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THE ETHICS OF CONFIDENTIALITY

The Ethics of Confidentiality Clauses in Settlement Agreements
By Jon R. Pactor

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RG STAFF: EDITOR / JENNA PARSONS jparsons@inbar.org
COPYEDITOR / REBECCA TRIMPE rebeccatheditor@gmail.com
GRAPHIC DESIGN / BURKHART MARKETING PARTNERS info@burkhartmarketing.com
WRITTEN PUBLICATIONS COMMITTEE CO-CHAIRS / COLIN FLORA & PROF. JOEL SCHUMM wpc@inbar.org
ADVERTISING / KELSEY KOTNIK kkotnik@inbar.org
DEPARTMENTS

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Michael E. Tolbert
Partner
Tolbert & Tolbert
mtolbert@tolbertlegal.com

Jon R. Pactor
Attorney
Pactor Law
pactorlaw@quest.net

Hon. Darrin Dolehanty
Judge
Wayne Superior Court #3
ddolehanty@co.wayne.in.us

Catheryne Pully
Outreach & Partnerships
Indiana State Bar Association
cpully@inbar.org

Jack Kenney
Director of Research & Publications
Indiana Public Defender Council
jkenney@pdc.in.gov

Derrick Wilson
Managing Partner
Mattox & Wilson, LLP
dhw@mattoxwilson.com

Margaret Christensen
Office Managing Partner
Dentons Bingham Greenebaum LLP
margaret.christensen@dentons.com

Katie Dickey
Associate
Denton Bingham Greenebaum LLP
katie.dickey@dentons.com

K. Aaron Heifner
Attorney
Beeman Heifner Benge P.A.
kaaronheifnerlaw@gmail.com

Cassidy Segura Clouse
Summer Associate
Faegre Drinker Biddle & Reath LLP
cassidy.clouse@faegredrinker.com

Daniel Pulliam
Partner
Faegre Drinker Biddle & Reath LLP
daniel.pulliam@faegredrinker.com

Steph Weber
Freelance Writer
Words of Weber LLC
Email?
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.
Everyone has heard the old saying “keeping up with the Joneses.” If you are new school, you may say “keeping up with the Kardashians.” At some point in our lives, we have all used some iteration of this phrase. The phrase is commonly used to target wasteful spending habits or to highlight the attention-seeking behavior of some people that flaunt material possessions to show a certain lifestyle that may not truly exist. At one time or another, we have all fought hard to “keep up with the Joneses.” Whether it be in our personal or professional lives, peer pressure can cause professionals to make bad choices simply to uphold a certain image. Lawyers are in no way immune to this problem.

In fact, lawyers are the most likely group to lock horns with the Joneses in the quest for supreme social standing. Why? Well, lawyers are competitive by nature. Moreover, societal pressures placed on lawyers to dress, act, and drive certain vehicles are what fuel this inevitable showdown. Law firms have folded because of the Joneses. Lawyers practice every day in areas of law they absolutely hate because of the Joneses. Some lawyers even take on staggering amounts of debt annually to keep up with the Joneses. So, just who are the Joneses and why are we in this endless rat race to match their level of success?

**A FICTITIOUS GOLD STANDARD OF UPWARD SOCIAL MOBILITY**

“Keeping Up with the Joneses” was a comic strip created by Arthur R. Momand in 1913. The central characters in the comic strip were the McGinis family. The McGinis family struggled to “keep up” with their neighbors, the Joneses, for elite social standing in their community. Strangely enough, the Joneses are never
seen in the comic and are only spoken of for social comparison.

The use of the Joneses as the benchmark for elite social status predates the 1913 comic strip. In 1879, English writer E. J. Simmons wrote in a memoir about “the Joneses” who did not associate with “the Robinsons” because they were not on the same level in social circles. In 1901, even Mark Twain in his essay “Corn Pone Opinions” wrote about the socially upward moving Jones family and their activities. Despite many literary references, the Joneses remained invisible, yet the family is still used as the standard for success. No one has ever caught up to the Joneses because they simply do not exist.

**ROMANCE WITHOUT FINANCE IS A NUISANCE**

Jazz guitarist Lloyd “Tiny” Grimes wrote a famous song (recorded by Charlie Parker) titled, “Romance Without Finance is a Nuisance.” As young lawyers, my wife, Shelice, and I operated on a shoestring budget to eliminate expenses and debt.

Shelice and I got married early in our legal careers. Although young, we were blessed to make partner at our respective firms ahead of the normal partnership track. With the title of “partner” came a host of expectations and burdens from external and internal forces as to what image Shelice and I should portray to the world. Many people expected us to match the Joneses and immediately buy fancy cars, a mansion, and a new wardrobe. Others simply wanted us to give them money.

When we announced we would get married, because we were lawyers, people assumed our wedding would rival that of Prince Harry and Meghan Markle. They were sadly mistaken. Many were surprised at our modest wedding ceremony at a rent-free location. The inexpensive wedding reception and our decision not to take a honeymoon was also a shock to most. We did not send our guests traditional, paper wedding invitations. This move saved us money on postage. We also did not have an open bar primarily because we do not drink, but this also helped us save money. Shelice and I received criticism, even from people very close to us, that we were not portraying the right “image” of a successful husband and wife lawyer duo.

