that time.

I focus on Jackie Robinson’s story for two reasons. First, because he serves as a stark example of the benefits of diversity. By lifting its self-imposed limitations on who could play the game, baseball elevated the quality of the athletic product it presents to its fans, not to mention provided more equal opportunities for participation. Although sport is its own context, with a significant physical component and often with base than a generation ago. Of course, while we are each defined in part by the totality of our individual circumstances, touting the benefits of diversity is not to suggest a lawyer cannot relate to and effectively serve the needs of a client of a different race, gender, or other immutable condition. A modicum of empathy can go a long way to bridging cultural and other gaps, but it rarely arises in a vacuum. As a profession, the law is not especially diverse, adding to the challenge of developing the exposure to other perspectives on which empathy is grounded.

"Diversity of background and experience, and diversity of thought, can enhance the quality and efficacy of work product in other contexts, including the law."

ultimately wanting a more diverse bar and bench is not about window dressing or what some cynics dismiss as virtue signaling. It is about wanting to improve outcomes, advance justice, promote faith in legal institutions, and increase opportunity for all Hoosiers.

Addressing race in the context of law can be tricky. I’m far from an expert on the subject, but it seems to me there’s an inherent tension between pushing back against individual and systemic racism on one hand, with their combined legacy of denied opportunities as well as stated and unstated antipathy to others based on skin pigment, and on the other hand wanting to treat everyone equally under the law based on individual merit. Statistical data, to say nothing of evidence from cell phone cameras, suggest in more than a few jurisdictions facially neutral laws continue to be applied unequally to our Black brothers and sisters. Does blindness to race equate to blindness to injustice? Can we act affirmatively to provide access and redress while remaining consistent with societal notions of fairness? Courts have in recent decades struggled to strike an appropriate balance, especially in the contexts of education and employment.

I recently heard an older white CEO assure his audience that nowadays when considering two equally qualified candidates to fill one open position at his company, the tie goes to the candidate who is a minority. But he quickly went on to acknowledge there’s no such thing as a tie when comparing applicants’ qualifications. One way the well-intended might foster progress to racial equality without having to put a thumb on the scale could involve valuing and embracing different backgrounds and world views. And when it comes to making decisions about admission, hiring, and promoting, the more subjective the criteria for achievement the greater the importance of being aware of and at times even resisting the natural impulse to favor one’s inherent biases.

A second reason I find Jackie Robinson’s story compelling today is because it serves as a touchstone to compare not only how the law has evolved to ameliorate some of the more odious vestiges of segregation and unfair discrimination from Robinson’s time, but also how past attitudes about other races persist.

clearer measurements of merit allowing more objective bases of comparison between athletes, such as speed, scoring percentages, etc., the benefits of diversity are not limited to physical pursuits. Diversity of background and experience, and diversity of thought, can enhance the quality and efficacy of work product in other contexts, including the law.

Consumers of legal services come in all stripes, and certainly our civil as well as criminal courts daily engage with the broad spectrum of humanity, not just in the largest cities of our state. Indeed, even small-town practitioners are encountering a more diverse client
and continue to erect barriers to equality. As I write these words in the final month of 2021, a judge in Louisiana is on voluntary unpaid leave after her exposure in a recent candid video expressing hateful views about Blacks in her community. To be sure, there has been significant progress since Robinson’s 1947 MLB debut in both civil rights and societal attitudes toward Blacks and other minorities. But anyone who thinks Robinson’s story has no currency in today’s world hasn’t been paying attention or is willfully blinkered. Far too many of our fellow citizens were cut from the same cloth as Alabaman Ben Chapman, the vile manager of the Philadelphia Phillies whose loud “N*****, N*****, N*****” and other overtly racist taunts each time Robinson came up to bat vividly distilled the non-physical abuse he and many others of his race faced, and not just in the South. The team holding out the longest against integrating was the Boston Red Sox, waiting 12 years after Robinson’s major-league debut before adding a Black player to their roster. And make no mistake, then as now the abuse was not limited to the non-physical.

Closer to home, our state has its own troubled history on race. A generation before Robinson broke baseball’s color barrier, Indiana found itself gripped by intolerance in the form of the Ku Klux Klan. Not only were Black Hoosiers the target of discrimination, hate, and violence, but Jews and Catholics also were viewed in many quarters as second-class citizens, or worse. Back then your state bar association was a lonely voice speaking out against the Klan agenda, which had its adherents at the highest levels of state government. Notwithstanding
the fact that, then as now, lawyers work in communities of all sizes in which challenging the powers that be could be detrimental to their law practice, delegates to the ISBA’s annual meeting in 1923 unanimously adopted a resolution condemning the Klan, setting an admirable and enduring example of speaking out to protect minority civil rights. I also note, however, that the exclusion of Black attorneys from professional associations in that same era led to the founding of the Marion County Lawyers’ Club in 1925.

Today the Klan as an organization is widely dismissed. Yet in some quarters the racist views it espouses still predominate. As IU emeritus history professor James H. Madison noted in his recently published, well-researched history, *The Ku Klux Klan in the Heartland*, one of the organizers of the 2017 white nationalist rally in Charlottesville, Virginia, hails from southern Indiana and is reaching new audiences with his “timeworn hatred mixed with twenty-first-century ingredients, including rapid internet connections to like-minded people.” Madison at p. 195.

For the record, your state bar association values diversity and seeks opportunities for its promotion. Our full Diversity Position Statement can be found on the ISBA website and reads, in part, “this commitment is not only essential to the pursuit of our mission ‘to improve the administration of justice and promote public understanding of the legal system,’ but it also strengthens our ability to address all our members’ needs.” One of the four pillars of our newly adopted strategic plan calls for a specific focus on increasing the diversity of
But it is my conviction that every one of us can and should play a role in ensuring all vestiges of 'race hate' and second-class treatment based on race are eliminated both in law and in practice.

subject was a revelation. Plus, you can get an hour of free ethics CLE credit for watching. Recordings of the Open Conversations programs, along with our full Diversity Position Statement, can be found at inbar.org/page/systematic-inequities.

Seeking to combat a different type of prejudice, next month your ISBA is among the sponsors of the Law vs. Antisemitism Conference at IU McKinney School of Law on the IUPUI campus on March 13 and 14. I hope to see you there.

While there’s clearly more lawyers can do to ensure “We the People” as proclaimed in the preamble to our Constitution truly extends to all citizens, there are hopeful signs of progress. In the same state and the same month in which the judge was caught on video using racist language, the governor announced his posthumous pardon of Homer Plessy 129 years after his 1892 conviction for violating Louisiana’s law segregating rail passengers by race. Our Supreme Court long ago repudiated its majority opinion in Plessy v. Ferguson which had sanctioned the separate but equal standard, proving the prescience of the lone, courageous dissenter in that infamous case, Justice John Marshall Harlan, who wrote, “The destinies of the two races in this country are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of the law.” On a related note, I highly recommend Peter S. Canellos’ 2021 biography of Justice Harlan, The Great Dissenter.

One manifestation of that indissoluble linkage referred to by Justice Harlan is familiar to baseball fans. As in other sports, each baseball team periodically retires the playing number of their greatest ballplayers. As the movie title reflects, Jackie Robinson’s number was 42. It is hardly surprising the Dodgers, now in Los Angeles, long ago retired number 42. But as a sign of respect for his singular achievement, not just for his team but for his sport, in all of baseball only one number has been retired by every team: 42. Each year, April 15 is Jackie Robinson Day in baseball, when every player, regardless of race, wears his number 42. This April 15 will mark the 75th anniversary of Jackie Robinson breaking baseball’s color barrier. You’ll find me somewhere in the stands celebrating with my fellow fans.

In conclusion, I certainly don’t have the answers to what is the most appropriate response today to the pervasive and systemic racism that was such an inescapable aspect of the Black experience in the past, and which we have yet to fully eradicate. But it is my conviction every one of us can and should play a role in ensuring all vestiges of “race hate” and second-class treatment based on race are eliminated both in law and in practice. Viewing current debates and struggles through such a lens won’t necessarily lead to agreement as to optimal tactics or outcomes, but with a good faith commitment to such common purpose we can surely advance the ball and fully embrace the profound notions that not only are all persons equal before the law, but all persons are created equal.
TWO ISBA PROGRAMS WIN AWARDS

By Res Gestae Editor

Thank you for picking up the combined January/February issue of Res Gestae. We have several insightful articles to share with you. But first, we want to highlight two award-winning programs ISBA members and staff have shared with the community.

ISBA BENCH AND BAR CELEBRATION OF THE 19TH AMENDMENT WINS STAR AWARD

The ISBA Bench and Bar Celebration of the 19th Amendment was named the 2021 Outstanding Individual Program/Event at the Indiana Society of Association Executives’ (ISAE’s) 20th Annual STAR Awards. The award recognizes an exceptional single-day, non-convention event focused on education, advocacy, or networking produced by an individual or association in Indiana.

