FEATURING:
CLASS ACTIONS MATTER IN INDIANA, ACROSS THE COUNTRY, AND AROUND THE WORLD

PLUS:
Lawyers and Depression: 3 Possible Reasons Why a Lawyer May Be Unhappy
Ethics of Dealing with Inquiries and Prospective Clients
Get started at lawpay.com/inbar 866-583-0342

Data based on an average of firm accounts receivables increases using online billing solutions.

LawPay is a registered agent of Wells Fargo Bank N.A., Concord, CA and Synovus Bank, Columbus, GA.
CLASS ACTIONS MATTER IN INDIANA

Class Actions Matter in Indiana, Across the Country, and Around the World
By Irwin B. Levin and Richard E. Shevitz
WAGE DISCRIMINATION

Nothing to See Here! Debunking the Myth of Equal Pay and How to Protect Your Business
By Kathryn M. Cimera

LAWYERS AND DEPRESSION

Lawyers and Depression: 3 Possible Reasons Why a Lawyer May Be Unhappy
By Dr. Matthew Welsh, J.D., Ph.D.
Cases referred to Klezmer Maudlin will be personally handled by either Randal Klezmer or Nathan Maudlin. We will be thoughtful, responsive and dependable in our service.
Perseverance. That was the theme of Indiana Chief Justice Loretta Rush's State of the Judiciary speech at the Indiana General Assembly this past January. Both bench and bar have had to persevere in their delivery of justice and provision of legal services in the face of significant new and unforeseen challenges wrought by the stubbornly persistent COVID-19 pandemic. Navigating such headwinds has called upon determination and at times creativity and no small measure of grit. Which prompts me to focus this month's column on one of my favorite movies for lawyers.

Charles Portis' 1968 novel "True Grit" has twice been the basis for a feature film of the same name. The first in 1969 starred John Wayne as the iconic Rooster Cogburn, a seasoned, hard-drinking, one-eyed federal marshal. My personal favorite, however, is the 2010 remake starring Jeff Bridges as Cogburn and a young Hailee Steinfeld as central character Mattie Ross, the 14-year-old girl who hires Cogburn to help track down the man, Chaney, who murdered her father. Directed by siblings Ethan and Joel Coen, who also wrote the screenplay adapted from the novel, their film received ten Academy Award nominations, including Best Picture, Actor, Supporting Actress, Director, and Cinematography. It's a great movie, and the late nineteenth century dialogue is quite rich.

If you're not inclined to watch the whole film, which has some violent scenes, I encourage you to track down online the 4-minute clip of Mattie Ross horse trading with the local stable owner, if for no other reason than to see his reaction when young Miss Ross threatens to send her lawyer after him with a writ of replevin. There's also a delightful scene involving a Texas Ranger, played by Matt Damon, explaining why he is also pursuing Chaney for a different murder. Chaney shot a state senator's dog. "When the senator remonstrated, [Chaney] shot him as well. You could argue that the shooting of the dog was merely an instance of malum prohibitum, but the shooting of a senator is indubitably an instance of malum in se." Teenager Ross then translates the Latin legal terms for the befuddled Cogburn.
Kidnapped later in the film, as Ross tries to convince her captor to let her go (and after lamenting having been “abandoned to a congress of louts”) she asks him if he needs a good lawyer. “I need a good judge” is his cynical response in those waning days of the wild west, replete with dead-or-alive bounties. Although the scene suggests his definition of a “good judge” was one who could be swayed, whether by carrot or stick, we need not cede the term to the bandit’s context. Our need today and always is for good, impartial judges—women and men who know the law and are willing to do the hard work to sort through competing arguments and explain their reasoning. Ruling without fear or favor, even during a pandemic, requires its own form of grit. Lawyers can help keep modern-day frontier justice at bay not only through our own adherence to both the rule of law and the rules of professional conduct, but also by participating in the poll of attorneys when judges appear on the ballot and by advocating for selection of judges based on merit. I can also think of many fine lawyers who would make excellent judges and hope many apply for the upcoming vacancy on our state Supreme Court.

Another scene from “True Grit” parallels the process lawyers sometimes imagine prospective clients follow when selecting an attorney to represent them. Mattie Ross consults the local sheriff when seeking to retain the services of a federal marshal to pursue Chaney into the Indian territory where he’s fled. “Who’s the best marshal?” she asks. The sheriff identifies three and briefly assesses each’s abilities. One is “the best tracker,” but another he deems overall the best. And then there’s Rooster Cogburn, who according to the sheriff is the meanest, pitiless and tough but with a drinking problem.

Although Miss Ross, savvy well beyond her 14 years, had asked the sheriff for his recommendation, for the services she had in mind she wasn’t interested in whom he identified as best. Instead, she replied, “Where can I find this Rooster?” Upon first meeting Cogburn, Mattie declares, “They tell me you are a man with true grit.”
But after spending some time in his presence, she professes some misgivings: “Now, I aim to get Tom Chaney and if you are not game I will find somebody who is game. All I have heard out of you so far is talk. They told me you had grit and that is why I came to you. I am not paying for talk.”

The movie also gives us a glimpse into this fictional lawyer-client relationship that may be all-too-familiar to some readers. At one point Mattie reads a letter from her slightly exasperated lawyer: “Mattie, I wish you would leave these matters entirely to me, or at the very least do me the courtesy of consulting me before entering such agreements. I am not scolding you, but I am saying your headstrong ways will lead you into a tight corner one day. I trust the enclosed document will let you conclude your business and return [home.]” Part of our role as lawyers is to try to manage the expectations of sometimes headstrong clients as we work to extract them advantageously from tight corners whether of their own or others’ making. Mattie’s offscreen lawyer presumably drafted the bill of sale and release to formalize Mattie’s transaction with the stable owner, perhaps relieved not to have to also come up with a writ of replevin, notwithstanding the foregone fees.

Despite Cogburn’s abundant flaws, by the end of the movie he has demonstrated the true grit he indeed possesses. No idealist when confronting evil, he was resourceful and possessed a sense of duty and responsibility to and for others. We see him show courage in the face of danger and perseverance in the face of hardship; he could be relied upon when it counted most. Commendable qualities in a federal marshal, as well as in an attorney.

I’ll conclude my commentary on “True Grit” with this exchange, with apologies to my friends at JLAP. After Mattie explains her reluctance to give Cogburn cash up front (“You want to be kept in whiskey.”), the irascible Cogburn replies, “I don’t need to buy that, I confiscate it. I am an officer of the court.” No saint, he. But just as great men and women can be flawed, so can flawed men and women still also at times show greatness. May our own flaws not prevent us from being great lawyers and, when called upon, demonstrating true grit for our clients and communities.

"May our own flaws not prevent us from being great lawyers and, when called upon, demonstrating true grit for our clients and communities."
It took a lot of packing and boxing and going through old documents, but, as of February 28, 2022, ISBA has officially vacated its office in Regions Tower. We will be moving into our new headquarters in the Capital Center building at 201 North Illinois Street in downtown Indianapolis in the next few months, once renovation of our custom-configured suite is completed.

WHY THE MOVE

ISBA has been headquartered in Regions Tower for 16 years. The end of our lease in February 2022 gave us an opportunity to reexamine what we wanted from
an office space and how we could better and more efficiently serve our members. Thus, a taskforce of volunteer members was convened to first identify what members needed and wanted from a headquarters office, then to study and vet potential locations.

The taskforce identified the need for a convenient central location that offered opportunities for members to convene and connect with each other, with the courts, and with resources beneficial to their work. With these goals in mind, several locations were scouted and toured, before the taskforce selected the Capital Center.

ABOUT THE NEW HEADQUARTERS

The Capital Center offers modern amenities, flexible space, and competitive pricing, all in a convenient downtown location that makes access to peers and resources easy. The building is within walking distance of the Indiana Statehouse and the Birch Bayh Federal Building, and it is also home to Indiana Supreme Court offices. With plenty of public meeting spaces, and a proximity to downtown restaurants, cafes, and offices, members will be able to stop in, chat with friends, and foster camaraderie.

ISBA’s custom-configured suite on the 12th floor will also offer opportunities for members to gather. A flexible and open office space will allow ISBA to host everything from mid-sized networking events to CLE to section and committee meetings. Two conference rooms are also available for smaller meetings.