Pressure was put on us to change the venue of our wedding reception to a more upscale location and to expand the guest list, which would increase costs. However, Shelice and I stuck to our guns because we had one goal in mind: not to create wedding debt. Around the same time as our wedding, we purchased our first home which we felt was more important for our careers and family’s future. The money we saved by not taking a honeymoon went toward the down payment on our first home – a home that has greatly appreciated in value since the purchase. We also made the decision not to carry credit card debt.

The wise decision not to incur or create debt because of what people expected of two lawyers getting married helped us take control of our lives and careers. It also helped us build a strong foundation for our marriage. From that point on, we were not hostages to our jobs because of debt. Our mindset in not trying to keep up with the Joneses allowed us to focus on further eliminating our law school debt and investing our money over time. The freedom from not operating in debt and engaging in sound investments...
allowed us the flexibility to do what we love in our practice. It also allowed us to eventually start our own business. None of this could be achieved without God’s vision of prudence and the decision to ignore what people thought lawyers should buy or what vehicle they should drive. Ignoring the critics has paid dividends for our family (no pun intended) over the years. It has also allowed us to engage in our passion of philanthropy.

**LAWYERS MUST FIGHT THE URG**
**E TO KEEP UP WITH THE JONESES**

Data from the credit reporting agency Experian looked at American debt in 2018. Credit card debt for Americans reached an all-time high of $834 billion. Auto loan debt hit an all-time high of $1.27 trillion dollars while personal loans became the fastest-growing type of consumer debt totaling $291 billion dollars. Erika Martinez of the Los Angeles based psychotherapy firm Envision Wellness believes ramped-up spending habits can be traced to social media and the need to follow certain influencers or friends. The Joneses have now gone viral!

A few years ago, this point hit home for me during my discussions with a young lady about her desire to become a lawyer. After telling me that she only went to law school because she could not find a job after graduating from college, she went on to express that becoming a lawyer would put her ahead of all her friends on the social totem pole of life. This thought process is completely misguided and has caused many problems for new lawyers that enter our profession. Sadly enough, most people do not aspire to practice law as a calling anymore. Many new lawyers enter the profession because of failed past careers or for the perceived glitz and glamour of being a lawyer.

Entry into the practice has never been an easy road. However, the pressure of carrying enormous debt from law school and the pull to live a certain lifestyle because of the lawyer title can make an already rough road even tougher. A July 2020 report from the American Bar Association (ABA) found student loan debt for law school graduates has trended upward. According to the most recent data from the National Center for Education Statistics, in 2015-16 the average law school debt was $145,500. The ABA report also found more than 40% of the new lawyers surveyed indicated their debt is impacting major life events such as getting married or having children. Many survey respondents indicated that their heavy debt load prompted them to take jobs in which they had no actual interest.

Essentially, lawyers are taking jobs not out of passion, but because of crippling debt. This problem is further compounded by the desire of some new lawyers to meet the unrealistic standards imposed by the public and reach the fictitious benchmarks imposed by the idea of the Joneses. Lawyers are better equipped and able to deliver quality legal services when they are planted in a fertile environment that caters to their strengths and passions. It can hardly be said that new lawyers planted in rocky, barren soil will ever realize their full potential. This spells bad news for the legal profession.

A recent global poll uncovered that out of the world’s one billion full-time workers an astronomical 85% of people are unhappy in their jobs. A 2016 article by Forbes revealed that working at a job you do not like merely to pay bills or for social standing can lead to negative health consequences like stress, depression, and anxiety. More importantly, the creativity one brings to a job is lost which hinders productivity, ingenuity, and industry innovation. The legal profession is currently at a crossroads. Non-legal service providers like Legal Zoom and Avvo are perched and ready to pounce on what they believe is a neglected legal market saturated by lawyers that are disinterested and lack creativity primarily because they are not operating in their purpose.

The legal profession needs lawyers that are truly committed and ready to innovate. We need lawyers that are ready to positively transform the practice of law for the 21st century. This cannot be done by keeping up with the Joneses. In the Bible, Proverbs 12:9 states: “better to be a nobody and yet have a servant, than to pretend to be somebody and have no food.” We must pivot and place more of an emphasis on the actual delivery of legal services to the everyday consumer and not on the clothes we wear or the car we drive while doing it. Our existence depends on it.
THE ETHICS OF CONFIDENTIALITY CLAUSES IN SETTLEMENT AGREEMENTS
Confidentiality clauses in settlement agreements present ethical problems for attorneys who draft or approve them. Many attorneys do not see these problems, or they do not take them seriously. They should do both.

Confidentiality clauses restrict what settling parties and sometimes their attorneys can say about the settled legal matter. Confidentiality clauses are not unreasonable in the abstract, but that characteristic does not justify the violation of the Rules of Professional Conduct. A confidentiality clause might involve several Rules of Professional Conduct such as Rules 1.1, 1.4(a), 1.4(b), 1.7, 1.8(g), 1.16(d), 3.4, 5.6, 8.4(a), and 8.4(d). Confidentiality clauses also can create potential tort or contractual liability for attorneys. This paper discusses the risks from confidentiality clauses.

Attorneys have an ethical obligation to explain confidentiality clauses to their clients

Rule 1.4(a) and (b) require attorneys to explain confidentiality clauses so their clients can make informed decisions about them. The language of a particular clause will shape the degree of explanation and risk. Some clauses might simply restrict the clients from disclosing the amount of a settlement. Those clauses are easy to explain. Other clauses are challenging. Such clauses may restrict the payee and the attorney from disclosing facts of the legal dispute or matters of public record, may restrict making reports to governmental officials, and may restrict the production of evidence in other judicial proceedings. Still other clauses may require the return of evidence or restrict the attorney’s ability to practice law.