The event was recognized for its success in connecting women leaders of the past, present, and future. A partnership with the Indiana Supreme Court and the Indiana Women’s Suffrage Centennial Commission, the event honored both the 100-year anniversary of the 19th Amendment and the 13 women judges on Indiana’s Appellate
Court who helped pave the way for today’s women legal professionals. 275 Indiana legal professionals, many of whom were women, came together for a celebration that showcased how the administration of justice in Indiana is fairer thanks to women’s influence, highlighted remaining areas of improvement, and reminded the next generation of women leaders that their potential is limitless.

One attendee said, “I left this event with a sense of pride in what the women before me were able to accomplish, appreciation for the women of color who were systematically excluded and overlooked, and a renewed drive to continue pushing for voting rights in our country.”

**OPEN CONVERSATIONS WINS LEXISNEXIS COMMUNITY & EDUCATIONAL OUTREACH AWARD**

*Open Conversations,* hosted by ISBA board member Angka Hinshaw and Indiana Supreme Court Justice Steven David, was named the winner of the LexisNexis Community & Educational Outreach Award. This award, given annually by the National Association of Bar Executives (NABE), honors outstanding bar public service and law-related education programs across the country.

This is the second time *Open Conversations* has received national attention. The program also received the Award of Outstanding Achievement from the Association of Continuing Legal Education (ACE) for its candid dialogues about race and culture in the legal landscape. Though the program’s last conversation occurred in December, its work continues to evolve in the members who attended and participated in the conversations.

One attendee said, “The ISBA *Open Conversations* program represents a true and genuine attempt at the legal profession moving forward, by facilitating open, honest, and civil conversations about race, inequality, and next steps. I see positive progression in each successive month’s webinars, as well as in my expanded awareness of colleagues’ respective experiences and my inadequacies in understanding.”

Angka and Justice David discuss what they’ve learned throughout the program and how members can contextualize the year’s work moving forward in “Time of Reflection – An Open Conversation about the *Open Conversations Program*” on page 18.

The ISBA strives to support lawyers professionally and personally through education, connection, and advocacy. We wouldn’t be able to do this work without the support of our members who help provide the programming that supports these goals. Thank you to everyone involved in the planning and implementation of these programs. Congratulations on these well-deserved awards! 😊
STATE OF THE JUDICIARY

INDIANA COURTS: FULFILLING OUR CONSTITUTIONAL RESPONSIBILITIES
INTRODUCTION

Welcome to the State of the Judiciary. It’s always a privilege to address you in this magnificent chamber. We are one of the few states in the country where all three branches of government are housed in one building. While each of our branches has independent obligations, our proximity to each other cultivates opportunities to work together in so many ways for the benefit of every Hoosier.

As Chief Justice of Indiana, it is my constitutional responsibility to report to you the state of Indiana’s courts—my eighth such address. And the message I offer today is one of perseverance.

CONSTITUTIONAL PROMISE

Throughout these last two years, your judiciary has embraced solutions to keep courts operational, resulting in the resolution of two million cases. But success is not measured solely by the number of cases we decide. Why? Because the Indiana Constitution’s Open Courts Clause promises every Hoosier a fair, impartial, and accessible justice system. And we are delivering on that constitutional promise.

Yes, your Indiana Supreme Court thoughtfully decides cases—as our Constitution requires. But the Constitution further charges us with critical administrative responsibilities—responsibilities that are vital to the rule of law, because a judge’s decision-making is only as good as the legal system in which it takes place.

Across our 92 counties, your dedicated trial court judges confront an increasingly complex array of criminal, business, family, housing, and debt cases. In many ways, courts have become the government emergency room for society’s worst afflictions. Substance abuse, mental illness, domestic violence, homelessness—the challenges brought to courtrooms each day are the same challenges facing your constituents. And, like you, we are determined to find solutions. We share in the Governor’s stated desire to uphold Indiana’s reputation as a place Hoosiers want to live, work, play, study, and stay.
Today, I will highlight four critical components of our constitutional responsibilities.

**INCREASING PUBLIC TRUST**

We are implementing initiatives to increase confidence in the judiciary. And why is public trust so critical to the judiciary? Because it’s the judiciary’s currency. As Alexander Hamilton famously pointed out in the Federalist Papers, we have “no influence over either the sword or the purse.” True, but we do have tremendous influence over Hoosiers’ trust in government. Every day, thousands of citizens across Indiana enter our courtrooms, where they are guaranteed a fair, impartial, and accessible justice system. So we must operate a justice system that bolsters our currency.

**STRENGTHENING HOOSIER FAMILIES**

We are instituting court reforms to better serve vulnerable and endangered children and adults, to better support our veterans, and to better help our families navigate their way through divorce, child custody, or evictions. And, in doing so, we are also addressing the ever-increasing number of Hoosiers entering our courtrooms with substance use disorder and severe mental illness.

**IMPROVING PUBLIC SAFETY**

We are expanding problem-solving courts and remain committed to working with all justice partners to safely implement pretrial reform.

**MODERNIZING OUR COURTS**

We are innovating—from recently completing one statewide case management system to increasing the speedy resolution of business disputes. We are committed to leveraging technology to better deliver justice across our state.

These efforts are foundational for fulfilling that constitutional promise of providing a fair, impartial, and accessible justice system for every person, in every Indiana community.

**PUBLIC SERVICE**

When we are all in this room together, it is apparent that we have a tremendous connection, a bond we share because we chose public service. While we took different paths to office, the underlying motivation is the same: to serve the people of our state. And one of the most deeply committed public servants of our time—one we should all aspire to be—is Justice Steven David.

Justice David will step down from the bench after nearly 30 years as a judicial branch leader and the longest-serving justice currently on the Court. A highly decorated colonel in the United States Army, his service spans 28 years and includes tours of duty in Iraq and Guantanamo Bay.

As a tireless champion of justice, he has selflessly led many of the court reforms that I am going to speak about today. Justice David please come to the podium and provide an update on several of the initiatives.

**REMARKS BY JUSTICE STEVEN H. DAVID**

Thank you, Chief Justice Rush. We have served as judicial officers together for over 20 years. So thank you for...
sharing some of your time today with me. For a ninth generation Hoosier who grew up in Ogilville, Indiana, this is a tremendous honor.

OK, the big news—let’s talk about the modernization of the courts through technology.

We now have a unified case management system. It’s in every county! I’ll say it again: one statewide case management system, with public access at mycase.in.gov, with 34 million visits last year. We couldn’t have done it without your support, your trust, and your confidence. All Hoosiers now have free, 24-7 access to court information.

And we have our e-filing system that is also in every county; every week about 140,000 electronic filings move through the system—paperless! This saves millions of dollars for all users, including government agencies. By supporting us in this journey, we are a more responsive and transparent judiciary.

Thank you also for your unwavering support for commercial courts, available statewide. 1,300 cases have moved through this sophisticated system that handles challenging business-to-business disputes. It’s timely, cost effective, predictable, and fair. Thank you to the Commercial Courts Committee, which has listened to the needs of practitioners, corporate counsel, and judges. A special shout out to Kevin Brinegar of the Indiana Chamber of Commerce as well as your own Senator Eric Koch and Representative Greg Steuerwald.

Indiana is a national leader in specialized courts, often called problem-solving courts. They focus on accountability, but also treatment. Accountability and treatment are not mutually exclusive; together, they are mutually successful!

We have 118 of these specialized dockets statewide and 21 more in the planning process. They include drug, family recovery, domestic violence, mental health, and veterans treatment courts. It has been my honor to witness hundreds of people graduate from these extraordinary programs. They are incredibly time-consuming local initiatives. But as a veteran; the son, grandson, and father of a veteran; and the husband of a Navy officer who has been recalled to active duty—I am truly grateful for your support of these profoundly impactful and life-changing, indeed life-saving, programs.

If you need to feel good about the good you do and the support you have given us in this work, please attend a problem-solving court graduation. You must experience it to really appreciate it. Watch the very police officer and the person they arrested for drug use stand together and hug each other in tears and triumph. Or attend a veterans treatment court graduation where a service member—scarred by the experiences and trauma of service, sacrifice, and conflict—who was once willing to give their life for all of us, now has a new life, thanks to all of you. It just doesn’t get any better than that.

Let’s talk about public safety, which includes pretrial and criminal justice reform. They allow us to enhance public trust and safeguard constitutional rights. We are working with you and our friends at the Indiana Prosecuting Attorneys Council, public defender agencies, law enforcement, and other stakeholders to build a more constitutionally transparent system to protect due process and equal protection rights while maintaining public safety. We envision transformative and lasting change in which we are not holding low-risk people in county jails. We have 12 counties now certified as pretrial service agencies led by the courts and 30 more in the planning stages. Our goal is simple: to make sure that before trial, the right people are in jail for the right reasons. Nothing more complicated than that.

And what about increasing public trust as the Chief Justice referenced? I wear this wrist band that says, “the rule of law always.” It is the rule of law and our respect for it that separates us from most of the rest of the world. It makes us the envy of most of the world and the enemy of some of the world. It is precious. It requires constant care and attention. It takes work and commitment to ensure that sacred phrase, “and justice for all!”