Members will be able to reserve individual offices within the new headquarters free of charge for their personal or ISBA-related business: to have a quiet place to work during the day, to host client meetings, or to simply hang out between downtown business meetings. More information about how to reserve space in the new headquarters is forthcoming.

You can learn more about the Capital Center and the various amenities it offers by visiting zeller.us/capitalcenter/.

BRIEF OFFICE CLOSURE

Renovations to the new office suite are still underway. Until renovations are complete, ISBA staff will be working remotely but will remain fully available to members throughout the transition period. Contact us as you normally would; we’re always willing to help.

We are excited to share this new space with you! We will keep you updated as renovation progresses and let you know when we officially move in.
CLASS ACTIONS MATTER IN INDIANA, ACROSS THE COUNTRY, AND AROUND THE WORLD
In the past 40 years, there have been a plethora of class action cases tried or resolved in both state and federal courts. This article reflects on actions impacted by Trial Rule 23, including historically significant international litigation on behalf of Holocaust survivors, statewide litigation recovering health care benefits on behalf of Hoosier families, and recovering payments that were owed to Indiana families that adopted children from the state foster care system. The article also notes the little-recognized application of the cy pres doctrine as a beneficial device in class action settlements.

HOLOCAUST LITIGATION

In the 1990s, several class action lawsuits were brought against Swiss banks and German companies on behalf of Holocaust survivors, heirs of Holocaust victims, and slave laborers throughout the world to recover the ill-gotten profits that enriched these private sector entities.

Swiss banks enhanced their wealth on the backs of Holocaust victims in several ways during the Nazi era. When Nazi Germany first imposed harsh, discriminatory restrictions on Jewish citizens and others in the 1930s, some German Jews began to transfer assets out of that country hoping to rebuild their lives elsewhere. To prevent that flight of capital, Germany made it a capital crime to transfer assets internationally. Seeing an opportunity, banks in neighboring Switzerland then created their now well-known system of secret numbered bank accounts to attract investments from German depositors who needed to make deposits anonymously.

At the end of World War II, when most of those depositors had been murdered in concentration camps, the Swiss banks and Swiss bureaucracy barred surviving family members from obtaining their accounts. One client testified in the class action litigation that she tried to claim her father’s account at a Swiss bank immediately after the war, but the bank manager angrily turned her away and said he could not honor her request to look for her father’s account unless she produced a death certificate, all while holding a file bearing her late father’s name. She left the bank in tears, saying, “Hitler didn’t issue death certificates in Auschwitz.”
Despite pressure from the United States government, Swiss banks steadfastly refused to disclose the existence of those funds, much less disgorge them to the rightful heirs and claimants. Years later, that recalcitrance by the banks allowed the heirs to argue for the tolling of the statute of limitations as to their claims in federal court in this country.

Swiss banks also directly supported the German war machine during World War II by purchasing gold from the Nazis at a time when other countries would not do business with Germany. Swiss banks not only received stolen property and gold which the Nazis looted from occupied countries; they even purchased dental gold which the Nazis ripped from the corpses of murdered concentration camp inmates and smelted for trade.

Many German manufacturers used concentration camp inmates as unpaid forced laborers in their factories to produce civilian products and to produce uniforms and weapons for the army. Holocaust survivors, including some living in Indiana, can be seen in wartime photographs as teenagers performing forced labor in facilities owned by German automobile manufacturers and other German companies whose products are household names today.

German pharmaceutical companies also used concentration camp inmates as guinea pigs in medical experiments. Terre Haute resident, Eva Kor, who recently passed after decades of work on issues of forgiveness and tolerance, was subjected to medical experiments carried out with the complicity of the Bayer Corporation. We brought a class action against that company for her and on behalf of other Holocaust survivors who were victims of medical experimentation in concentration camps. Our investigation revealed a series of letters between an Auschwitz concentration camp official and Bayer that were introduced into evidence at the Nuremburg trials, which recorded the gruesome sale of human beings in cold, transactional terms:

With a view to the planned experiments with a new sleep-inducing drug we would appreciate it if you could place a number of prisoners at our disposal...

We... consider the price of 200 RM per woman to be too high. We propose to pay no more than 170 RM per woman. If this is acceptable... Please prepare for us 150 women in the best health possible.

After conducting the experiments, the company followed up with another brutally factual confirmation of the business relationship:

Received the order for 150 women. Despite their macerated condition they were considered satisfactory...

The experiments were performed. All test persons died. We will contact you shortly about the subject of a new shipment.

Heil Hitler
Bayer Scientific Section

A recent German appellate court decision that tolled the statute of limitations of World War II era claims based on the political reunification of Germany provided the basis for bringing class action lawsuits against these German companies in this country some 50 years after the war ended.

The claims against Swiss banks and German companies brought on behalf of Holocaust survivors, heirs of Holocaust
victims, and slave laborers were resolved for total recoveries of $6.25 billion dollars. Of course, no amount of monetary compensation can remedy the horrors that were inflicted upon those who suffered or died in the Holocaust, but the international litigation provided a historical reckoning and important symbolic relief that could not have been accomplished without the vehicle of class action lawsuits. While not making the victims whole, the settlements required the disgorgement of a portion of the profits those private sector entities gained from their Holocaust involvement, achieving a measure of “rough justice.”

MEWAs are subject to oversight by the Indiana Department of Insurance but are not required to submit their rates or other information regarding their financial condition to the state. However, the Indiana Department of Insurance has authority to liquidate insolvent MEWAs. In the case of ICIT, corrupt internal managers, unscrupulous insurance agents, and negligent lawyers exploited that reduced oversight for their own benefit.

To increase sales, ICIT encouraged insurance agents to market ICIT health care benefits to employers outside the construction industry at rates far below those charged by conventional insurance companies for health insurance. As part of those aggressive sales efforts, agents sometimes displayed a meaningless form created by ICIT’s outside general counsel that gave the appearance of an official state registration certificate.

The increased sales of ICIT policies provided increased commissions to the sales agents and a short-term cash infusion to ICIT. The sales of policies with increased benefits at reduced rates meant ICIT faced an ever-growing number of health care claims it had insufficient resources to pay, so it simply became a matter of time before the music inevitably stopped.

“...the international litigation provided a historical reckoning and important symbolic relief that could not have been accomplished without the vehicle of class action lawsuits.”

INDIANA CONSTRUCTION INDUSTRY TRUST LITIGATION

At the local level, class action litigation often provides economic recoveries that essentially make class members whole. For example, when an Indiana health benefits provider known as the Indiana Construction Industry Trust (ICIT) collapsed, approximately 8,200 Hoosiers were saddled with $17.99 million in unpaid medical bills. Some of those families faced crushing medical debts that added an impossible financial burden to the emotional burdens of serious health care challenges.

ICIT was a Multiple Employee Welfare Arrangement (MEWA). Like conventional insurance companies,
When posed with the question of whether women and men in their workforce are paid equally many business leaders respond with a resounding yes. Yet according to the Bureau of Labor Statistics data in 2020, annual earnings for women were 82.3% of the annual earnings for men, and the disparity is even greater for women of color. Why then are individual business leaders largely of the opinion that pay disparity is not an issue?

The disconnect in part may be due to a misunderstanding that wage discrimination is often promoted through practices which on their face do not appear discriminatory but have negative impacts that result in women being paid less than men. This lack of awareness and failure to proactively make corrections in these processes can create legal liability as well as a negative workplace culture.

THE EQUAL PAY ACT

The Equal Pay Act (EPA) was enacted in 1963 and prohibits wage discrimination based on sex. The EPA is part of the Fair Labor Standards Act (FLSA) and applies to all employers covered under the FLSA, which includes most private employers. The EPA prohibits employers from paying employees different wages for performing “equal work on jobs the performance of which requires...
equal skill, effort and responsibility and which are performed under similar working conditions.\textsuperscript{5} Under the EPA, an employee must establish the employer paid the employee’s opposite-sex comparator more for performing equal work, but they do not need to establish it was the employer’s intent to do so.\textsuperscript{6}

An employer in turn can successfully defeat a plaintiff’s claim by establishing a number of affirmative defenses, including one which states the discrepancy in pay is “based on any factor other than sex” which is commonly referred to as the “catch-all” defense.\textsuperscript{7} Over the years, courts have allowed a seemingly unlimited number of factors to allow for a pay discrepancy so long as the factors are not related to sex. This broad application has constrained the intent of the EPA and resulted in diminished protections afforded by the act.