Confidentiality clauses can violate Rule 1.1’s requirement of competency

Rule 1.1 requires attorneys to provide competent representation. The Indiana Supreme Court held in 2020 that an attorney who attempts to get a confidentiality clause can violate Rule 1.1 and violate Rule 8.4(d) for engaging in conduct prejudicial to the administration of justice. The court reprimanded an attorney who attempted to obtain a confidentiality clause involving child exploitation at a private high school. The school, being represented by the attorney, proposed a confidentiality clause with the child’s family, which was represented by its own counsel. No confidentiality clause was executed. The court found the attorney’s “efforts to silence the victim and her family provided the school with incompetent representation and were prejudicial to the administration of justice.”

That case teaches an attempt itself can violate the Rules of Professional Conduct and that a confidentiality clause can...
be prejudicial to the administration of justice. Attorneys who participate in creation of any confidentiality clause ought to be conscious of those lessons.

**CONFIDENTIALITY CLAUSES CAN IMPEDE THE PRODUCTION OF EVIDENCE IN VIOLATION OF RULE 3.4**

Competency is only one ethical rule affecting confidentiality clauses. Each confidentiality clause is a potential violation of Rule 3.4, which imposes ethical obligations on attorneys not to restrict or impede the production of evidence. Consistent with Rule 3.4 is the precept stated by the Indiana Supreme Court that agreements “tending to impede the regular administration of justice are void as against public policy, regardless of the means used, the natural results, or the motive of the parties.” A violation of Rule 3.4 also may be prejudicial to the administration of justice in violation of Rule 8.4(d).

**CONFIDENTIALITY CLAUSES CAN RESTRICT AN ATTORNEY’S ABILITY TO PRACTICE LAW IN VIOLATION OF RULE 5.6**

Attorneys should pay close attention to Rule 5.6 which prohibits attorneys from participating in “an agreement in which a restriction on the lawyer’s right to practice is part of the settlement of a client controversy.” The restriction is more likely to be subtle rather than overt. For example, the experience of an attorney with an adverse party may be useful information to convey to the attorney’s subsequent clients who are in a dispute with the same adverse party. However, the attorney may withhold that information from subsequent clients because the attorney fears violating a confidentiality clause, thus restricting the attorney from providing competent representation to subsequent clients. Such a restriction also could violate Rule 1.1 and Rule 1.4.

**CONFIDENTIALITY CLAUSES CAN VIOLATE RULE 1.16(D) REGARDING CLIENT RECORDS**

Some confidentiality clauses require attorneys to return to the opposing party evidence which was obtained during discovery. Returning records to opposing parties in lieu of providing them to the clients could violate Rule 1.16(d), which requires lawyers upon termination of the representation to surrender papers to which clients are entitled. While this writer has found no Indiana case imposing discipline on an attorney who returned records to an opposing party, Indiana has imposed discipline on attorneys who provided clients’ files to other attorneys without the clients’ informed consent. Indiana also has many disciplinary decisions where attorneys failed to return case files to their own clients.

**CONFIDENTIALITY CLAUSES CAN VIOLATE RULE 1.8(G) AS TO CONCURRENT CLIENTS**

Rule 1.8(g) requires attorneys who represent multiple clients in the same legal matter to get signed, informed consent from all clients before making an aggregated settlement or a plea.
agreement. An Indiana attorney who represented 64 clients in a tort claim violated this rule. She had authority to settle all claims and enter into a confidential settlement agreement. She believed the confidentiality provision in the settlement agreement prohibited her from discussing the settlement terms, including the total amount, with her own clients.

CONFIDENTIALITY CLAUSES CAN BE UNETHICAL ATTEMPTS TO INTERFERE WITH THE ATTORNEY DISCIPLINARY PROCESS

Confidentiality clauses in settlement agreements of legal malpractice cases and fee disputes impose serious risks to attorneys. Sometimes the clauses expressly prohibit the filing of a grievance with the Disciplinary Commission or require the withdrawal of a grievance. An actual agreement not to file a grievance violates the Rules, and so may the mere proposal of such a clause even if the client rejects it. Sometimes confidentiality clauses in a settlement of a malpractice claim or fee dispute subtly attempt to dissuade former clients from submitting a grievance. Instead of mentioning “grievance” or “Disciplinary Commission,” the clauses employ broad language which implies the prohibition against submission of a grievance. Clauses may simply require the promisee not to disclose anything about the case or settlement with exceptions for disclosure to tax advisers or in response to subpoenas or court orders. To laymen, such broad language may mean that they cannot file a grievance. Attorneys who tender such a clause may intend to convey that very impression on the opposing party. In one case, counsel wanted an opposing client to sign a clause with such broad, vague language. The client desired that the confidentiality clause should specify “Disciplinary Commission” as an exception to confidentiality. When defense counsel learned of the client’s desire for that specific language, defense counsel dropped the request for a confidentiality clause.

CONFIDENTIALITY CLAUSES CAN BE UNETHICAL ATTEMPTS TO REDUCE ATTORNEYS’ LIABILITY FOR MALPRACTICE

Rule 1.8 (h)(1) prohibits lawyers from making an agreement prospectively limiting their liability unless their clients have independent counsel. This rule can be violated in ways clients do not understand.