We have launched the Commission on Equity and Access in the Court System. Don’t be afraid of it; we aren’t. It is all about improving our systems. It is our way of doing a friendly audit of our own processes. And we aren’t doing it alone. Thank you legislators Travis Holdman, Greg Taylor, Greg Steuerwald, and Ragen Hatcher, along with my Vice-Chairs Norris Cunningham and Deborah Daniels. Will everyone who is serving on the Commission or any of its 8 working groups please stand and accept our thanks?

Continued on page 41...
TIME OF REFLECTION - AN OPEN CONVERSATION ABOUT THE OPEN CONVERSATIONS PROGRAM

What a year it has been for all of us! Personal triumphs and disappointment. Anxiety about our future – both personal and professional – yet we move forward. Together, if we believe in ourselves, our colleagues, our profession, and our fellow citizens, we can overcome any challenge. Together, we can make real and long-lasting positive changes to our world. Failure is not an option.

During 2021, over 1,500 people viewed the live “Open Conversations on Race and Racism.” Thank you for viewing the program. Thank you to those of you who will view the programs, as most have been recorded and are available through the State Bar’s website. Thank you to the sponsors – bar associations from across the state, law firms of all sizes (including solo practitioners), international companies, statewide organizations, all of Indiana’s law schools, as well as the entire Indiana Judiciary.
What has been the common denominator among the twelve programs? Honesty, vulnerability, openness, and a willingness to believe the stories of our colleagues and friends. We all joined together on the journey of understanding race, racism, and our parts in it, a journey that is complex, uncomfortable, and scary but so very necessary. Guests shared experiences of micro-aggressions from clients, judges, and peers; negative racial and ethnic stereotypes; mistreatment by police, and the list goes on. Some of the experiences shared were revealed for the first time – to an audience of hundreds. We all listened attentively with ranges of emotions from tears to anger to fear to resolve to shame to hopelessness to hope to acceptance of the fact that we all have so much more to learn and so many opportunities to make our state and our nation better.

The Open Conversations program has helped focus our attention on what our colleagues and friends have endured and what some of our fellow citizens have had to endure for a very long time. One of the several objectives of the program has been to move our profession and our circles of influence forward to eliminate racism once and for all.

Historical literature has memorialized many accounts of racism that led to the gross and horrific mistreatment of people such as Emmett Till, Jesse Washington, and more recently George Floyd. And those accounts are powerful. But, when you hear and perhaps see racism and the effects of it, it can leave you stunned and speechless, especially when it happens to someone you know or know about. Many of us can easily condemn the overt actions of racism such as lynching, slavery, confinement camps, or racial epithets. For the most part, modern day racism looks different, and can be easily overlooked, even by the most well-intended individuals. The Open Conversations program has peeled two of the many layers of the racism onion – awareness and conversation. We all learned that we have much to learn, individually and collectively. No one is immune from the need to be more aware, more knowledgeable, and more committed to doing more. This is a shared responsibility. No matter how we identify – black, brown, yellow, white, or some other color or combination – we are resolved to more clearly understand the challenges that we all have and are further resolved that injustice for some is an injustice to all. In 2022, we shall continue our journey to eliminate racism and to be anti-racists.

A public conversation between a young Black woman and an older White man about race and racism sparked a successful series of conversations among program guests that included lawyers, judges, and other community leaders – not just within Indiana but across the United States. The program has won two national awards. The most recent award was the LexisNexis Community & Educational Outreach Award in December 2021. Were the Hosts nervous? Yes. Absolutely. But doing what is right is sometimes very hard.
After a year of intense conversation about racism, attention was needed for mental and emotional well-being. The 2021 program series ended with a powerful conversation about mental wellness and its complexity when crossed with communities of color. Internationally recognized mindfulness teacher and University of San Francisco law professor, Rhonda Magee, led two meditation exercises which set the stage for us to begin to understand how mindfulness and racism intersect.

According to mindfulness.org, “mindfulness is the basic human ability to be fully present, aware of where we are and what we’re doing, and not overly reactive or overwhelmed by what’s going on around us.” There is no doubt that the benefits of mindfulness bring awareness through observing our own mind and increases our attention to the well-being of others. But how does mindfulness help when we find ourselves intentionally or unintentionally in conversations about race, racism, and other sensitive topics? As we learned, mindfulness is a tool to effectively discuss race or whichever topics we find ourselves engaged in. During the program, Rhonda posed the question: “How do you want to be in this moment in time?” Maybe in such times we should draw upon our year of conversations and try our best to listen, to meet the person where they are and to try to have a positive and respective conversation. If not us, then who? We can’t continue to overlook or be afraid of the past nor underestimate the challenges we face. We can choose to accept responsibility for our actions going forward and together chart a course onward.

In 2022, join Open Conversations for quarterly discussions. This year the program will reach beyond race and address LGBTQIA+, lawyers with disabilities, and minority religious groups, and focus on what is being done to change the future and how you can be a part of it and make it better. “Thank you Angka, you are amazing!” said Justice David. “You are welcome,” responded Angka Hinshaw. “You aren’t too shabby yourself. We did the best we could last year. Let’s keep it going!”

"We can't continue to overlook or be afraid of the past nor underestimate the challenges we face. We can choose to accept responsibility for our actions going forward and together chart a course onward."
When an attorney graduates from law school, they must decide more than just what kind of law they want to practice: They must decide where they want to practice and what kind of life they want to live. Most new lawyers find the gravitational pull of the big cities, or at least the perception of the big cities, too much to resist.

Unfortunately, this perception has robbed many attorneys of the rich and fulfilling legal career a small-town practice can afford, and it has unintentionally resulted in a generational exodus of young lawyers away from their hometowns and into a handful of big cities. Years of this steady emigration has left our rural residents with 300% fewer attorneys per capita than their urban neighbors. Four counties in Indiana contain 60% of our attorneys while the remaining 40% are scattered across 88 counties.

The rare lawyer moving back to a rural area is invariably a child of an already established attorney. Otherwise, finding a new lawyer to move back home is an almost extinct occurrence. Due to the depressed supply of lawyers, those who have managed to stay are usually overworked and struggle to meet the demand for legal services, often leaving...
the client to face longer waits and delayed access to our legal system.

If the supply of attorneys in our rural communities is low and the demand for legal work high, why don’t the rules of economics push the price for legal services higher and attract more attorneys back to their hometowns? These basic tenants of economics are at work and pushing prices higher, but the profits are not enough to sufficiently incentivize attorney relocation. Why? Because three major barriers block the path. They are the:

1. **High cost of overhead a single small firm must disproportionately bear,** undermining the firm’s elevated revenue and degrading its profit margin;

2. **High cost of time a solo or small-firm attorney must divert to “running the business” instead of practicing law and generating income; and**

3. **Unfair perception of what it means to be a lawyer in a small town, which disincentives eager new lawyers.**

**POSSIBLE SOLUTION: TOGETHER WE ARE STRONGER**

The answer to reducing these barriers is simple: working together. When firms across the state share the costs of overhead, consolidate purchasing power, and delegate the time spent “running” the business to a small group of people, the barriers begin to crumble and the path to bringing attorneys home starts to emerge. Our solo and small firms are much stronger together than any individual firm could ever be alone.

The concept is not new. The big firms naturally consolidated their administrative duties and expenses long ago so each individual attorney could focus solely on billing and practicing law. But when they did, they probably didn’t even think about it because it was intuitive to delegate these “business” tasks to a small group of people so the lawyers could be lawyers. It was easy to do when they were all in the same building (or possibly a few buildings throughout the country). But in this world of technology and collaboration, solo and small firms in our rural communities now have the tools and capabilities to replicate this amongst ourselves across the state, thereby leveling the playing field.

Over the past seven years my wife and I (who practice together and own Sprunger & Sprunger) pioneered a new law-firm model aimed at tearing down these barriers uniquely shouldered by the solo and
small-firm practitioner. Together, we invested the time, energy, and resolve necessary to translate the idea into a logistically workable reality. Along the way, we have been pleasantly surprised to keep discovering new groups of attorneys who benefit from this model: young attorneys who never thought moving home was possible, retiring attorneys who found the answer to a solid succession plan, niche-practice-area attorneys who found enough clients to justify their narrowly tailored practice in a small town, and existing attorneys who just want to earn more and experience freedom from their administrative headaches. Across the board, we found by joining together, our attorneys have:

1. More time. Attorneys save time by avoiding the administrative headaches of running the “business” of the law firm. According to Clio’s 2020 Legal Trends Report, the average Indiana attorney only bills 32% of their time worked, or 2.56 hours in an 8-hour day. In rural firms utilizing our model, our attorneys are shielded from their administrative burdens and have accordingly increased their billings by 107%. Therefore, each attorney provides 107% more legal services to their underserved communities (stretching each attorney farther to chip away at that 300% lawyer-to-resident per capita disadvantage our rural residents face), the attorney doubles their revenue, and the attorney gets to do more of what they love: practice law.

2. Reduced expenses. By consolidating expenses across multiple firms, simple economies of scale decrease the cost. Practices become more efficient as margins of waste are reduced. For example, one phone receptionist for a small firm may cost $40,000 a year after wages, benefits, payroll taxes, and costs of equipment are included. While the firm needs someone to cover the phones all the time, they may only ring a quarter of the time. By eight firms joining together and sharing the cost of two receptionists, each firm gets their phones answered all the time, but each firm only pays a quarter of the receptionist, or $10,000.00 instead of $40,000.00.