\textbf{A PUSH FOR GREATER PROTECTION}

For several years now, there has been a push, both from public opinion and regulators, regarding the continued perpetuation of the wage gap based on sex.\textsuperscript{8} As a result, there has been an increase in legislation introduced at both the federal and state level to remove barriers to establishing wage discrimination claims on the basis of sex as well as to promote additional pay transparency.\textsuperscript{9} Employers not monitoring and proactively attempting to address these issues will be caught playing catch-up in the event of a regulatory change or find themselves immersed in legal disputes for which they are unprepared.

Both state and federal lawmakers have challenged the reading of the catch-all defense in the EPA. Several states have successfully enacted their own equal pay laws which limit the catch-all defense of the EPA by narrowing the phrase “any factor,” while other states have passed laws which eliminate the catch-all defense entirely.\textsuperscript{10} For employers with employees in multiple states this creates a regulation minefield if company-wide pay and hiring practices are not uniform.

In addition, many states have passed laws aimed at increasing the transparency of employer pay practices. Several states now prohibit employers from asking applicants their current salary and/or basing their offers off an applicant’s current salary.\textsuperscript{11} Other states require either posting salary ranges for positions or disclosing such ranges upon request.\textsuperscript{12} No such laws have been passed in Indiana. However, plaintiffs alleging claims under the EPA whose salaries were based on pay from their prior employment may have greater success as employers struggle to justify the rationale for the initial pay amount in a climate where this practice is facing growing skepticism by both courts and public opinion.\textsuperscript{13}

\textbf{STEPS EMPLOYERS SHOULD TAKE}

What can employers do to promote fair pay practices and be better positioned to defend claims under the EPA (or state laws) while faced with a changing regulatory framework and increased scrutiny? Employers may want to consider conducting a pay equity analysis to identify any potential issues and implementing policies and practices to address them. Additionally, employers should ensure that their pay practices are transparent and consistent across all employees, regardless of gender.

"Any practice of asking applicants their current pay rate should stop, even if employers are not legally prohibited from doing so."

**Intellectual Property is Complex.**

Team with our attorneys to protect your client’s creative and intellectual assets. Focused exclusively on patent, trademark, copyright and trade secret matters, our attorneys support your practice and provide a cost-effective, team approach for your client.

WOODARD, EMHARDT, HENRY, REEVES & WAGNER, LLP

Make your ideas untouchable.®

uspatent.com

111 MONUMENT CIRCLE, SUITE 3700
INDIANAPOLIS, IN 46204
317.634.3456
audit. A pay equity audit can determine if discrepancies exist and if legitimate reasons for those discrepancies can be established. In addition, if inconsistencies are uncovered through a pay equity audit, employers can analyze what processes and procedures need to be changed and/or strengthened to ensure such inconsistency does not occur in the future. In many cases, a pay equity audit should be conducted under the protection of attorney-client privilege to alleviate some of the risk associated with a self-critical analysis.

For employers who do not want to engage in a full-blown pay equity audit, there are still important steps that can be taken to promote pay equity. Creating a culture of transparency surrounding compensation is key. Employers cannot continue to cloak pay decisions in secrecy without risking employee retention and recruiting. The more employees’ wages are based on objective metrics that are visible to all, the less likely employees will experience a wage gap.

Any practice of asking applicants their current pay rate should stop, even if employers are not legally prohibited from doing so. Employers who base an employee’s starting wage on their prior pay rate may have difficulty using this factor in defending against a future wage discrimination claim. Instead, pay range should be based on position. If an employer is concerned the applicant is not within the position’s pay range, employers should ask applicants to define their salary expectations.

As is true with all employment decisions, documentation is essential. All pay decision-makers must document their decision, including objective criteria, regarding the basis for an employee’s starting wage and increases (or reasons for not giving an increase). Failure to contemporaneously record this information weakens an employer’s ability to defend a wage discrimination claim.

Business leaders cannot continue to rely on an unsubstantiated belief there is not a wage gap between women and men in their workforce. Instead, employers need to actively ensure compensation is transparent and based on objective measures.

"Business leaders cannot continue to rely on an unsubstantiated belief there is not a wage gap between women and men in their workforce. Instead, employers need to actively ensure compensation is transparent and based on objective measures."
are seeking organizations which value pay equality. Kathryn Cimera is an employment law attorney at Mallor Grodner LLP representing clients in litigation and litigation avoidance within the employment law sector. She provides counseling on employment issues and has extensive experience representing employers in court and with agency investigations. She earned her JD from Pepperdine University School of Law, in California, and currently is also an Adjunct Faculty member teaching Employment Law for HR majors at IU’s O’Neill School of Public and Environmental Affairs.

FOOTNOTES

1. Special thanks to Lainey Sezer and Shalena Baynes for providing editing, citation checking, and general overall support.
4. FLSA coverage is determined if an employment relationship exits and the employer or the employee satisfies the requirements for enterprise coverage or individual coverage. 29 U.S.C. §§ 203(d), (e) (2018); and 29 U.S.C. § 206(a) (2016).
5. 29 C.F.R. § 1620.13 (2022).
6. See Stopka v. All. of Am. Insurers, 141 F.3d 681, 685 (7th Cir. 1998).
8. 29 U.S.C. § 206(d) (2016). See, e.g., Lauderdale v. Illinois Dept. of Human Servs., 876 F.3d 904, 908 (7th Cir. 2017); Warren v. Solo Cup Co., 516 F.3d 627, 630 (7th Cir. 2008). Wensning v. Dept of Human Servs., 427 F.3d 466,468 (7th Cir. 2005) (stating that the justification may be “any reason, good or bad” as long as the reason is not related to gender).
10. California, Connecticut, Illinois, Louisiana, Maryland, New Jersey, New York, and Vermont require the employer to demonstrate the identified factor is “job related with respect to the position in question and is consistent with a business necessity.” New Mexico, Massachusetts, Oregon, and Colorado eliminated the “catch-all” defense and provide a “menu” of available defenses.
12. California – Cal. Lab. Code § 432.3(c) (2021) (employers must disclose pay ranges to certain applicants upon request); Colorado – Colo. Rev. Stat. § 8-5-201 (2021) (employers must disclose salary or salary range in job postings); Connecticut – Conn. Gen. Stat. Ann. § 31-40z (2021) (employers must provide prospective employees with wage information upon an employee’s request or at specific times including before an offer is made); Maryland – Md. Code Ann., Lab & Empl. § 3-304.2 (upon request employers must provide a wage range to applicants for the applied position); Washington – RCW 49.58.110 (2021) (employers must provide salary range for positions upon an applicant or employee’s request and the request is made after an initial offer of employment).
13. While Indiana lawmakers have not passed legislation narrowing the catch-all defense, in 2021 a Seventh Circuit decision expanded the evidence available to a plaintiff to establish a claim under the EPA. Kellogg v. Ball State Univ., 984 F.3d 525 (7th Cir. 2021) (allowing evidence outside the statute of limitations to call into question the non-discriminatory factors preferred for the pay difference). The Seventh Circuit also requires employers to establish the defense and not simply proffer a basis other than sex. See King v. Acosta Sales & Mktg., Inc., 678 F.3d 470, 474–75 (7th Cir. 2012) (noting employer must prove and not simply assert a factor other than sex).
CRIMINAL JUSTICE NOTES

By Joel M. Schumm

DECEMBER OPINIONS
ADDRESS WARRANTS, JURORS, CREDIT TIME

During December the Indiana Supreme Court issued an opinion in a life without parole (LWOP) case while the Court of Appeals addressed issues including warrants, jury selection, pretrial motions, and credit time.

WRONG ADDRESS ON WARRANT

The search warrant in Lundquist v. State, No. 21A-CR-851, 2021 WL 6140583, at *1 (Ind. Ct. App. Dec. 30, 2021), listed the wrong address but “correctly described the physical characteristics” of the home. The Court of Appeals found no Fourth Amendment violation under Indiana cases upholding searches “so long as warrants adequately and accurately described the physical characteristics of the properties to be searched, even where the physical descriptions contained some errors or an address was incorrect.” Id. at *5.
But Article 1, Section 11 of the Indiana Constitution “in some cases confers greater protections to individual rights than the Fourth Amendment affords.” *Id.* Relying on Prohibition-era Indiana precedent, the court concluded “the Indiana Constitution requires a warrant to describe locations to be searched with such particularity as to eliminate any discretion on the part of the officers serving the warrant.” *Id.* at *6. This standard was met considering the warrant description—a one-story residence, gray in color, with a front door facing northeast and an attached garage southeast of the residence. This property is located south of County Road 50 South in Wabash County, IN on the west side of the horseshoe driveway—a different-looking and located residence than the home at the listed address. *Id.*

The court included photographs of the two residences to underscore the point. *Id.* at *7.