Attorneys cannot reduce their exposure to liability by shortening the statute of limitations for doing so by a clause in their fee agreements. Such a clause violates public policy. Confidentiality clauses can limit prospective malpractice claims more severely than clauses which reduce the statute of limitations. Clients who sign a settlement agreement with a confidentiality clause may then or later have claims of malpractice against the attorneys who advised them to enter into the settlement agreement. Such clients, fearing a malpractice suit may expose them to liability for breach of the confidentiality clause, may forego the malpractice claim altogether, thus eliminating the attorney’s potential liability and implicating a violation of Rule 1.8(h)(1). Rule 1.7 on conflicts of interest is also relevant because a confidentiality clause could involve the attorneys’ self-interest by reducing the exposure to a claim for malpractice.

A COURT CAN OVERRIDE A CONFIDENTIALITY CLAUSE

Three attorneys were involved in a dispute over the division of attorney fees which involved separate suits for medical malpractice and products liability. They had a fee-splitting agreement. To simplify convoluted facts, one attorney Fitzpatrick was handling the products case, and a second attorney Allen was handling the malpractice case and had been an attorney in the products case. The products case settled with a confidentiality clause, and Fitzpatrick held the settlement funds. Allen sued for fees. The court rejected Fitzpatrick’s arguments that he did not have to disclose the settlement amount because of the confidentiality clause. The court ordered him to disclose the amount to Allen. As a result of Fitzpatrick’s disobedience of the court orders, the court entered a default judgment as a discovery sanction. The Court of Appeals upheld the default judgment but reversed the amount of the award.

LAWYERS WHO SIGN CONFIDENTIALITY CLAUSES CAN BE EXPOSED TO CIVIL LIABILITY FOR WHICH THEY MAY LACK INSURANCE

Attorneys can incur civil liability for breach of contract if they agree to confidentiality clauses in clients’ settlement agreements and later breach them. Worse, the attorneys might have no malpractice insurance because policies normally do not cover contractual obligations that attorneys undertake. Therefore, attorneys should avoid agreeing to these clauses and should be careful not to be in a situation where an opposing party may allege that they had agreed to such a clause.

In a recent California case, an attorney may have inadvertently agreed to a confidentiality clause in the client’s settlement agreement when he signed the agreement beneath the phrase “approve as to form and content.” The California Supreme Court held whether the attorney intended to be bound to a confidentiality clause was a question of fact.

"That statute provides a person cannot knowingly or intentionally induce by threat or coercion a witness or informant"

Continued on page 37...
UNCOMFORTABLE ABOUT RACISM?
GOOD, MOST OF US ARE

By Hon. Darrin Dolehanty

Signs of racism, racial inequalities, and inequities surround our profession, our clients, the litigants in our courtrooms, and the cases brought for them and against them. Statistics show more than just disparity – they are evidence of the chasm of inequities that counteract the work we do to build and sustain a just, inclusive, civil society.

For instance, Black Hoosiers are incarcerated at rates far greater than whites. Black Hoosier adult men are imprisoned at rates far greater than white adults. (2020 Sentencing Project data from 2020 reports the ratio as nearly 5 to 1). The statistics are just as troubling when the lens is turned to children. The March 2021 Indiana Youth Institute’s Data Report indicates half of all youth in the justice system are a racial or ethnic minority, though only 1 in 3 children in Indiana are a race or ethnicity other than White. The wealth gap between races is tremendous. The 2021 “Kids Count” data book details fundamental needs lacking for some of our fellow Hoosiers – housing and economic stability.

“White Hoosiers own 91% of homes in the state, compared to 5.2% and 3.9% for Black
and Hispanic Hoosiers, respectively. And while the median income for white families is $61,054, Hispanic families earned over 20% less, coming in at $48,310. The gap is even larger for Black families, who earn 40% less than their white counterparts, with $36,323.”

Reflecting on these figures calls us to ask: How might our profession respond to the burgeoning call for racial justice in our state and in our time?

DEVELOP A COMFORT FOR BEING UNCOMFORTABLE

First, develop a comfort for being uncomfortable. Take risks. Engage in conversations that put your beliefs in peril. These suggestions are not new but applying them to racial justice feels highly charged. Our collective wounds from the past 15 months are still raw. Moving past instinctive hesitation to openly discuss race and equity issues opens the door to personal enrichment and an opportunity to join the build toward a more perfect union.

For the past several months, ISBA’s Open Conversations program has offered an excellent forum to explore, watch, listen, take chances, and challenge what we think we know about race and racism. The guest speakers open their hearts, expose their lives, and share their stories, building a safe and honest forum of discussion, trust, and enrichment. Real-life panelists share real-life stories that are head-shakingly, ear-ringingly, and jaw-droppingly hard to hear, and we are in their debt. The first half of the year’s sessions have been incredible; the schedule of upcoming sessions looks to continue that standard. Whether you join these sessions, or some other discussion forum, at least take the chance. Progress and growth come from gathering and processing new information and from challenging ourselves, even when the topic makes us uncomfortable. Accept that we are learning, not learned.

CHANGE YOUR LENS. OBSERVE. LISTEN.

Find your own definition for racism and challenge yourself to apply it to real life situations. If you are looking for a start: Racism is the belief that a person’s race and the color of their skin determines their worth, and that racial differences lead to the inherent superiority of a particular group, concurrent with the inferiority of all others. Hold your working definition up to what you are watching, listening to, noticing. Consider others’ definitions of racism. Practice articulating your observations and risk sharing them with someone else. Ask their thoughts. Accept their feedback.