3. Better expenses. While the expenses to run the practice are cheaper when purchased together, they are also better. It becomes practical to invest in infrastructure or equipment that would otherwise be unattainable for a single small firm. For example, together the firms can invest in better network security than any individual firm could feasibly manage. Together we can address facilities, marketing, HR, and payroll with professional staff dedicated only to our firms. We are all familiar with various vendors who each offer individual services, but together for the first time, we can provide extra simplicity by doing it all when we do it together.

4. Increased opportunity and synergy. Finally, opportunities are bigger when we work together. Being part of a bigger organization opens doors and career opportunities that are not possible on your own. As we work together it becomes possible to develop trusted referral networks and niche practice areas that would not otherwise be feasible in a single small town. The bigger we grow, the more synergies reveal themselves.
REDEFINING SMALL-TOWN LAW

The last barrier is a mistaken but stubborn perception that big cities are where “real lawyering” occurs and a small-town practice is somehow second rate with less opportunities, less income, and less of a chance to make a real difference in the world.

The reality couldn’t be farther from the truth. I would argue a small-town practice, among your family and friends, holds a level of fulfillment that is unmatched. The work you do as a lawyer in a small town has a direct and ascertainable impact on real lives. Nowhere else can you see a friend from elementary school laughing at the grocery store with the children you helped him adopt. Nowhere else do you see a young mother and child at the high school basketball game who you helped get back on their feet after the father’s life was taken in a vehicle accident. One day, while sitting in the balcony at church, I looked down and realized that in just about every one of the 20 or so rows below me, I had touched at least one person’s life through my practice. That level of tangible impact is the norm and not the exception in a small-town practice. And with a model like the one we are pioneering, a lawyer can have this fulfillment plus a work-life balance without sacrificing the big-city income.

I am hopeful reducing these barriers with models like ours will allow more attorneys who have felt the tug or calling to move home to do it. And in doing so, begin to balance the scales for rural residents who deserve equal access to legal counsel when the troubles of life that only a lawyer can fix come knocking. But we can only do it together.

If this piques your attention, I encourage you to contact me directly so we can continue this important discussion - together.

Cory Sprunger, Managing Partner
Sprunger & Sprunger
cory@sprungerandsprunger.com
www.sprungerandsprunger.com/join
(260) 589-2338
CONSIDERING MURDER
BY JUVENILES

In three cases, the Indiana Supreme Court and the Court of Appeals grappled with issues of juveniles who committed murder. The Supreme Court reinstated a 60-year sentence for a 15-year-old tried as an adult as an accomplice to murder after the juvenile’s sentence had been vacated by the Court of Appeals after the denial of post-conviction relief. A 13-year-old tried as an adult for murder had his 63-year sentence reduced to the advisory 55-year sentence for murder, the Court of Appeals finding he was not the worst of the worst. In yet another case, the Court of Appeals upheld a 115-year sentence for murder and attempted murder for a defendant who was 16 years old at the time of the crime.

SUPREME COURT CASE

Tyre Bradbury v. State of Indiana, 21S-PC-441, October 1, 2021

Ineffective assistance of counsel claim rejected, stipulating to a disputed element of crime and failing to seek lesser included offense instruction

Tyre Bradbury was 15 years old when his 19-year-old friend shot and killed a toddler while firing at a rival gang member. Bradbury had provided the gun to the
shooter and was charged as an adult with murder as an accomplice. In a 3-2 split, the Indiana Supreme Court reinstated Bradbury’s murder conviction after it had been vacated by a split decision in the Court of Appeals on appeal from the denial of post-conviction relief.

Bradbury argued his trial counsel’s performance was deficient and he was prejudiced. The trial court denied his post-conviction relief petition.

A split Indiana Court of Appeals reversed the trial court, finding trial counsel ineffective in stipulating to the co-defendant’s murder conviction and failing to request a jury instruction on the lesser-included offense of reckless homicide.

Judge Nancy Vaidik dissented from the Court of Appeals majority.

The Supreme Court accepted the case on transfer and likewise split, affirming the denial of Bradbury’s post-conviction relief petition and effectively reinstating his murder conviction. Justices Steven David, Mark Massa, and Geoffrey Slaughter affirmed the post-conviction court’s ruling that Bradbury’s counsel was not ineffective.

The majority found trial counsel was not ineffective for failing to request a jury instruction on the lesser-included offense of murder as the principal, thus conceding the co-defendant had the requisite intent to kill. Justice Massa, joined by Justice Slaughter, issued a concurring opinion to express his belief that defense counsel’s performance was effective and something to praise rather than second guess, even if it failed to lead to acquittal.

Justice Goff, joined by Chief Justice Rush, dissented. They found deficient performance in counsel’s failure to consult with Bradbury about whether to request the lesser-included instruction. Counsel also testified his failure to request such an instruction was not a strategic decision. This deficient performance prejudiced Bradbury given the conflicting evidence that would have likely created a serious enough dispute over Bradbury’s culpability as an accomplice for the court to have given the instruction.

COURT OF APPEALS


Nearly-maximum sentence inappropriate for 13-year-old tried as an adult

Alphonso James III was 13 years old when he killed an acquaintance during an exchange involving an Xbox, money, and a firearm. While inside a vehicle during the exchange, James reached for the victim’s gun while also drawing his own gun and shot the victim nine times.

After a bench trial where James admitted the shooting but claimed self-defense, he was sentenced to 63 years of imprisonment. At sentencing the trial court found James’s offense was heinous and aggravated, he was beyond the rehabilitation of the juvenile justice system, and the community’s safety and welfare were served by sentencing him as an adult.

A unanimous Court of Appeals panel partially reversed James’s 63-year sentence, reducing the sentence to the advisory sentence of 55 years for murder, holding the 63-year sentence that matches the harshest sentences imposed on hardened adult offenders was too severe for James, a 13-year-old waived to adult court.
The court found treating James the same as an adult offender for sentencing purposes was illogical and contravened the basic notion that juveniles are different from adults in sentencing and are generally less deserving of the harshest punishments.


Murder and attempted murder convictions and 115-year sentence upheld despite defendant's young age and erroneous admission of evidence

Police collected DNA from a murder scene where the victim had been stabbed to death, and his wife was severely injured. Seven years later, police sent the DNA to a genealogy company for testing and received Corbett's name as a possible lead. Police then conducted a “knock and talk,” followed by a trash search of Corbett's home where items were taken for DNA analysis. After more testing of items from the trash pull, police obtained a search warrant for Corbett's DNA, which matched DNA at the crime scene.

Corbett, 16 years old at the time of the offense, was convicted of

"The court found treating James the same as an adult offender for sentencing purposes was illogical and contravened the basic notion that juveniles are different from adults in sentencing and are generally less deserving of the harshest punishments."

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**Pursuant to Indiana Court Rule 1.15, an audited financial statement of the Indiana Bar Foundation’s IOLTA program for the prior year is published in this issue of Res Gestae.**

Indiana Bar Foundation, Inc.

**Schedule of IOLTA Activities**  
*Year Ended June 30, 2021*

**REVENUE:**

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</tr>
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murder and attempted murder and sentenced to 115 years in prison. On appeal, Corbett argued the knock and talk was an unconstitutional search, as was the trash pull, and the remaining evidence supporting the application for the search warrant for his DNA was uncorroborated hearsay and the warrant was therefore unsupported by probable cause. On the knock and talk issue, the Court of Appeals found the detective did not violate Corbett’s rights under the Fourth Amendment, as the officer intended to speak to the occupants and determine who lived at the home. See Florida v. Jardines, 569 U.S. 1 (2013). Police actions surrounding the trash pull were not unreasonable under the totality of circumstances. Thus, the trash pull did not violate Article 1, Section 11 of the Indiana Constitution.

Citing Camm v. State, 908 N.E.2d 215, 224 (Ind. 2009), reh’g denied, the court found an abuse of discretion under Indiana Evidence Rule 404(b) (2) in admitting evidence of other homes burglarized. Corbett also argued — and the State conceded — error in admitting evidence of nonjudicial punishment Corbett received while in the Navy under Ind. Evid. Rule 609(a)(2), because the punishment does not constitute a criminal conviction with which he could be impeached. Still, the court found harmless error in admitting the other burglaries and nonjudicial punishment, given the substantial evidence of Corbett’s guilt.

Because of the brutal nature of the crimes, the court upheld the maximum sentence despite Corbett’s young age at the time of the crimes, his lack of criminal history, five-year service in the U.S. Navy, and his
classification as low risk to re-offend under the Indiana Risk Assessment System.


Inadequate *Pirtle* advisement required suppression of evidence seized as result of warrantless search.

Posso brought his son to a Bloomington emergency room, where the child was pronounced dead. Law enforcement officers questioned Posso at the hospital and at the sheriff's office before his arrest for murder. He signed consent forms authorizing them to search his motel room, van, and cell phone.