Nevertheless, the issue might resurface in a future, closer case. In a footnote, the court observed “coinciding results should not be confused for the idea that the two separate analyses are duplicative. We expressly leave for another day the question of whether separate analyses of the particularity requirements found in both the federal and state constitutions will always yield identical results.” *Id.* at *7 n.11.

**ALLEGED CONDITIONING OF JURORS**

**Glover v. State**, No. 21A-CR-1422, 2021 WL 5872830, at *6 (Ind. Ct. App. Dec. 13, 2021), reiterates the broad discretion of trial courts in regulating jury selection. In a domestic violence case, the Court of Appeals rejected the defense argument that “the State’s mini opening and questions during jury selection sought only to shape a favorable jury by deliberate exposure to the substantive issues in the case.” *Id.* at *6. The court reasoned (1) “Indiana Jury Rule 14(b) expressly permitted the State to give a mini opening that was a ‘brief statement] of the facts and issues... to be determined by the jury,’ which is how the State used its opening” and (2) “the State’s questions inquired with the prospective jurors about their own experiences with and exposure to domestic violence,” which “bore similarities to the actual case and explored the jurors’ understanding of domestic violence, which was relevant to uncovering the jurors’ attitudes toward the charges and any preconceived ideas they may have had about the charges and any defenses.” *Id.*

The court distinguished cases of improper questioning because “nothing in the State’s questioning of the prospective jurors suggested the existence of prejudicial evidence that was not introduced at trial.” *Id.*

**CALLING A WITNESS WHO TAKES THE FIFTH**

**Martin v. State**, No. 20A-CR-2326, 2021 WL 6140601, at *6 (Ind. Ct. App. Dec. 30, 2021), summarizes Indiana precedent holding that “a defendant may not force a witness to take the stand solely to garner a favorable inference from the invocation of [the privilege against self-incrimination], but the defendant is not precluded from using—in defense argument or proffered instructions—the fact that an invocation occurred outside the presence of the jury.” Martin, however, argued he should be able to call a witness solely to invoke the privilege when “there is sufficient evidence of guilt on the part of one other than the accused.” *Id.*

Although the Court of Appeals found the argument waived for lack of a timely objection, it emphasized...
the importance of discretion to trial courts in concluding “[t]here may be particular circumstances, developed in a pretrial hearing, that would warrant allowing a defendant to call a witness notwithstanding concerns of invocation of the Fifth Amendment privilege.” *Id.* at *7.

**PRETRIAL DISMISAL BASED ON INSUFFICIENT EVIDENCE REVERSED**

In *State v. Smith*, No. 21A-CR-1475, 2021 WL 5822737 (Ind. Ct. App. Dec. 7, 2021), the Court of Appeals reiterated “[a] pretrial motion to dismiss directed to the insufficiency of the evidence is improper, and a trial court errs when it grants such a motion.” *Id.* at *2 (quoting *State v. Helton*, 837 N.E.2d 1040, 1041 (Ind. Ct. App. 2005)). The line is sometimes blurry, however, when trial courts have “a certain level of discretion to determine factual issues when considering motions to dismiss” but that “discretion does not extend to usurping the function of the jury.” *Id.* at *3. The court summarized some “evidence of criminality” (despite a recantation) and quoted *Helton* for the proposition “an alleged ‘total absence of evidence’ following victim recantation... is not a basis for dismissal of an Information.” *Id.*

**CREDIT TIME**

In *Niccum v. State*, No. 21A-CR-1533, 2021 WL 5996283, at *1-2 (Ind. Ct. App. Dec. 20, 2021), the parties agreed the defendant was entitled to three days of credit time after he was arrested for a probation violation on February 27 and then spent all of February 28 and some portion of March 1 in jail before his release. But the case presented an issue of first impression regarding good time credit. Indiana Code section 35-50-6-4(b) assigns most defendants charged with felonies to credit Class B. And section 35-50-6-3.1(c) states “[a] person assigned to Class B earns one (1) day of good time credit for every three (3) days the person is imprisoned for a crime or confined awaiting trial or sentencing.”

The Court of Appeals rejected the state’s interpretation that the term “day” excludes the “triggering event,” that is, the day of arrest. Instead, looking to the above-cited statutes and others, the court concluded the “unambiguous language of the statutory scheme for determining credit time makes clear that our legislature intended the calculation of good time credit to be a function of the defendant’s accrued time. The State’s argument to the contrary contravenes the plain language of the statutes and would disharmonize the statutory scheme.” *Id.* at *5.

**INDIANA SUPREME COURT ANNUAL REPORT**

The Indiana Supreme Court issued its annual report in December 2021 for the fiscal year July 2020 to June 2021. The report notes 22 opinions in criminal cases (five of which were short, per curiam opinions and three of which were direct appeals in death penalty or LWOP cases). The denial of 353 criminal petitions to transfer meant 1 in 20 odds of discretionary review in a criminal case.¹ Most appellate criminal law is made by the Court of Appeals, which issues more than 1,000 opinions most years, many of which are published and precedential.
LIFE WITHOUT PAROLE CASE

Although the LWOP sanction is noteworthy, the issues raised on appeal often are not. LWOP cases go directly to the Indiana Supreme Court under Appellate Rule 4(A)(1).

In Hall v. State, 177 N.E.3d 1183 (Ind. 2021), the defendant “challenge[d] the sufficiency of the evidence for her convictions; the sufficiency of the evidence for her murder-for-hire aggravating circumstance; the admission and exclusion of certain testimony at trial; and ask[ed] this Court to revise her concurrent conspiracy sentence.” The court rejected each challenge, perhaps the most novel of which was whether the defense could introduce deposition’s video footage for the first-time during closing argument. The trial court sustained the state’s objection, explaining “the time for viewing the deposition would have been in lieu of reading it during the guilt phase, not during closing argument.” Emphasizing the discretion given to trial courts during closing argument, the Indiana Supreme Court reasoned: “Because the State would not have the opportunity to rebut this new mode for the jury to experience [the] deposition, the trial court’s decision declining the use of the video during closing arguments was not ‘clearly against the logic and effect of the facts and circumstances.’”

Before 2000, the Indiana Supreme Court was required to consider all criminal appeals with a sentence over 50 years on a single count, but a constitutional amendment that year changed its jurisdiction to “such terms and conditions as specified by rules except that appeals from a judgment imposing a sentence of death shall be taken directly to the Supreme Court.” Ind. Const. Art. 7, § 4. Thus, a simple rule amendment could allow LWOP cases to instead be heard by the Court of Appeals, allowing additional time and docket space for other cases of broader impact to be heard by the Indiana Supreme Court.

FOOTNOTES

According to the Indiana Judges and Lawyers Assistance Program (JLAP) 46% of lawyers experience depression at some point in their career (JLAP, 2021). This is nearly seven times higher than the rate of depression for the general population, which is 7% (DSM-5, 2013). Additionally, according to a Johns Hopkins study comparing rates of depression in 28 separate occupations, lawyers had the highest percentage of depression compared with other professions (Harrell, 2001). Further, 52% of lawyers described themselves as ‘dissatisfied’ (Seligman, 2003). These studies reveal lawyers suffer from depression at a far greater rate than non-lawyers.

According to the DSM-5, a Major Depressive Disorder occurs when five or more of the symptoms listed below have happened in the same 2-week period and demonstrate a change from previous functioning. Further, at least one of the symptoms is either a depressed mood or loss of interest or pleasure: (1) depressed mood most of the day, nearly every day, as indicated by either a subjective report such as feeling sad or empty or an observation made by others; (2) markedly diminished interest or pleasure in activities, most of the day, nearly every day; (3) significant weight loss when not dieting or weight gain; (4) insomnia or hypersomnia nearly every day; (5) psychomotor agitation or retardation; (6) fatigue or loss of energy;

LAWYERS AND DEPRESSION:
3 POSSIBLE REASONS WHY A LAWYER MAY BE UNHAPPY

By Dr. Matthew Welsh, J.D., Ph.D.
(7) feelings of worthlessness or excessive or inappropriate guilt nearly every day; (8) diminished ability to think or concentrate, or indecisiveness, nearly every day; (9) recurrent thoughts of death, suicidal ideation with or without a specific plan for committing suicide, or a suicide attempt.