INSIST ON RELIABLE DATA

Data comes at us from every direction. Recognizing valid data from junk data may not be as easy as we would like. Insist on current, valid, meaningful data. For example, Indiana’s Juvenile Detention Alternatives Initiative has pulled case-based race and equity inclusion data from dozens of juvenile courts across the state and interprets this information into an understandable format. Similarly, the Indiana Criminal Justice Institute harvests, analyzes, and shares data on racial
disparities in juvenile court cases and shares this information openly so communities can identify and address localized race issues. The Indiana Supreme Court’s Office of Judicial Administration has created the Office of Diversity, Equity, and Inclusion, recruiting Dr. Gina Forrest as Chief Diversity Officer and Ms. Princess Darnell as DEI Coordinator, to guide us and challenge us in better understanding and utilizing these and other sources of information.

**BE INTENTIONALLY CRITICAL**

Be critical in your observations and actions. Come to recognize inequities when they occur. Prepare and practice resistance and responses to racist comments, actions, practices, and beliefs. For Family Courts across the state, the significant role of trauma is garnering more and more attention. Being “trauma-aware” and having a “trauma-informed courtroom” are explored in continuing education forums – learn about these topics. A “trauma-informed” approach is generally guided by the Four Rs:

**Realization about trauma and how it affects people;**

**Recognizing the signs of trauma;**

**having a system that can Respond to trauma; and**

**Resisting re-traumatization.**

A similar approach should be explored as one route to a better understanding of issues of race and racism. Programs such as *Open Conversations* offer ways for greater **REALIZATION** of race issues and how those issues affect our communities, our workplaces, our people. Being “race-aware” offers a fresh lens to help us better **RECOGNIZE** daily signs of racism and institutionalized policies that appear race-neutral on their face but are far from it in application. Having a “race-informed” office, firm, or courtroom prepares us to **RESPOND** to racist comments, acts, and practices when they happen, and to **RESIST** racism in our personal and professional lives.

Racism, racial intolerance, and xenophobia permeate our communities. It remains to each of us as legal professionals to stand against racial prejudices and racists attitudes. Bring your own sense of race issues to open discussion. Risk being wrong. Our profession does not favor wrong. We earn our keep by being right. Leave behind the need to be the expert. Dare to learn. Relearn what you think you know. It requires only time and a commitment to discovery, to start.
CELEBRATING TEN YEARS OF THE LEADERSHIP DEVELOPMENT ACADEMY

By Catheryne Pully

When then-ISBA Executive Director Tom Pyrz called me into his office to offer me an “opportunity to excel,” I was understandably skeptical, as this was code talk for “putting another project on your plate without removing anything.” We had a conference call with ISBA President Erik Chickedantz, who laid out his goal of creating a leadership program like one he had heard about in Alabama. I did a bunch of research about programs in other states, we created an amazing committee of dedicated ISBA volunteers, and the Leadership Development Academy was established.

COVID-19 disrupted LDA Class 9 and postponed LDA Class 10, so while we are celebrating 10 years of LDA, we only have nine classes in the books. Reflecting on those nine classes, there’ve been a lot of constants.

Every class has been to Muscatatuck Urban Training Center. I’m not sure how we pulled it off, but the first LDA Class got to ride in army Blackhawk helicopters. Most classes
have played paintball, which has resulted in only couple minor injuries. We’ve seen military special operators train, sheltered in creepy basements from tornadoes, slept in barracks, eaten powdered eggs, played with goats, met Sahara the camel, been moved to tears by Veterans Treatment Court graduates, gotten lost in a maze of tunnels and enjoyed the “sounds of freedom” while trying to sleep.

Every class has also been to the Indiana Statehouse. Most have met with the Governor, most have met with state representatives and learned more about the legislative process. Every class has met every member of the Indiana Supreme Court and many members of the Indiana Court of Appeals. Every class has been treated to the magic of Pat and Mary Jo. Eight times now (eight, not nine, because I missed one year due to a Navy mobilization) – eight times I have seen Pat and Mary Jo take 25 lawyers who didn’t know each other and turn them into a functioning group of cohorts who could lower a hula-hoop or flip a table cloth (okay, well, not everyone could, but it was a fun exercise). So many things that the classes have in common.

But every class has been different. Each had its own personality. And each class has taught me something about servant leadership, relationships, and about the practice of law.

Every ISBA president has been supportive of the program and some have been all-in, attending...
every LDA session during their year as president. While the goal of the program isn’t to create bar leaders, many LDA have ascended to leadership positions in the ISBA. The current Board of Governors has 14 LDA alumni, the incoming House of Delegates Chair-Elect is an LDA grad, and the state bar’s committees and section leadership positions are full of LDA grads.

Indiana Supreme Court Justice Steven David has spoken to every class, either at graduation or at Muscatatuck, or both – and he usually tells them it should have been called the Leadership Enhancement Program, because they are already leaders. I still think “Development” is accurate, because we’re all still learning and growing (or we should be). I know one thing for sure: The program and its participants have enhanced my personal and professional life in ways I’m still discovering, and I am grateful for that. Cheers to another 10 years of LDA.

Catheryne Pully is the ISBA Director of Outreach and Partnerships, and is the staff director of the Leadership Development Academy. Many LDA alumni affectionately refer to her as the LDA Den Mother. She has helped administer the program each year since its inception except for one, in which she was mobilized with the U.S. Navy.