In an interlocutory appeal following the denial of a motion to suppress, the Court of Appeals found no federal constitutional violation and Posso did not experience a “question-first” interrogation. Even so, the court did agree Posso was not advised of his state constitutional right to the presence and advice of counsel before he consented to the searches of his motel room, van, and cell phone.

*Pirtle v. State*, 263 Ind. 16, 323 N.E.2d 634 (1975), holds that a person in police custody is entitled to the presence and advice of counsel before consenting to a search and the right, if waived, must be explicitly waived. This right applies only to the “weightiest intrusions” such as the search of the hotel room and van.

As a matter of first impression, the court also concluded the search of a cell phone is a weighty intrusion under *Pirtle*.

Posso's argument he was subjected to an impermissible “question-first” interrogation was rejected because a reasonable person under the same circumstances would not believe they were under arrest while being questioned at the hospital or not free to resist the entreaties of the police.

Ruth Johnson and Jack Kenney are staff attorneys at the Indiana Public Defender Council where they provide research assistance, training, and support to public defenders across the state.

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THE INTERSECTION OF ASSISTED REPRODUCTION WITH ESTATE PLANNING AND FAMILY LAW: ARE YOU ASKING THE RIGHT QUESTIONS ON YOUR INTAKE DOCUMENTS?

By Amanda D. Sapp

Most family law and estate planning attorneys think of a house, car, bank account, or other typical assets when assisting a client. One asset that is almost always forgotten about is stored genetic material. With 1 out of 8 couples experiencing infertility, and a continued rise in the number of people seeking fertility treatments to preserve fertility or start their families, this is something that should be a standard question on all family law and estate planning intake documents. The client(s) will not likely think to bring up their genetic material to the attorney during their initial consultation.

If a client has stored genetic material, there are several questions that should follow, including:

- What type of genetic material is it? Eggs, sperm, embryos?
- Who are the genetic contributors to the material?
- Are the clients single, married, engaged, or in a committed relationship?
- Does the client have an informed consent document they filled out at the fertility clinic? If so, does it discuss what will happen to the genetic material upon death and divorce?
- If one of the genetic contributors should die, can the other person use the stored material and create a child through posthumous reproduction, either carrying the child themselves or through gestational surrogacy?
- If they do not have stored genetic material, would they want their partner/spouse to retrieve their genetic material if they are in a coma or not suspected to live following an accident? If they consent to the retrieval, can the person retrieving the genetic material actually use it? If so, how will that look on any living will or when setting up inheritance for the future child(ren)?
- In the event a single person has stored their genetic material to preserve their fertility, can their parents use the material to carry on the family name or legacy? Or the situation of their girlfriend/boyfriend/fiancé who claims they discussed having children, but the decedent never wrote those wishes in an estate plan?

It should be noted Indiana has been quiet regarding these litigated issues, but these types of cases are becoming more prevalent across the country. The field of
assisted reproduction is constantly evolving, as well as related litigation, which also makes it difficult for the legal professionals involved to have confidence in how a court might decide. In all these cases there are two competing interests: the fundamental right to procreate and the fundamental right not to be forced to procreate against one’s wishes. There are a growing number of cases where the court has held embryos are “property” of some type that can be considered for equitable distribution. The issue of sperm use after death and honoring estate plan wishes also has been litigated, which determined sperm was considered property divisible under an estate plan. After determining whether the genetic material can be considered property, most courts then will look to see if there are any documents with written guidance by the party or parties as to their disposition wishes. In one case, a couple from Texas died without written guidance in any estate plan or fertility clinic consent documents for the disposition of their frozen embryos. The Texas probate court held that the embryos were property and should be awarded to their only heir, their 2-year-old son, and upon his 18th birthday he would determine their disposition. In another case, a West Point cadet was in a skiing accident and the parents obtained a court order to have his sperm retrieved before he died. However, further litigation ensued as to whether they could utilize the sperm that was retrieved to procreate. The court found that the cadet’s parents could use the sperm of their deceased son to continue the family name in accordance with Chinese tradition, in addition to the parents’ claim the cadet had a strong desire to father children, even without any written guidance by the cadet. Is this really what these clients would have wanted? An estate plan outlining their wishes could have been extremely helpful for these courts.

In separation and divorce cases, it has been a challenge for the courts as well, with almost all litigation in this area involving couples who separate and want different disposition than to which they previously agreed. Most courts are looking to whether there were written instructions and applying a balancing interests test. In Davis v. Davis, the court heavily relied on any contracts the parties had that gave instruction for disposition of their embryos upon divorce. Pennsylvania found embryos were marital property that could be subject to equitable distribution, but that court also weighed on the fact the wife was unable to have biological children without the use of the embryos. In a non-marital case out of Illinois, the court relied on an oral agreement between the parties, as well as the fertility clinic informed consent documents, and held the girlfriend’s interests in procreation outweighed the boyfriend’s right not to procreate when balancing their interests.

While most fertility clinics include some language in the informed consent documents the patient signs designating what will happen in the event of death or divorce, there should be additional estate planning the court can evaluate as well in all death and divorce cases. Balancing the interests of the parties, in addition to the parties having clear, express agreements and estate plans, is becoming the benchmark for easier evaluation by the court to reach a just decision.

**FOOTNOTES**

1. [https://resolve.org/infertility-101/what-is-infertility/fast-facts/](https://resolve.org/infertility-101/what-is-infertility/fast-facts/)
3. Report and Recommendations of Master in Chancery, In the Estate of Yenenesh Abayneh Desta, Deceased, No, PR 12-2856-1. Probate Court No. 1 Dallas County, Texas
5. Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992) 2d 657 (1993)
By Adrienne Meiring

ETHICS

CHANGING PERSPECTIVES:
FROM REACTIVE TO RESPONSIVE

The past two years proved unique for the legal profession. With a pandemic, social unrest, and election uncertainty, 2020–2021 posed tremendous and unprecedented obstacles. Yet, amidst this chaos, the legal community rose to the challenge.

Lawyers, judges, and other stakeholders collaborated on innovative ways to keep courts open and improve the administration of justice. Technology took center stage as judges began to hold remote hearings and livestream proceedings, and lawyers conducted virtual client meetings and depositions. In response to the community's outrage at public events, legal professionals came together to encourage candid discussions about racial inequities in the legal system in hopes of finding solutions to achieve impartiality and justice for all.

The message emerging from the past two years is the legal profession must adapt to productively meet the public’s needs. The Indiana Supreme Court Disciplinary Commission also has felt that need to adapt. Against this backdrop, the most useful information I can impart in my first article for Res Gestae is to share my vision of the commission's future role in this changing legal landscape.

In short, my vision is to change the commission's approach from a reactive to a responsive one that meets customer needs more effectively.

HISTORICALLY A REACTIVE ENTITY

Since its creation on June 23, 1971, the Disciplinary Commission has been charged with enforcing attorney professional responsibility rules by investigating and prosecuting viable claims of attorney misconduct. Over the years, the Indiana Supreme Court has amended the professional responsibility rules and the operating rule for the Commission (Admission and Discipline Rule 23) several times, consistently demonstrating its desire “to be active in developing, as a whole, the ethics level of the bar.”

Despite these changes, the commission primarily has remained “a reactive agency that responds to grievances filed by other individuals.” While this model has served well in ferreting out serious misconduct and holding transgressors accountable, this model can be improved in three areas: 1) preventing ethical misconduct; 2) addressing the root causes that lead to ethical
misconduct; and 3) educating the public about what qualifies as ethical misconduct as well as making it easier for the public to report serious misconduct. A responsive model that seeks input and information from local and state bar organizations and provides community outreach would better serve these three areas.

**CUSTOMER FOCUSED: TECHNOLOGY, EDUCATION AND PREVENTION**

To create a responsive model, it is first key to identify the commission’s “customer.” In defining the purpose of Admission and Discipline Rule 23, the Indiana Supreme Court implicitly identified the “customer” by noting the rule shall “be employed and construed to protect the public, the courts and the members of the bar of this State from misconduct on the part of attorneys, and to protect attorneys from unwarranted claims of misconduct.” With these “customers” in mind, the next step is to identify how the commission can be more responsive to the needs of the public, courts, and ethically-minded attorneys in the state.

**TECHNOLOGY**

Technology can be a great asset to meet the needs of commission customers. Making the process easier for individuals to submit ethical concerns to the commission not only streamlines the process but also allows the commission to more quickly identify and investigate serious misconduct.

Recently, the commission launched an electronic complaint system through which individuals can download a complaint form, fill it out electronically or by hand (and scan), and then submit the form to the commission at DCGrievance@courts.in.gov. For more information on the process and complaint form, visit www.in.gov/courts/discipline/complaint/.

Similarly, the commission is updating procedures for how it dispenses informal ethical advice. Currently, attorneys can submit ethical questions through the Indiana Courts Portal. More information on question submissions can be found at www.in.gov/courts/discipline/guidance/. Since time is often of the essence, commission staff is working on expeditiously answering inquiries, usually in 72 hours or less.

"...the commission encourages attorneys to submit ideas for future opinions to their bar association's leadership or to commission members/staff."