REASONS WHY LAWYERS ARE PRONE TO UNHAPPINESS

Psychologist Dr. Martin Seligman’s research suggests lawyers are more likely to experience depression due to the interaction of a lawyer’s unique work environment with common personality traits. In a chapter titled “Why are Lawyers so Unhappy” from Authentic Happiness (2003), Dr. Seligman identified three reasons why lawyers are prone to unhappiness: (1) An effective lawyer is trained to be pessimistic; (2) lawyers develop a ‘take no-prisoners mindset’ in a culture where success is defined by wins and failure by losses; and (3) lawyers have “low decision latitude in high-stress situations.” These attributes of a lawyer also often lead to perfectionism, taking on excessive responsibility, and rewarding an inability to express emotion, which incidentally are all personality factors related to suicide (Whiston, 2009).

Pessimism is a benefit to a lawyer because an effective lawyer must examine everything that might go wrong for a client to protect a client from encountering potential future harms (Seligman, 2003). For instance, lawyers are trained to be pessimistic so they can protect against problems that non-lawyers may not be aware of such as a potential reason to avoid a contractual obligation, possible litigation that might arise due to a client not taking proper precautions, and/or future lawsuits due to a client’s failure to foresee a vulnerable liability that might be exploited by a litigious plaintiff. While pessimism is a valuable quality for a lawyer because it decreases risk for clients and protects clients against future unanticipated harm, pessimism is highly correlated with depression. For instance, a pessimistic lawyer

"These attributes of a lawyer also often lead to perfectionism, taking on excessive responsibility, and rewarding an inability to express emotion, which incidentally are all personality factors related to suicide."

The Indiana Bar Foundation’s Keystone Society offers a compelling, comprehensive, and convenient way to support quality civic education while also providing support for Hoosiers relying on legal aid to gain fair representation.
may become mistrustful, more likely to believe their partner is cheating, cite reasons the economy might fail, and even question whether they will succeed in their own professional pursuits.

The second factor that creates successful lawyers according to Dr. Seligman, but also leads to depression, is that the legal profession is an adversarial, win-loss culture. This ‘win-loss’ atmosphere can be especially anxiety provoking considering the result of a case can be out of a lawyer’s control due to an inability to pick whether you represent an innocent or guilty client, the level of skill the opposing counsel possesses, the experience of a judge, or simply the misapplication of justice. This type of ‘win-at-all-costs’ mindset is so prevalent among the legal profession that Black’s Law Dictionary defined this type of lawyer as a “Ramo Lawyer.” According to Black’s Law Dictionary, a Rambo Lawyer is “A lawyer, esp. a litigator, who uses aggressive, unethical, or illegal tactics in representing a client and who lacks courtesy and professionalism in dealing with other lawyers.” Dr. Seligman writes about this phenomenon when he explains, “American law has migrated from being a practice in which good counsel about justice and fairness was the primary good to being a big business in which billable hours, take-no-prisoner victories, and the bottom line are now the principle ends.” While this type of aggressive, ‘win-at-all-cost’ and competitive personality trait may be indicative of a highly sought-after and successful lawyer, this personality trait can also lead to an inability to express authentic, human emotions, such as empathy and compassion, which can also exacerbate depression.

A third factor Dr. Seligman identified is lawyers have ‘low decision latitude’ in high-stress situations. For example, lawyers often have little choice in their work or who their clients are. Many lawyers join a law firm and are assigned to whatever practice area where the firm needs additional lawyers, regardless of whether the lawyer is interested in or trained in that area of law. Additionally, partners may assign new associate lawyers with undesirable or guilty clients and boring tasks. Further, lawyers have little control over their schedule, billable hours, and when their clients want to communicate with them. Lawyers experience a high amount of pressure to respond quickly to these often-uncontrollable demands.

THE IMPORTANCE OF SEEKING TREATMENT

The personality traits of some lawyers (pessimism, competitiveness, perfectionism in an uncontrollable work environment) may make it less likely a lawyer suffering from depression will seek treatment. For example, a lawyer may be less likely to get treatment for their depression out of concern that they may be stigmatized, be perceived as being weak, or lose their job. Additionally, not talking about their struggles, emotions, or depression can
"...not talking about their struggles, emotions, or depression can further exacerbate the symptoms of depression and make lawyers feel even more isolated."

As someone who ‘lost’ her law firm job 10 months after being diagnosed as clinically depressed, I still think there’s enormous bias against depression and treatment for it. However, I have learned from numerous medical professionals that attorneys do have a very high rate of digestive problems and depression, but much of that must still go ‘un’ or ‘underreported.’

The consequences of untreated depression can be severe. For example, a study by the National Institute for Safety and Health conducted 20 years ago found male lawyers between the age of 20 and 64 are more than twice as likely to die from suicide than men in other professions (Weiss, 2009). Additionally, a 1997 Canadian study stated suicide was the third most common cause of death among lawyers insured by the Canadian Bar Insurance Association. Further, the suicide rate for lawyers insured by the Canadian Bar Insurance Association was nearly six times the rate of the general population of North America at 69 deaths per 100,000. It is speculated that lawyers’ drive to be perfectionist and competitive enhance their likelihood of committing suicide (Weiss, 2009).

Fortunately, there are confidential sources of treatment for lawyers who have depression. The Indiana Judges and Lawyers Assistance Program (JLAP) (https://www.in.gov/courts/jlaphelps/) provides confidential referrals for lawyers seeking help for stress, anxiety,
Dr. Matthew Welsh J.D., Ph.D., is a licensed attorney and licensed clinical psychologist. He works as a psychologist at a Veterans Affairs Hospital in North Chicago providing psychotherapy to veterans for combat and non-combat PTSD, suicide ideation, drug and alcohol use, depression, anxiety, anger, work stress, and relationship problems. He also has his own private coaching and counseling practice. For more information, visit his website at www.DrMatthewWelsh.com or email him at DrWelsh@DrMatthewWelsh.com.
ETHICS OF DEALING WITH INQUIRIES AND PROSPECTIVE CLIENTS

Ever get a call out of the blue from someone who seems eager for your help? You tell them about yourself, the caller tells you about her legal problem, and you discuss your thoughts on a preliminary strategy. You feel brilliant. The caller seems to think you are smart, too. This goes on for a while. Then you attempt to talk about your fee and the discussion grinds to a halt. Pretty soon the caller thanks you for your time, and you are left listening to the hollow drone of a dial tone.

What just happened? What if the other side of the legal problem calls you? Do you owe any duties to that caller who just sapped you for free advice? In this article, we hope to provide a little guidance on how to deal with prospective clients.

THE LINE BETWEEN CALLER/INQUIRER AND “PROSPECTIVE CLIENT”

Ever notice when you go to some law firms’ websites and click on a lawyer’s email address, there is a disclaimer that warns against sharing “confidential information” or there is a statement that an email does not mean that an “attorney-client relationship has been formed?” Ever wonder why those disclaimers exist? That’s because that firm is trying to avoid having “inquirers” become “prospective clients,” which, as shown below, can create a conflict of interest and exclude an unsuspecting lawyer from participating in other cases.

Now, not every person that contacts your law firm shopping for a lawyer is a “prospective client.” Ind. Prof. Cond. R. 1.18(a) provides, “A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.” However, it is a little more complicated than that. As explained in Comment [2], “A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a ‘prospective client’ within the meaning of paragraph (a).”
The Southern District of Indiana found a party’s single email to an attorney at a law firm (where the attorney did not respond) did not make her a prospective client or create a conflict of interest such that no attorney at that firm could represent the adverse party. *Mihuti v. Mid America Clinical Laboratories, LLC*, 2019 WL 6468273 at *1 (S.D. Ind. Dec. 2, 2019). The court disagreed with the argument the emailer had a reasonable expectation the lawyer was willing to discuss the possibility of forming a client-lawyer relationship just because the law firm’s website invited potential clients to contact the attorneys directly. Id. “The phrasing of Rule 1.18 implies a ‘discussion,’ not just one-sided conversation.” *Id.* at *3. Had the law firm’s website done more, like invite the party to discuss the details of the matter at issue, the court may have reached a different result.