Special Feature: LDA Alumni Through the Years
Get to know each member of the LDA classes. Learn about their careers as they participated in LDA, and find out what they’re up to now. Visit inbar.org/LDA to read the feature.

2022 LDA Class Applications Open
Applications are now open for the 2022 LDA class. Lawyers looking to develop their leadership skills can visit inbar.org/LDA to learn more about the program and apply. The cohort will participate in the following sessions:

Session 1
(Fort Harrison): January 13-15

Session 2
(Statehouse): February 21-22

Session 3
(New Harmony): March 17-18

Session 4
(Muscatatuck Urban Training Center): April 7-8

Session 5
(Lake County): May 19-21
In June, the Indiana Supreme Court issued opinions addressing warrantless searches, vehicle forfeiture, Miranda warnings, and the informer’s privilege. The Court of Appeals decided cases involving depositions of child witnesses, corrupt business influence, and the right to public trial. Select opinions are summarized below.

**WARRANTLESS SEIZURE AND SEARCH OF ARRESTEE’S VAN UNDER PLAIN VIEW AND INVENTORY SEARCH EXCEPTIONS**

In *Combs v. State*, No. 20S-CR-616 (Ind. June 3, 2021), police did not violate James Combs’s Fourth Amendment rights when they conducted a warrantless seizure and inventory search of his van following an accident. The court held police properly seized and inventoried the van as an instrumentality of Combs’s crime of leaving the scene of an accident. At the time of seizure, the officer reasonably believed the van would be useful in prosecuting Combs and its incriminating character was immediately apparent. And once seized, police lawfully...
impounded the van for towing and conducted an inventory search at the scene under the police department’s “thorough and reasonable” written tow policy. Id. at 13. Justice Goff dissented, believing the state failed to show officers needed the van itself to solve the OWI or leaving accident scene investigation and evidence obtained during the inventory search should have been excluded as fruit of the poisonous tree.

HARSHNESS OF VEHICLE’S FORFEITURE GROSSLY DISPROPORTIONATE TO THE GRAVITY OF CRIME

In State v. Timbs, No. 20S-MI-289 (Ind. June 10, 2021), a 4-1 decision, the Indiana Supreme Court affirmed the trial court’s order to return a seized Land Rover to Timbs. The majority determined Timbs met his high burden of showing the harshness of the forfeiture was grossly disproportionate to the gravity of his underlying drug dealing offense and culpability for the Land Rover’s misuse, and therefore unconstitutional under the Eighth Amendment Excessive Fines Clause. In so holding, the court declined the state’s invitation to reconsider the proportionality test developed in State v. Timbs, 134 N.E.3d 12 (Ind. 2019), for examining forfeitures under the Excessive Fines Clause.

NONCUSTODIAL INTERROGATION AT POLICE STATION

In State v. Diego, 20A-CR-227 (Ind. June 9, 2021), a 4-1 majority of the Indiana Supreme Court reversed the suppression of Domingo Diego’s statements made during a police stationhouse interview, finding Miranda warnings were not required because he was not subjected to custodial interrogation. Distinguishing State v. E.R., 123 N.E.3d 675 (Ind. 2019), where statements were suppressed involving the same detective, the majority concluded the totality of objective circumstances surrounding the interrogation would make a reasonable person feel free to end the questioning and leave. Justice Goff dissented, arguing in a 12-page opinion Diego’s limited-English proficiency could have kept him from knowing he was free to leave.

INFORMANT’S FACE-TO-FACE INTERVIEW TRIGGERS APPLICATION OF INFORMER’S PRIVILEGE

In State v. Jones, No. 20A-CR-664 (Ind. June 22, 2021), the Indiana Supreme Court reversed the trial court’s order directing the state to produce a confidential informant for a face-to-face interview, finding the informant’s identity would be inherently revealed through their physical appearance at such an interview. Thus, the state met the threshold requirement to show the confidential informant’s privilege applies. The burden then shifts to the defendant to show why disclosure of the informant’s identity is relevant and helpful to the defense or is necessary for a fair trial. The court remanded to the trial court to engage in a balancing inquiry to determine whether an exception to nondisclosure is warranted.

COURT OF APPEALS DECISIONS


Lappin v. State, No. 20A-CR-2208 (Ind. Ct. App. June 14,2021) (Court found no violation of the defendant’s right to public trial when, during the COVID-19 pandemic, the trial court limited public attendance to audio-only during voir dire and limited public seating in the courtroom during the trial).


The full texts of all Indiana appellate court decisions, including those issued not-for-publication, are available via Casemaker at inbar.org or the Indiana Courts website at in.gov/judiciary/opinions. A more in-depth version of this article is available at inbar.org.
THE SECRET HISTORY
OF THE FLOYD COUNTY
BAR ASSOCIATION

MINUTES REVEAL SHOCKING ACTS OF
CIVILITY AND CIVIC RESPONSIBILITY!

By Derrick Wilson

Over the last few months, one of my guilty pleasures has been watching the show *Drunk History*, which combines interesting historical narratives with a semi-lucid storyteller who is heavily impaired by alcohol. Inspired by this premise,¹ I embarked upon a mission to learn more about the Floyd County Bar Association. I have practiced law for 30 years in Floyd County. After exhaustive research,² I learned the shocking history behind our association.