**EDUCATION AND PREVENTION**

Education also is a key aspect in serving commission customers. Most of the state’s 20,000-plus attorneys seek to adhere to the ethical guidelines delineated in the Rules of Professional Conduct. Sometimes, unexpected situations or changes arise in the legal environment that require further guidance on rule application. The commission seeks to address these situations by issuing more formal advisory opinions on ethical subjects of interest to the bar, with the goal of issuing four opinions each year.

Although the commission typically chooses topics based on the frequency of recent issues coming before the agency, the commission encourages attorneys to submit ideas for future opinions to their bar association’s leadership or to commission members/staff. The goal is to proactively address difficult and nuanced questions to give lawyers direction in unclear areas.

Continued on page 45...
Delaware County courts relocated in January 2021 to the Delaware County Justice and Rehabilitation Center at 3100 S. Tillotson Ave. in Muncie. The center sits at the corner of Tillotson Avenue and West 26th Street in southeast Muncie.

The building houses the five Circuit courts, the prosecutor’s office, family support office, adult probation, community corrections, the sheriff’s office, the public defender’s office, and the clerk. The jail is also part of the complex.

The Juvenile Court and Juvenile Probation Department did not relocate and remain housed at the Youth Opportunity Center in Muncie.

THE BUILDING IS A FORMER MIDDLE SCHOOL

The County Commissioners purchased the former Wilson Middle School building and hired RQAW in Fishers, Indiana, to remodel the building into the justice center and jail. You can still see some of the original restrooms and showers in the building, as well as the original auditorium. The spacious hallways are reminiscent of the days when a thousand middle
school students went from classroom to classroom during passing periods. But very little remains from the building’s prior life as a school.

The public enters from one main entrance with metal detectors and security bailiffs. The first floor includes the five Circuit court courtrooms, a spare hearing room, the self-service legal center, the clerk’s office, the public defender’s office, and the sheriff’s office. The second floor houses the prosecutor, family support, Title IV-D court offices and courtroom, adult probation, and community corrections.

**ADVANTAGES FOR THE COMMUNITY**

The building has several advantages over the former justice center, which was in downtown Muncie. Parking is ample and directly in front of the building. Gone are the days when litigants, witnesses, and attorneys had to circle around downtown Muncie trying to find a place to park. And they don’t have to move their vehicles every two hours to avoid a parking ticket!

The new building has several large conference rooms where attorneys can meet privately with their clients, unlike the former location where client conferences had to take place in the hallway.

The courts now have the latest technology to project photographs, diagrams, and PowerPoint presentations onto large video boards. The boards are accessible to jurors and observers in the gallery, as well as the judge and the witness on the witness stand. With the increase in Zoom hearings, the new technology in the courtroom is especially welcome.

**SELF-HELP LEGAL CENTER**

The Delaware County Circuit Courts provide a self-help legal center for litigants without attorneys. The Indiana Supreme Court funded the center through a generous grant. The center was relocated to the justice center on South Tillotson Avenue, directly inside the entrance on the first floor. Litigants can use the computers to find forms, input the information, print the forms, and file the pleadings, all in the same building.

Prior to March 2020, through the grant the courts were able to pay attorneys to assist people with the forms in the center. Almost 3,000 people received assistance with forms from an attorney. Many thousands above that number have used the center on their own, when the attorney is not in the center.

**ADVANTAGES FOR STAFF**

Like the public, employees now have ample, free parking. Many employees take advantage of the track that still sits adjacent to the building to walk at lunch and on breaks. Delaware County has built trails reaching almost a mile in two different directions for biking and walking.

Staff also have access to a break room and a spacious workout room, which includes weights, exercise mats, and treadmills.

Attorneys who serve as public defenders now have spaces within the public defender’s office where they can go to get work done between hearings. In the former justice center, public defenders had no space to sit and work between hearings and during trials. Now they can work and interact with co-counsel and support staff in a spacious, comfortable setting.

Access to all the offices in the justice center is restricted by key fobs. The public cannot enter the secured areas leading to the various offices. The individual offices are also secured by key fobs and only those with the proper access can enter the offices.

Although the public cannot go into the employee work areas without permission, the justice center’s design allows the public to interact face-to-face with employees in the clerk’s office, probation department, community corrections, prosecutor’s office, and family support division through plexiglass partitions to protect both the public and the staff.

**CAUTIONARY TALES**

Some might ask, do you have any advice if we are thinking about relocating to a new facility? The answer is: yes. Having the necessary infrastructure for technology is critical. Make sure there is adequate power coming into the building and extra power in reserve. Make sure there are battery back-ups on all essential equipment in case the power goes out or fluctuates. Make sure there is ample bandwidth and access to servers. Contact the court administrator if you want more detailed information about these cautions.

Also, make sure you have alternate means to conduct hearings until your courtroom is fully functional. Even though we had blocked out time on court calendars for the move, we still had essential hearings to conduct. Thankfully, we were utilizing Zoom during the time of our move, so we purchased external hard drives to record the Zoom hearings. The court reporter would then upload those hearings into the system after each session.

**QUESTIONS?**

If you have any questions about the Delaware County Justice and Rehabilitation Center, for example, if you are an attorney and want to know how to access a court office, or you want to find out more about moving operations to a new building, contact Court Administrator Emily Anderson at (765) 747-7734, or via email at eanderson@co.delaware.in.us.
This article highlights three Indiana Supreme Court opinions, along with two civil transfer grants and six Indiana Court of Appeals opinions issued in October or November 2021. The full text of all Indiana appellate court decisions, including those issued not-for-publication, are available via Casemaker at www.inbar.org or the Indiana Courts website at www.in.gov/judiciary/opinions.

**INDIANA SUPREME COURT**

Applicability of *res ipsa loquitur* in premises liability cases

In *Griffin v. Menard, Inc.*, 175 N.E.3d 811 (Ind. 2021), a customer sued Menard, Inc. (Menard) concerning injuries sustained when a sink broke through the bottom of a box while being pulled from a shelf and landed on the customer. The trial court granted summary judgment in favor of Menard, but the Indiana Court of Appeals reversed in part. The Court of Appeals concluded issues of material fact precluded summary judgment on the premises liability knowledge and *res ipsa* issues. The Indiana Supreme Court granted transfer vacating the
Court of Appeals' opinion, and then affirmed the trial court's decision.

To prevail on his premises liability claim, Griffin needed to prove that Menard had actual or constructive knowledge of the dangerous condition—here the defective box. The Supreme Court acknowledged Griffin designated evidence Menard had no records of when it last inspected the boxes or how long the box had been on the shelf. Nonetheless, the court held these facts did not create "an issue of material fact with regard to Menard’s actual or constructive knowledge." Id. at 814 (emphasis in original).

Res ipsa loquitur is translated from Latin as “the thing speaks for itself.” The doctrine recognizes “that in some situations, an occurrence is so unusual, that absent reasonable justification, the person in control of the situation should be held responsible.” Id. at 815. The Supreme Court stated the central question when reviewing this doctrine is “whether the incident probably resulted from the defendant’s negligence rather than from some other cause.” Id. As the defective box was accessible to other customers, the Supreme Court held the doctrine did not apply here. Id. at 816. Justice Goff issued a separate opinion concurring in the court’s res ipsa loquitur decision but dissenting with regard to whether a material fact existed concerning the premises liability claim.

Enforceability of trust provision based on marital status

In Rotert v. Stiles, 174 N.E.3d 1067 (Ind. 2021), the Indiana Supreme Court reviewed a trust provision wherein a deceased mother stated that her son’s interest would be distributed to him directly if he was unmarried at the time of her death; but if he was married when she died, his interest would be held in trust. At the time that the mother’s trust was executed, Rotert’s third wife had filed for divorce. Later the two reconciled and were married when the mother died. After the mother died, Rotert filed a lawsuit against the trustee seeking to invalidate the restrictive trust provision claiming that it was an improper restraint upon his marriage. The trial court granted the trustee’s motion for summary judgment, finding the trust language was valid and enforceable.

The Indiana Probate Code Section 29-1-6-3 provides: “A devise to a spouse with a condition in restraint of marriage shall stand, but the condition shall be void.” The Court of Appeals in In re Estate of Robertson, 859 N.E.2d 772 (Ind. Ct. App. 2007), applied the probate code’s restraint-against-marriage prohibition to a trust. Relying on that opinion, the Court of Appeals reversed the trial court’s summary judgment ruling. Here Indiana Supreme Court granted transfer, stated its disapproval of and overruled In re Estate of Robertson, and affirmed the trial court’s ruling. In doing so, the Supreme Court stated: “Absent a clear indication from the legislature that trusts are subject to a general prohibition against restraints of marriage, we reject such a view.” Id. at 1072.

Justice Goff issued a separate opinion concurring in the result but opining the prohibition against restraints on marriage should apply to testamentary trusts, not just to wills. However, Justice Goff further opined he “would affirm the trial court by holding that, because Rotert’s interests in the estate vested ‘at the time of’ the settlor’s death, the terms of the Trust amounted to permissible conditions of acquisition rather than impermissible conditions of retention.” Id. at 1074.