The court’s opinion cites the American Bar Association’s Standing Committee on Ethics and Professional Responsibility Formal Opinion 10-457, which specifically addressed the idea of unilateral communication through a law firm’s website. ABA Opinion 10-457 acknowledged some websites might specifically encourage a visitor to submit a personal inquiry which, “when responded to, begins a ‘discussion’ about a proposed representation and, absent any cautionary language, invites submission of confidential information.” ABA Opinion 10-457 at p. 4. On the other hand, as the court acknowledged in *Mihuti*, “Another website might describe the work of the law firm and each of its lawyers, list only contact information (such as a telephone number, e-mail, or street address), or provide a website e-mail link to a lawyer. Providing such information alone does not create a reasonable expectation that the lawyer is willing to discuss a specific client-lawyer relationship.” ABA Opinion 10-457 at p. 4; *See also Mihuti*, 2019 WL 6468273 at *4.

What can you say to someone without forming the prospective attorney-client relationship? Certainly, you can safely give general information about yourself and your practice without crossing any line. When someone calls, you can set out “rules” for the discussion that includes instructing the caller not to reveal confidential information. However, once you start discussing the facts of the case, secrets the caller would only share with an attorney, and strategy, the line is likely crossed and if you don’t get hired for whatever reason, you have a prospective client on your hands and under the Indiana Rules of Professional Conduct, you now owe duties to that prospective client.

**DUTIES OF CONFIDENTIALITY AND LOYALTY ARE OWED TO A PROSPECTIVE CLIENT**

First and foremost, you owe a duty of confidentiality to a prospective client—regardless of who that prospective client hires. Ind. Prof.

**Probate Litigation**

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

Curtis E. Shirley

Telephone: 317.439.5648
1905 S. New Market St., Suite 200, Carmel, IN 46032
Email: curtis@shirleylaw.net | URL: www.shirley.net

Continued on page 37...
DECEMBER UPDATES
ADDRESS CARGO, ROAD CONDITIONS, AND TORTS

In December, the Indiana Supreme Court issued 6 civil opinions and the Indiana Court of Appeals issued 53 civil opinions. The Supreme Court’s opinions are summarized below. The full text of all Indiana appellate court decisions rendered during the month of December, including those issued not-for-publication, are available via Casemaker at inbar.org or the Indiana Courts website at in.gov/judiciary/opinions.

SUPREME COURT ADOPTS RULE REGARDING DUTIES OF SHIPPER AND CARRIER FOR SAFE LOADING

In a divided opinion in Wilkes v. Celadon Group, Inc., 177 N.E.3d 786 (Ind. 2021) (Slaughter, J.), the Indiana Supreme Court held the carrier maintains the primary duty of loading and securing cargo, but a shipper is liable for injuries resulting from a latent or concealed defect if it assumes a legal duty of safe loading.

Cummins had contracted with Celadon to haul certain of its industrial trays to North Carolina. Celadon, the
shipper, in turn retained Knight Transportation as the carrier. Wilkes, a Knight driver, was injured by falling trays when he opened the trailer. He sued Cummins, Celadon, and their affiliated companies for negligently packing, loading, and failing to secure the trays. Celadon had directed and supervised the loading of the trays on the Knight trailer.

In affirming the trial court’s grant of summary judgment to Celadon and Cummins, the Supreme Court officially adopted the Fourth Circuit’s “Savage rule” from United States v. Savage Truck Line, Inc., 209 F.2d 442, 445 (4th Cir. 1953), in which liability remains with the carrier unless the shipper takes responsibility for loading the cargo and the defect is latent or concealed. In assessing whether a shipper takes responsibility for loading the cargo, the court found a shipper assumes the duty if the shipper loads the trailer without any help from the carrier. Here, Celadon assumed the duty to load because a Celadon employee loaded the trailer without any help from Knight. The court next considered whether Celadon loaded the trailer with a latent defect or provided any assurances to a driver about a load’s safety. Celadon designed evidence showing any defect was apparent. Wilkes designated no contrary evidence the defect was latent. No evidence suggested the oily trays presented any greater risk than other unsecured cargo. Wilkes viewed how the cargo was loaded, and Celadon made no assurances to Wilkes, an experienced driver, about the load’s security. Therefore Knight, the carrier, and not Celadon, the shipper, was responsible for Wilkes’s injuries.

Justices Goff and David concurred in part and dissented in part.

GOVERNMENT MAY BE LIABLE FOR KNOWN HAZARDOUS ROAD CONDITIONS THAT RECUR DURING INCLEMENT WEATHER EVENTS WHEN IT HAS HAD AMPLE OPPORTUNITY TO RESPOND

In a divided opinion in Ladra v. Indiana, 177 N.E.3d 412 (Ind. 2021) (Goff, J.), the Indiana Supreme Court modified the rule in Catt v. Board of Commissioners, 779 N.E.2d 1, 5 (Ind. 2002), regarding Indiana Code § 34-13-3-3(3) of the Indiana Tort Claims Act, which grants governmental immunity for injury resulting from the temporary condition of a public thoroughfare caused by the weather. Under the modified rule, if the government has failed to remedy a known, existing defect in the public thoroughfare despite opportunity to do so, immunity does not apply simply because the defect manifests during recurring inclement weather events.

In this case, Ladra struck a flooded area of the interstate, resulting in an accident. She sued the State of Indiana and Indiana Department of Transportation (INDOT) for failing to post a warning of the flooded roadway and failure to maintain proper drainage. Reversing the trial court’s grant of summary judgment to INDOT, the Indiana Supreme Court reflected the rule in Catt inappropriately granted blanket immunity to the state in
every circumstance involving inclement weather because that was incompatible with the government’s duty to maintain the safety of public thoroughfares. Ladra designated evidence INDOT had received numerous reports of clogged drains in the area. The court concluded INDOT was aware this area was prone to flooding and had failed to rectify a known problem manifested during inclement weather. Because INDOT had had ample opportunity to address the problem and failed to do so, immunity did not attach.

Justices Massa and Slaughter dissented.

DUTY TO WARN DOES NOT ARISE DURING PERIOD OF REASONABLE RESPONSE TO WEATHER CONDITIONS

In Staat v. Indiana Department of Transportation, 177 N.E.3d 427 (Ind. 2021), the Indiana Supreme Court applied its holding in Ladra v. Indiana to another case where an injury arose from flooding on the highway but held immunity applied because the government had not had time to respond.

Staat, driving on the interstate during a storm, struck a pool of water causing an accident. Staat and his wife sued INDOT. INDOT moved for summary judgment under the ITCA, claiming immunity because the accident was the result of a temporary condition caused by weather. The Supreme Court affirmed the trial court’s grant of summary judgment to INDOT, holding immunity applied because the road condition had not yet stabilized. Rather, the condition was still evolving and worsening, so the period of reasonable response had not yet lapsed. The court held INDOT was not required to provide warnings to motorists when its employees could not safely do so. Because the period of reasonable response had not elapsed, the weather, and not the government’s conduct, caused the highway condition.

TORT CLAIMS ACT NOTICE REQUIRED IN SUIT AGAINST POLITICAL SUBDIVISION RAILROAD

In Lowe v. Northern Indiana Commuter Transportation District, 177 N.E.3d 796 (Ind. 2021) (Slaughter, J.), the Indiana Supreme Court found Northern Indiana Commuter Transportation District constituted a political subdivision subject to service of pre-suit notice within 180 days of injury under the Indiana Tort Claims Act (ITCA).

Lowe, a district employee, was injured at work while hammering spikes into frozen track ties. He sent notice to the Indiana attorney general of his injury within 263 days. The attorney general responded the state had no connection to the case, after which Lowe filed a complaint against the district under the Federal Employees’ Liability Act (FELA). Affirming the trial court’s summary judgment in favor of the district, the Indiana Supreme Court found the ITCA applied to FELA claims because FELA was enacted under Congress’s Article I power, which does not subject nonconsenting states to private suits for damages in state courts. The court reasoned FELA claims are tort claims, and the ITCA governs tort claims against governmental entities. Because the district’s enabling statute defines it as a “distinct municipal corporation,” the court ruled the district should be treated as a separate municipal
corporation under the ITCA and thus a political subdivision subject to pre-suit notice within 180 days of injury. Lowe did not “substantially comply” with the ITCA by providing notice within 270 days because the substantial compliance doctrine concerns the content of the notice, not timing. Nor did Indiana consent to suit under FELA and waive sovereign immunity.