Floyd County, Indiana, was incorporated in 1819 and is the second smallest county in the state by land mass. If you continue south from New Albany, you will soon be swimming in the Ohio River and eventually either drown or reach the shores of Louisville, Kentucky.

Local bar members apparently formally organized the association around 1919. As part of the bylaws, the members agreed to a fee schedule for common legal matters. Members were to report any violation of these rules. According to the fee schedule, plaintiff's attorneys were entitled to a contingency fee of 25% before trial and 33 1/3% after trial in Circuit Court.³ Defense attorneys fees were based upon the amount in controversy. Defense counsel received $25 for claims involving $100 or less. The practicing members of the bar signed off on the bylaws and the fee schedule. This tradition of a signed roll of attorneys for the Floyd County Bar Association generally stayed in effect until the 1980s. The original signatures of all the lawyers during this time are still in the minute book. The minutes are written testimony to a number of shocking matters.
A. THE FLOYD COUNTY BAR ASSOCIATION ALWAYS HAD A HIGH DEGREE OF CIVILITY

Bar association minutes cover hundreds of pages and date back to 1860. The earliest record is a resolution noting the passing of a local member of the bar, which has become a long-standing practice. A large portion of those pages are devoted to flowery resolutions mourning the loss of local bar members. Several resolutions start with language such as, “Man that is born of woman is of few days and full of trouble. He cometh forth as a flower and is cut down. He fleeth also as a shadow and the place that knew him shall know him no more forever.” In another resolution, the bar noted that “the pale horseman has again invaded our ranks and taken from us another of our fellows.”

In 1945 when Judge John Paris passed away after serving as Floyd County Circuit Court Judge for over 30 years, the bar association held an elaborate memorial service. The transcript of that service is still available because Judge Paris’ widow was unable to attend the actual service. One of the speakers was Sherman Minton, who would go on to serve on the U.S. Supreme Court from 1949 through 1956. Minton retired from the U.S. Supreme Court and returned to New Albany. The presenters’ remarks at the service come across as a form of prose or poetry. The records also reflect a number of memorial resolutions from adjoining county bar associations and judges. In the 1950s, an attorney named Charles Black passed away and the bar association noted his passing by way of the usual resolutions. The resolution noted that he was admitted to the bar in 1931 as the first African American member of the Floyd County Bar Association. At the time of his death, he was also the only African American member of the Floyd County Bar Association.5

The minutes do contain some instances where bar members are called out for transgressions. In 1924 the bar association set up a committee to address the “immoral conduct” and “moral turpitude” apparently exhibited by a lawyer. The association noted if such charges were true, the proper steps needed to be taken and a proper order made for his disbarment. Curiously, the salacious details about the nature of the conduct are lacking.

B. THE BAR ASSOCIATION CONSISTENTLY HAD A STRONG SENSE OF CIVIC RESPONSIBILITY

In 1929, the bar association passed a resolution complaining about the intolerable conditions at the courthouse and requesting the matter be resolved immediately. Apparently, juries did not have a space to privately deliberate without interruption because the Floyd County engineer had taken part of the space that was supposed to be used for juries, meaning people would wander through while juries were deliberating. Additionally, the association noted that, “[s]ince women have been given equal rights with men they are not only eligible for jury service, but this is one of their duties” but, if a woman on a jury had to use the restroom, she had to be escorted out of the building to address her personal needs, a “most embarrassing position” according to the resolution.6 The bar pointed

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out the deplorable nature of the situation and noted that this violated Indiana law.

John Paris was an icon in Floyd County serving as the Circuit Court judge for decades. In 1935 he had the opportunity to take a newly created federal position. The bar association tendered a resolution noting his commitment to the county and respectfully asking he decline the post and continue to serve as judge. It appears he took their advice.

In 1947 the bar association president set up a committee to address the unauthorized practice of law by various entities and to send cease-and-desist letters to the guilty parties. In 1950 the bar association considered a request from local members of the VFW and the Floyd County Medical Association Auxiliary to adopt a resolution against socialized medicine. The auxiliary letter strongly noted “compulsory health insurance has been the forerunner of a complete socialist state, with history providing us. We can be certain the same state of government control will take place over our very lives if we delegate more and more responsibility for our welfare to our government.” The matter was tabled.

During the same meeting the bar association president presented a letter from the local VFW requesting all lawyers in Indiana be required to “sign non-Communist loyalty pledges, with disbarment as a penalty for refusing to sign or for admissions of being a communist or fellow traveler.” After discussion the bar association sent a letter to the VFW indicating the oath taken by lawyers on admission to practice law adequately covered the issue of loyalty and the bar association had no right to disbar an attorney since that power was left to the Indiana Supreme Court.

Over the years, the bar association reviewed proposed legislation that affected local lawyers and sent letters to provide their views. The bar association lobbied local officials regarding the creation of judicial posts and updated court facilities. The association was active in the Indiana State Bar Association. The minutes reflect specific instructions being given to members serving on the House of Delegates regarding substantive issues under consideration.

The minutes from the 1950s and 1960s reflect many items going on with the association. In 1955, apparently a controversy arose over how an attorney was portrayed on a television variety program and the bar sent the offending sponsor of the show a resolution censuring them for the attorney’s portrayal. In the 1950s, apparently a lot of lawyers worked on Saturdays. In 1956 a bar member moved that all members close their offices on Saturday, but somehow lost the motion.