Scope of Trial Rule 15(C)’s relation back power

In Miller v. Patel, 174 N.E.2d 1061 (Ind. 2021), more than two years after her son’s treatment, Miller sought to amend her complaint against her son’s medical providers under Indiana Trial Rule 15(C) to allege a violation of 42 U.S.C. § 1395dd, the Emergency Medical Treatment and Labor Act (EMTALA). The EMTALA has a two-year statute of limitations. The trial court denied her request and an appellate panel affirmed. The trial court “relied heavily on Williams v. Inglis, 142 N.E.3d 467, 476 (Ind. Ct. App. 2020), trans. denied, which held EMTALA’s two-year statute of limitations preempted an amendment under Trial Rule 15(C).” The Indiana Supreme Court, in this case, concluded there is no direct conflict between EMTALA’s limitations provision and Trial Rule 15(C)’s relation back power. The court stated its disapproval of Williams’ contrary holding and reversed.
the trial court’s order, thereby remanding the case with instructions to allow Miller to bring her EMTALA claim. *Id.* at 1065.

**Scope of the Medical Malpractice Act concerning claims between health care providers**

On October 21, 2021, the Indiana Supreme Court granted transfer and vacated the Court of Appeal’s opinion in *Lake Imaging, LLC v. Franciscan Alliance, Inc.*, 171 N.E.3d 619 (Ind. Ct. App. 2021). The primary issue in *Lake Imaging* was “whether an indemnity claim by a healthcare provider against another healthcare provider based on alleged medical negligence is subject to Indiana’s Medical Malpractice Act.” *Id.* at 621. Both the trial court and Court of Appeals held such an indemnity claim is subject to the MMA. As such, the courts held the claim is subject to the MMA’s two-year statute of limitations. Courts do not have subject-matter jurisdiction over claims that fall outside of this limitations period. These issues will now be reviewed by the Indiana Supreme Court.

**Scope of MCS-90 endorsement to vehicles not listed on insurance policy**

In *Progressive Southeastern Insurance Company v. B&T Bulk LLC*, 170 N.E.3d 1125 (Ind. Ct. App. 2021), the Court of Appeals reviewed a trial court’s finding an insurance policy endorsement under the federal Motor Carrier Act provided coverage for claims resulting from negligent operation even when the vehicle involved was not specifically listed under the company’s insurance policy. An employee of an Indiana trucking company was on his way to pick up a load when he crossed a median and collided with a car, killing the driver. Although the truck was not listed under the trucking company’s insurance policy, the policy included an MCS-90 endorsement as required by the Motor Carrier Act. The Court of Appeals held Indiana Code § 8-2.1-24-18(a) applies this requirement under the MCS-90 endorsement to the facts of this matter providing coverage for the resulting losses from the truck driver’s accident. *Id.* at 1127. The Indiana Supreme Court has granted transfer. *Progressive Southeastern Ins. Co. v. Brown*, 176 N.E.3d 463 (Ind. 2021).

**INDIANA COURT OF APPEALS**

**Breach of peace during attempted repossession of vehicle**

In *Horizon Bank v. Huizar*, -- N.E.3d --, 2021 WL 4767971 (Ind. Ct. App. Oct. 13, 2021), Horizon Bank, through an independent contractor, repossessed a vehicle owned by Huizar due to his failure to timely make payments. The trial court found Horizon Bank’s repossession constituted a breach of the peace when the contractors got inside the vehicle, locked the doors, and then refused to leave the owner’s property upon request. Instead, the contractors demanded the owner provide keys to the vehicle. The Court of Appeals agreed and held the contractors’ actions created liability for Horizon Bank under the Deceptive Consumers Sales Act. *Id.* at *5.

**Order compelling arbitration is not final and appealable**

a lake. The disputing properties were governed by the Kesslerwood East Lake Association, Inc., wherein the property owners agreed any dispute would be decided in binding arbitration. Enforcing this provision, the trial court granted a motion to compel arbitration and denied a motion for relief from that order. The Court of Appeals held the order compelling arbitration did not constitute a final order under Indiana Appellate Rule 2(H) because the order did not resolve the parties' claims for damages and the order was not certified pursuant to Trial Rule 54(B). Id. at 6. The appeal was dismissed for lack of jurisdiction.

**Fifth Amendment does not shield civil discovery**

In *Duncan v. Barton’s Discounts, LLC*, -- N.E.3d --, 2021 WL 5099585 (Ind. Ct. App. Nov. 3, 2021), the Court of Appeals, on interlocutory appeal, addressed whether the Fifth Amendment to the United States Constitution shields the production of potentially incriminating documents and communications in a civil discovery proceeding. The Indiana Court of Appeals cited *Fisher v. United States*, 425 U.S. 391, 408 (1976) for the proposition the Fifth Amendment applies only when the accused is compelled to make a testimonial communication that is incriminating. Id. at 4. The Court of Appeals then concluded the withheld text messages were "non-testimonial in nature and therefore are not protected under the Fifth Amendment." Id. at *5. “The actual act of producing these text messages does not give Barton’s any new information. Therefore, the Fifth Amendment does not apply and the unredacted text messages must be produced.” Id.

**Uninsured motorist limitations period enforced**

*Napier v. American Family Mutual Insurance Company*, -- N.E.3d --, 2021 WL 5291911 (Ind. Ct. App. Nov. 15, 2021), involved a complaint against an insurer to recover uninsured motorist benefits. The applicable insurance policy’s filing limitations provision stated: “We may not be sued under the Uninsured Motorist coverage on any claim that is barred by the tort statute of limitations.” Id. at *1. Napier argued the applicable statute of limitations was either the six-year limitations found in Indiana Code § 34-11-2-9 or the 10-year limitations found in Indiana Code § 34-11-2-11, both of which relate to written contracts. The trial court disagreed and held the two-year tort statute of limitations found in Indiana Code § 34-11-2-4(a) applied. The Court of Appeals affirmed. Id. at *3.

**Out-of-state garnishee required to comply after waiving jurisdiction argument**

In *Liberty First Bank v. Automotive Finance Corporation*, -- N.E.3d --, 2021 WL 5351715 (Ind. Ct. App. Nov. 17, 2021), the Indiana Court of Appeals affirmed the trial court’s order concerning a garnishee who had no connection to Indiana. The trial court required this out-of-state garnishee to place a hold on an out-of-state bank account and answer interrogatories when the garnishee did not object, and, thereby, waived any claim the trial court lacked personal jurisdiction.
Doc fee claims against automotive dealers survive a motion to dismiss

Butler Motors, Inc. v. Benosky, et al., -- N.E.3d --, 2021 WL 5500697 (Ind. Ct. App. Nov. 24, 2021), concerned an interlocutory appeal involving 14 class action causes that had been consolidated for pre-trial purposes into one cause in the Indiana Commercial Court in Marion County. The disputes concerned the legality of certain automotive dealers who charged a document preparation fee (doc fee) of less than $200. The consumer-plaintiffs contend charging the doc fees violated the Deceptive Consumers Sales Act (DCSA) and Motor Vehicle Dealer Services Act (MVDSA). Notably, the DCSA confers a private right of action, but the MVDSA is enforced by the Indiana Secretary of State. In 2019, the Indiana Court of Appeals rejected an argument from automotive dealers that consumers did not have a private right of action under the MVDSA. See Gasbi LLC v. Sanders, 120 N.E.3d 614, 620 (Ind. Ct. App. 2019). A couple months later the Indiana legislature amended the MVDSA (doc fee amendment) in a purported attempt to clarify this issue.

The automotive dealers, in this instance, moved to dismiss the complaints pursuant to Indiana Trial Rule 12(B)(6) arguing, in part, the Doc Fee Amendment barred the consumers' DSCA claims. The trial court disagreed and denied the motions. The Court of Appeals affirmed and held "[b]ecause the 2019 Doc Fee Amendment did not expressly authorize the charging of the Doc Fees of $200 or less, there is no preclusive effect under [DCSA], and the DCSA was applicable to the claims relating to Doc Fees raised by Consumers." Id. at *11.

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Bradley M. Dick is a partner at Bose McKinney & Evans LLP in the Litigation and Utilities Groups. Mr. Dick received his J.D. magna cum laude from the University of Michigan Law School. Prior to joining the firm, he served as a judicial law clerk to Chief Justice Loretta H. Rush of the Indiana Supreme Court. His email is BDick@boselaw.com.

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Let me share just one great example of strengthening families and children. We have nearly 4,000 volunteers trained as Guardians Ad Litem/Court Appointed Special Advocates serving nearly 22,000 children. With the work of these earth angels, tragedy and sadness can be turned into happiness and hope.

Together we are figuring out how to do better for our citizens, and that is indeed serving the public. I would like to leave all of you with this thought as I turn it back over to the Chief Justice of Indiana.

Public service is all about putting others first; it is giving of your time and talent in ways that may not be fully appreciated until much later. It is about doing what is right every day as best you can because you care about others. And we are glad to be doubling down on our public service efforts—with you—in 2022. Thank you!

Thank you, Justice David. You will be dearly missed, as you leave a legacy of an exceptionally stronger judicial system. So, now let’s look to the future and ways in which we will build on that legacy.