NEGLIGENCE INFLICTION OF EMOTIONAL DISTRESS CLAIM EXPANDED TO COVER HIDDEN ABUSE OF A CHILD

In a divided opinion in K.G. v. Smith, No. 21S-CT-561, --- N.E.3d --- , 2021 WL 6063878 (Ind. Dec. 22, 2021) (Goff, J.), the Indiana Supreme Court expanded the scope of negligent infliction of emotional distress to include circumstances when a parent or guardian discovers, with irrefutable certainty, sexual abuse of a child by a caretaker.

In K.G., a child who is blind, nonverbal, limited in her mobility, and unable to communicate reciprocally, was sexually assaulted by Smith, her instructional assistant at school. The assistant sexually abused her while changing her diaper, but the mother, Ruch, did not learn of the sexual abuse until years later after Smith confessed to her actions. Smith later pled guilty to level-3 felony child molesting. Ruch sued Smith, the school, and the school district, individually and in her capacity as parent and next friend of K.G. She claimed emotional distress from the sexual abuse to K.G., compromising her ability to care for her daughter. The court reversed the trial court’s grant of summary judgment in favor of the school and the school district, acknowledging Indiana’s current modified impact and bystander rules would not permit a claim for emotional distress, but determining adoption of a new rule in these circumstances was proper and narrowly tailored.

The Supreme Court explained the new rule limited the class of potential plaintiffs to parents and guardians with established and loving relationships with their child who must establish (A) the tortfeasor owed a duty of care to the child’s parent or guardian; (B) there is “irrefutable certainty” of the act, i.e., an admission to the abuse by the caretaker, a finding of abuse by a judge, or the caretaker’s conviction for the abuse; (C) the tort is rarely if ever observed; and (D) the abuse had a severe impact on the parent or guardian’s health. Ruch satisfied these elements: School owed a duty to Ruch as K.G.’s parent. Harm was foreseeable because Smith was frequently with K.G. in private when changing her diaper. Smith confessed to sexual molestation and pled guilty to felony child molesting. Ruch would not have learned of the incident without Smith’s confession. And Ruch suffered emotional distress after discovering the abuse.

Justices Slaughter and Massa dissented.

RESCINDED BOARD POLICY WAS NOT A CONTRACT

In Clark County REMC v. Reis, No. 21S-CT-343, --- N.E. 3d ---, 2021 WL 6136736 (Ind. Dec. 29, 2021) (Slaughter, J.), the Indiana Supreme Court held a 2014 board policy of Clark County REMC (Clark REMC) allowing certain former directors to receive health insurance benefits was not an offer that could support a breach of contract claim.

The 2014 board policy permitted former directors to obtain personal health insurance with Clark REMC reimbursing up to certain caps. When a 2018 board policy terminated the 2014 policy, Reis, a former director, sued Clark REMC for breach of contract. The Indiana Supreme Court reversed a grant of summary judgment to Reis, concluding the 2014 policy did not constitute an offer. The policy did not memorialize terms and conditions, contain signatures by plaintiff or the board, and was not a promise to any plaintiff with reasonable certainty. Rather, it was an internal communication, signed by the board secretary, setting out the practice of the REMC, which changed over time. It did not convey with reasonable certainty intent to contract. The court remanded with instructions to enter summary judgment on behalf of Clark REMC on Reis’s contract claim.

Jane Dall Wilson practices appellate advocacy and litigates complex matters. Susanne Johnson conducts internal investigations and litigates complex matters. Both practice at Faegre Drinker Biddle and Reath LLP. Wilson participated in the Wilkes appeal on behalf of Cummins.
Meanwhile, ICIT officers, including its in-house accountant, received high salaries and took bonuses from ICIT’s declining assets, while attempting to hide the upcoming financial disaster from ICIT’s Board of Directors.

As ICIT’s financial condition became more and more precarious, its management resorted to an extraordinary accounting scheme to hide the company’s insolvency from its outside directors. ICIT entered a short-term lease of “precious stones” for $30,000, but falsely listed them as an asset worth $2,932,811 on the company’s financial statements to portray ICIT as solvent. Outside general counsel questioned the financial integrity of that ploy and learned the precious stones were a fraudulent asset but failed to advise ICIT’s outside directors of the problem.

ICIT then collapsed financially. It stopped paying the health care claims of beneficiaries and was placed into liquidation by the Indiana Department of Insurance. Its top officers and its in-house accountant were indicted on federal embezzlement charges, including conspiring to list the leased precious stones as a multi-million-dollar asset on ICIT’s financial statements.

When ICIT failed, its beneficiaries were burdened with personal liability for millions of dollars of health care bills. A class action lawsuit was brought against those responsible for the ICIT financial debacle on behalf of the beneficiaries, with the Department of Insurance serving as the liquidator of ICIT.

The ICIT litigation brought claims against a series of defendants, including: (i) ICIT’s former officers and its in-house accountant; (ii) dozens of insurance agents who had improperly marketed ICIT health care benefits; (iii) ICIT’s former outside actuary which had expressed a favorable view of ICIT’s financial condition; and (iv) the outside law firm that failed to advise ICIT’s directors of its deteriorating financial condition. At the outset of the litigation, the court issued an order barring medical providers and their agents from collecting the unpaid bills from ICIT beneficiaries pending the outcome of the litigation.

The litigation proceeded in phases. Although many of the individual defendants lacked the resources or insurance coverage to pay significant settlements, over $7 million in settlements was recovered from the outside actuary and the insurance agents who had improperly marketed ICIT health care benefits.

The malpractice insurer for ICIT’s outside counsel, however, refused to settle the malpractice claim against their insured arising from the law firm’s failure to advise the board of directors of the real meaning of the leased “precious stones” on ICIT’s financial statements, despite the lawyer’s presence at the board meeting at which those financial statements were discussed. On behalf of the liquidator, a policy limits demand of $1 million on the law firm’s malpractice carrier was made. The insurer refused to pay the policy limits, however, which in turn created the basis for a subsequent bad faith claim against it.

With the outside law firm remaining the only defendant that had not settled, the ICIT litigation moved to the next phase. We pursued extensive discovery on the legal malpractice claim, including lengthy depositions of the former board members, the outside counsel, and expert witnesses who opined as to the outside counsel’s breach of the professional standard of care. After completing discovery, the case was tried before a jury in Marion Circuit Court. The week-long trial began with testimony from representative families facing the unpaid medical bills. Former directors of ICIT testified they had not been advised of the company’s deteriorating financial condition by the outside counsel. The expert witnesses then testified as to the professional standard of care applicable to a lawyer who understood the fraudulent nature...
of presenting the leased “precious stones” at their fair market value on ICIT’s financial statements and failing to advise ICIT board members about the impropriety and the serious financial problems facing ICIT.

The jury reached a verdict of $17.99 million against the outside counsel—the entire amount of ICIT’s unpaid health care claims—with no reduction for comparative fault on the part of the more than 40 non-parties the defendant insisted be on the verdict form.

ICIT appealed, challenging the core determination as to malpractice and raising six other issues including the qualifications of the plaintiffs’ expert witness, the calculation of damages, and the absence of any findings as to comparative fault. The $17.99 million verdict was upheld on appeal in its entirety.

Because the defendant law firm lacked the resources to satisfy the substantial judgment against it, a settlement with the law firm involving a cash payment by the law firm along with the assignment of its bad faith claim against its insurer to the liquidator was arranged. That bad faith claim was then brought in a separate action against the insurance company. The insurance company ultimately resolved the bad faith suit for an additional payment of $16.5 million.

In total, the ICIT litigation produced a recovery of more than $24 million. The net recovery, after payment of all court-approved legal fees and expenses, provided sufficient funds to pay the thousands of victims of ICIT’s financial collapse checks sufficient to cover all their unpaid medical bills, providing substantial financial relief to all affected Hoosiers.

ADOPTION SUBSIDY LITIGATION

In spring 2014, we initiated a class action lawsuit against the State of Indiana to recover subsidy payments owed to Hoosier families who adopted children out of the state’s foster care system. The adoption agreement with the state provided for the adopting families to receive monthly payments to assist them so they could afford the costs of raising children. These payments helped care for some of the most vulnerable children in the state and are widely recognized as a prudent investment of state resources because children adopted out of foster care—typically by families of limited economic means—are more likely to complete their education, avoid the criminal justice system, and become productive, well-employed members of society.