INNOVATION

Our Court tasked some of the biggest thinkers in our profession to provide a long-term blueprint for the court system of tomorrow. Here’s just a sampling:

JAIL MANAGEMENT

To improve public safety, we are working on a centralized jail management system. Your Jail Overcrowding Task Force identified systemic problems with multiple jail management systems: problems that prevent all of us from collecting and analyzing reliable data. You asked for a solution, and we’re answering. Our newly created centralized system will improve public safety by ensuring accurate criminal records, allowing judges to view real-time incarceration status, and alerting community agencies when a supervised individual is arrested. Sharing offender information between jails, courts, community corrections, probation, and all justice partners is vital to public safety and will give you information like you have never had before to guide your policymaking.

EVICITIONS

Indiana has some of the highest eviction rates in the country. To find solutions,
we are devoting key resources to help landlords and tenants, including piloting a housing court. Thank you to Judges Robert Altice, Jennifer DeGroote, Kimberly Bacon, and Magistrate Kathleen Belzeski, as well as landlord and tenant representatives, and state leaders working to find equitable solutions through the Eviction Task Force.

**FAMILY LAW**

With over 100,000 divorce and paternity cases in our courts, we know that Hoosier families are facing an incredibly tough time—both emotionally and economically. The sooner they go to court and resolve differences, the better. So, we are implementing a pathways program that will tailor the court experience to a family’s needs, creating efficiencies in time, scale, and structure. Thank you to Judge Elizabeth Tavitas and the other members of the Family Law Taskforce.

**REMOTE ACCESS**

We are leveraging smartphones and online access. We already use text messaging for hearing reminders, scheduling, and confirming deadlines. Now we are piloting a mobile court check-in program. And soon, some people may not need to come to court at all: a new online dispute resolution platform will allow court customers to resolve disputes at no cost and on their own time.

**MENTAL HEALTH SYSTEM**

For our final few moments, I want to talk about a remarkable opportunity all of us in this building have to fix a broken mental health system. But if we’re going to do it, we must work together.

Last month, I visited Tippecanoe County Circuit Court Judge Sean Persin and heard a familiar story. His court is overwhelmed with serious mental health issues. Here is just a sampling of what he told me. Involuntary mental health commitments have tripled in the last few years. And after being found too mentally ill to stand trial, people are waiting—in jail—twice as long for placement in a state hospital. This tremendous increase in both cases and delays is not limited to one county, it’s occurring statewide.

We need to first understand how we got here. Two generations ago, the federal government deinstitutionalized our nation’s mental health delivery system. As psychiatric hospitals across the country shuttered their doors, primary responsibility for the care, treatment, and supervision of those with serious mental illness fell largely to local communities—police, jails, and courts. And today, mental illness permeates nearly every type of case that comes before our judges. In fact, the criminal justice system is now a primary referral source for a person to obtain mental health treatment.

Hendricks County Sheriff and recent President of the Indiana Sheriff’s Association, Brett Clark, believes “the
We need to give thanks to our jurors, but also our clerks, probation officers, staff, attorneys, justice partners, and all our trial court judges, many of whom are here today. We have a spirit of resilience that is allowing us to fulfill our constitutional promises.

And I know you agree with me. A tenacious spirit runs deep in this state. We are proud to stand in service with you for all our fellow Hoosiers.

Thank you and may God continue to bless our great state.

Police officers are not social workers, and jails are not treatment centers. And when we ask them to be, we compromise their core function of preserving public safety, which, in turn, puts everyone at risk.

This year, you, the General Assembly, will be tasked with considering how to best implement the national mental health hotline, better known as 988. It’s the future of crisis care—a hotline for mental health emergencies where the immediate crisis response is connected to the infrastructure in place.

In anticipation of your important work, the Supreme Court is convening a statewide summit organized by the cross-branch efforts of Justice Christopher Goff, Sheriff Brett Clark, Senator Jack Sandlin, Mental Health Director Jay Chaudhary, and Drug Czar Doug Huntsinger. Thank you.

Teams from all 92 counties, with members of the local JRACs you created, will collaborate with each other and state-level partners to start developing responsible, cost-effective solutions. Please plan on joining your community’s team at the October 21, 2022, summit.

CONCLUSION

At the beginning of this address I told you that today’s message is one of perseverance. Last month, during a meeting with dozens of your trial court judges, I was inspired by what I heard. Judge after judge—from counties across the state—reported their resolve to hear difficult cases and handle their dockets fairly and efficiently. And they complimented Hoosiers for wholeheartedly showing up for and fulfilling their jury duty obligation. Jackson County Judge AmyMarie Travis, for example, recalled asking jurors after a recent trial what the court could do to improve their jury experience. They unanimously reported wanting to come back and serve on another jury.

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single greatest challenge facing Indiana Sheriffs is dealing with serious mental illness in the jails.” Senator Mike Young and Representative Wendy McNamara recently echoed that sentiment. To their point, up to 80% of our current jail populations have mental illness, substance abuse, or co-occurring disorders. Serious mental illness is four-to-six times more prevalent in jail than in the general population.

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"As a self-regulating profession that plays a significant role in government and court processes, the legal profession has a unique responsibility to ensure a high level of ethical conduct and decorum among its members."
Continued from page 33

The commission hopes to increase its accessibility to attorneys by participating in more continuing legal education seminars. Plans include creating a speaker’s site so organizations can easily request commission staff to speak at educational events.

Other activities on the horizon aimed at furthering education and prevention efforts include: 1) creating a pamphlet to distribute to new lawyers on avoiding common ethical pitfalls, 2) developing a trust account checklist, and 3) establishing a quarterly ethics newsletter.

INSPIRING RESPONSIBILITY

As a self-regulating profession that plays a significant role in government and court processes, the legal profession has a unique responsibility to ensure a high level of ethical conduct and decorum among its members. This is a mission the commission cannot accomplish alone. All lawyers have a responsibility to aid in the observance of ethics rules and “to assure that [the profession's] regulations are conceived in the public interest...”

Inspiring responsibility necessitates us to do better in addressing issues of affected lawyers. New ideas are needed to more quickly reach affected lawyers suffering from substance use disorder, mental health issues, or aging-related issues before clients suffer losses and the lawyer’s problems become serious discipline issues.

The commission also needs input regarding national initiatives and proposed rule changes. For example, should Indiana adopt the ABA's amendment to Model Code of Professional Conduct Rule 8.4(g)?

I invite attorneys to a virtual Ethics Town Hall on Friday, March 4, 2022, to share ideas on how the commission can better serve its customers' ethical needs with their bar associations. For more information, contact your local bar association. With collaboration and a little change in perspective, together we can continue to raise the ethics level of the profession and better serve the public's needs.

FOOTNOTES

2. Over 90% of lawyers are spending more time on video or conference calls, see Roberta D. Liebenberg and Stephanie A. Scharf, American Bar Association, Practicing Law in the Pandemic and Moving Forward: Results and Best Practices from a Nationwide Survey of the Legal Profession, April 26, 2021 (https://www.americanbar.org/content/dam/aba/administrative/digital-engagement/practice-forward/practice-forward-survey.pdf).
5. Indiana's first Code of Professional Responsibility became effective in 1971 and was based on the ABA Model Rules of Professional Responsibility. Lundburg and Kidd, at 1255. The Indiana Supreme Court made additional revisions to the Code in 1987 and 2005, drawing on the ABA Model Rules and an ABA-created template. Id. The Indiana Supreme Court also has made multiple revisions to Admission and Discipline Rule 23 (e.g. increasing transparency to the attorney disciplinary process and attention to client trust accounts) Charles M. Kidd and Dennis K. McKinney, Survey of 1996 Developments in the Law of Professional Responsibility, 30 Ind. L. Rev. 1251, 1251, 1258 (1997).
8. Id. The Indiana Supreme Court also has made multiple revisions to Admission and Discipline Rule 23 (e.g. increasing transparency to the attorney disciplinary process and attention to client trust accounts) Charles M. Kidd and Dennis K. McKinney, Survey of 1996 Developments in the Law of Professional Responsibility, 30 Ind. L. Rev. 1251, 1251, 1258 (1997).
10. Model Rule 8.4(g) provides: It is professional misconduct for a lawyer to... (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.
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LEGAL SERVICES CORPORATION

THE LEGAL SERVICES CORPORATION (LSC) announces the availability of grant funds to provide civil legal services to eligible clients during calendar year 2022. In accordance with LSC’s multiyear funding policy, grants are available for only specified service areas. The list of service areas for which grants are available, and the service area descriptions are available at hwww.lsc.gov/grants-grantee-resources/our-grant-programs/basic-field-grant/lsc-service-areas. The Request for Proposals (RFP), which includes instructions for preparing the grant proposal, will be published at www.lsc.gov/grants-grantee-resources/our-grant-programs/basic-field-grant on or around April 15, 2021. Applicants must file a Pre-application and the grant application through GrantEase: LSC’s grants management system. Please visit www.lsc.gov/grants-grantee-resources/our-grant-programs/basic-field-grant for filing dates, applicant eligibility, submission requirements, and updates regarding the LSC grants process. Please email inquiries pertaining to the LSC grants process to LSCGrants@lsc.gov.

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