The state had added a new phrase to the form adoption contracts that conditioned its payment of the agreed-upon subsidies: “if the funds are available.” The state then took the position that the agency that entered into the contracts lacked the funding to continue the payments because the agency had voluntarily returned its “excess” budgeted funds to revert to the state’s general fund before making the promised payments. Of course, the funds remained available within the state budget. That lawsuit was resolved for $15 million, and settlement checks were mailed to the families just before Christmas.

PROVIDING FOR THE COMMUNITY

Although class action cases around the country have paid out literally billions of dollars to class members, on occasion certain class members cannot be located and it is impossible to distribute class action settlement funds to them. In those instances, the law provides a cy pres distribution may be made which generally results in the parties agreeing on one or more possible recipients and then jointly asking the court to order the funds to be distributed to appropriate organizations.

Under Indiana Trial Rule 23(F), 25% of the residual funds left over from Indiana class actions must be paid to the Indiana Bar Foundation to support programs of the Coalition for Court Access and its pro bono districts. For example, in class actions where Cohen & Malad, LLP served as lead counsel, approximately $1 million has been distributed to court-designated recipients and well over $100,000 has been delivered to the Indiana Bar Foundation.

CONCLUSION

Class action cases accomplish two basic goals: resolving the claims of large numbers of plaintiffs whose claims would otherwise have been frozen out of the judicial process and providing a method by which defendants can be required to disgorge ill-gotten gains. Through the tools created by Trial Rule 23, class action litigation can be used to make a difference locally, nationally, and around the world. ☝️
Cond. R. 1.18(b) provides, “Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.” In other words, Rule 1.18 treats a prospective client as a former client for the purposes of confidential information.

The Indiana Supreme Court once found an attorney violated the rules of professional conduct when, to help someone who was both a friend and a prospective client, the attorney disclosed information about the friend/prospective client’s divorce. In re Anonymous, 932 N.E.2d 671 (Ind. 2010). Notably, the respondent in Anonymous argued sharing the information was not barred “because it could be discovered by searching various public records and the internet.” Id. at 674. The court disagreed. “There is no evidence that this information was contained in any public record. Moreover, the Rules contain no exception allowing revelation of information relating to a representation even if a diligent researcher could unearth it through public sources.” Id.

In addition, if a caller or an inquirer becomes a prospective client and does not hire you, you and your law firm will have difficulty opposing that caller if the “other side” of the legal problem calls you. Ind. Prof. Cond. R. 1.18(c) provides a lawyer who possesses confidential information of a prospective client “shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter.” The rule outlines exceptions to this, including when the prospective client provides consent and instances when the lawyer, who possesses the disqualifying information, has taken measures to screen herself and the information from the firm and prompt notice is given to the prospective client. Without these exceptions, it is highly likely the law firm will be excluded from the case.

A WORD ABOUT DECLINATION LETTERS

Aside from issues of conflicts of interest and confidentiality, there is at least one other hazard that can arise when you discuss matters with a prospective client who you never hear from again: The prospective client can claim you are his or her lawyer. Don’t laugh. This has happened to lawyers who never believed they were engaged and who found themselves facing lawsuits for blowing statutes of limitations and other deadlines. Comment [17] to the “Scope” of the Indiana Rules of Professional Conduct says “[w]hether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.” Therefore, our own rules seem to give credence to the idea if a prospective client believes you are his or her lawyer, then maybe a trier of fact would agree.

How do you avoid this situation? When it is clear you are not getting hired, send a prompt declination letter that explicitly states you will not be taking on the representation of the prospective client. This declination letter can help prevent future malpractice issues before they arise.

KEY TAKEAWAYS

- One-sided communication from an inquirer to a lawyer likely does not make him or her a prospective client.
- Protect all confidential information shared with you by a prospective client.
- If a prospective client shares confidential information with you, but does not hire you, it will be difficult for your firm to be adverse to the prospective client in the same or substantially related matter.
- After speaking with a prospective client, send a declination letter if you are not subsequently engaged as an attorney.

James J. Bell works at the Paganelli Law Group and practices in the areas of criminal defense and attorney discipline defense. He also defends judges in ethics inquiries and attorneys in civil cases. In the past, he served as Chair of the Indiana State Bar Association’s Legal Ethics Committee and Criminal Justice Section. Mr. Bell’s Uber rating was recently lowered to 4.90 and he has no idea why.

Stephanie L. Grass is an attorney at Paganelli Law Group who advises on matters of professional responsibility, counseling attorneys and law firms on ethical issues. She also practices civil litigation, advocating for businesses and their owners in all pre-suit negotiations and litigation and appellate needs.
EMPLOYMENT DESIRED

JIM SCHNEIDER, TAX IRS audits and investigations, appeals, Tax Court, payroll tax and trust fund penalty cases, non-filers and back tax returns, records reconstruction, payment plans, penalty abatement, liens and levies. Schneider@CPAttorney.com. 317-844-1303. Over 40 years in practice.

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

CALIFORNIA LAWYER since 1966. AV rated. Member ISBA. Father and brother practiced in Marion. Enjoys interacting with Indiana lawyers. Handles transactions, ancillary probates and litigation in CA and federal courts. Law Offices of John R. Browne III, a Professional Corporation, 2121 N. California Blvd. Ste. 875, Walnut Creek, CA 94596, 415-421-6700; johnrbrowne@sbcglobal.net; www.jbrownelaw.com

EMPLOYMENT OPPORTUNITY

LOOKING FOR ASSOCIATE ATTORNEY FOR FAMILY LAW, litigation and criminal law in Jasper, IN. Experience preferred. Email resume to Fritch Law Office at mail@fritchlaw.com.

CITY OF BLOOMINGTON LEGAL DEPARTMENT – ASSISTANT CITY ATTORNEY:

Represents the city and its agencies, attends various commission meetings, reviews and drafts legal documents. Must be licensed Indiana attorney. 3 years’ experience preferred. $53,193 - $76,517. 9 a.m. – 5 p.m. M-F. See full job posting, apply online, and submit resume and cover letter at www.bloomington.in.gov/jobs before 5 p.m. on Monday, Feb. 28. EOE

HART BELL LLC is recruiting an attorney with 2-5 years experience. We have offices in Vincennes and Washington, Indiana. We are looking for a lawyer with a strong academic background, strong people skills, a desire to live in our rural community, and a desire to provide quality legal services to our clients. Compensation is competitive with larger communities. Visit our website at www.hartbell.com. Please contact Brent Stuckey, Hart Bell LLC, at bstuckey@hartbell.com or at 812-886-2026.

SPECIAL SERVICES

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

MEDICARE SET-ASIDES & LIEN RESOLUTIONS Susan V. Mason, Esq., MSCC, has provided all aspects of Medicare compliance on Indiana claims for over 10 years. For custom service, contact 412-302-8880 or smason@firstreviewinc.com. Indiana attorney references available.


CLASSIFIEDS

600 + appeals
30 + years experience
Stone Law Office & Legal Research
26 W. 8th St., P.O. Box 1322
Anderson, IN 46015
765/644-0331 800/879-6329
765/644-2629 (fax)
info@stone-law.net
David W. Stone IV Cynthia A. Eggert
Attorney Paralegal

WORKER’S COMPENSATION Indianapolis attorney Charles A. Carlock seeks referrals on Worker’s Compensation cases statewide. Tele., 317-573-5282 or 844-415-1461.


600 + appeals
30 + years experience
Stone Law Office & Legal Research
26 W. 8th St., P.O. Box 1322
Anderson, IN 46015
765/644-0331 800/879-6329
765/644-2629 (fax)
info@stone-law.net
David W. Stone IV Cynthia A. Eggert
Attorney Paralegal

ADVERTISING INFORMATION
Email your classified word ad to Kelsey Singh, ksingh@inbar.org. You will be billed upon publication. ISBA members: $0.60 per word, $20 minimum. Nonmembers & nonlawyers: $0.90 per word, $30 minimum.
Indiana Social Security Lawyers

Fleschner, Stark, Tanoos & Newlin

201 Ohio Street, Terre Haute, IN 47807
1-800-618-4878 • www.FleschnerLaw.com
e-mail: Lawyer@FleschnerLaw.com

Referrals Accepted
It’s Here!

Group Health Insurance for the members of the Indiana State Bar Association and their firms

Call Ritman today and hit the ground running with this long-awaited opportunity! Helping your firm with your Group Health Insurance needs would make us happier than a pig in — well, you know.