The bar association was probably somewhat ahead of its time by addressing attorney advertising indicating, by way of motion in 1957, that the bar had no objection to the telephone companies soliciting boldface type for its telephone directory from attorneys. During the same meeting, the association passed a resolution requiring members to rise when the judge enters the courtroom. In 1958, the association organized a celebration for Law Day U.S.A., including a mayoral proclamation and participation by local radio stations. This was the first Law Day. Dwight Eisenhower created this special day in 1958. This was several years before Law Day was recognized by Congress.

In 1960, the bar considered and rejected the concept of nonpartisan selection of judges in Indiana. In 1963, the Indiana Trial Lawyers Association asked the Floyd County Bar Association to support a resolution to repeal the guest statute which limited the ability to recover for certain plaintiffs. The measure passed over the objection of one Richard L. Mattox, my former partner and avid defense lawyer.

In the early 1960s, the controversial boldface type advertising rule came into question again. In 1963 an Indiana legal ethics opinion stated that the listing of a lawyer’s name in distinctive type was condemned. Several members complained this issue had been previously approved by the local bar association, but the bar encouraged lawyers to discontinue the use of boldfaced listings. In 1969, the bar approved a proposal involving counsel for indigent defendants and a method of payment for counsel. This was two years before Indiana took up a state public defender statute.

Over the years, the minimum fee schedule for bar members largely remained intact with frequent increases to the minimum fees. The fee schedule took a hit in 1973 when the bar association, at a special

“During the same meeting, not so coincidentally, the bar voted to abolish the fee schedule.”

In 1958, the association...
meeting, noted that the Department of Justice indicated that it would begin to take action against some of the larger bar associations in the United States because the fee schedules were considered a form of price-fixing. During the same meeting, not so coincidentally, the bar voted to abolish the fee schedule. In 1979, the association received a request by a medical association regarding doing a presentation on socialized medicine; the bar politely declined that request. In 1987, the association went on record urging the Indiana Supreme Court to adopt an IOLTA program. In 1988 the bar passed a resolution requiring mediation first before all modifications in family law cases excluding contempt. This resolution happened several years before the Indiana State Bar Association formally adopted ADR rules.

I officially joined the bar association in 1991. At the time, the bar hosted a program at local high schools every year for Law Day, continuing a tradition that started 40 years before. One of my bosses at the time, Frank Mattox, actively worked on countless projects for the bar including local court rules for family law cases, uniform financial disclosure statements, mandatory parent education classes for new divorce cases, and mandatory malpractice insurance for lawyers statewide. The bar association continued to address issues of the unauthorized practice of law by local companies. In 1998, apparently because no one else wanted the job, I became president of the Floyd County Bar Association for a year. This resolution happened several years before the Indiana State Bar Association formally adopted ADR rules.

Following traditions which are now over 150 years old, the Floyd County Bar Association has consistently honored members who have passed away with a memorial service. The only interruption in this practice has been the restrictions imposed by COVID-19. Several lawyers have expressed regret this tradition could not be kept up and the need to restore that practice as soon as possible. A number of our members have gone on to become leaders in the Indiana State Bar Association, including Jim Bourne and Todd Spurgeon who served as ISBA presidents.

So, there you have it – the now not-so-secret history of the Floyd County Bar Association. I am now challenging other associations to tell their stories so that the good work of other county bars doesn’t remain a secret.

Footnotes

1. The author can neither confirm nor deny that a small amount of alcohol may have been consumed during the drafting of this article.
2. In fairness, I reached out to the prior bar association president and had him email me the scanned copies of the minutes.
3. It appears that inflation has not hit contingency fee agreements for several decades.
4. And whose name is on the bridge connecting Kentucky and Indiana which I can see from the window of my office every morning.
5. Sadly, in 1960, the Floyd County Bar Association voted against the integration of the State Bar Association.
6. Indiana signed the 19th amendment in 1920 granting women the right to vote. According to the Indiana history blog, the first all women jury in Indiana happened in 1920 https://blog.history.in.gov/tag/indianas-first-jury-of-women/
7. Interesting, how history often repeats itself.
8. One has to question why we needed a resolution on this.
9. Although the bar association tackled a number of important, substantive issues involving the local bar over the years, some of the minutes are very entertaining. In March 1988, the minutes reflect the Circuit Court judge showed up two hours late with copious apologies and shared a few ribald stories with those still in attendance. It notes that his apologies were quickly accepted and after one round of drinks was restored to the good graces of the bar.
10. In reviewing the minutes for this article, I had to smile when reading the minutes from September 1996 which stated that the secretary-treasurer gave his “perfunctory thankless” report since I was the author of those minutes.
INDIANA EXPANDS LAWYERS ABILITY TO USE TRADE NAMES

I. 2021 Update to Rule 7.5 expands scope of permissible lawyer trade names

If you have ever dreamed of renaming your firm to distinguish your practice from your colleagues in the law, get excited. The 2021 amendment to Rule 7.5 may finally give you the chance to describe your unique attributes in your firm’s name. Breaking with the tradition that Indiana lawyers may practice under strictly informational firm names, the 2021 update to Indiana Rule of Professional Conduct 7.5 expands the scope of permissible law firm names by removing most restrictions on trade names. Rule 7.5(a) now provides:

A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade
name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

Prior to 2021, Rule 7.5 limited Indiana lawyers’ use of trade names to factual descriptions of the following:

- the names of lawyers actively practicing in the firm;
- deceased or retired lawyers who had practiced in the firm;
- the field of law in which the firm concentrates its work;
- the geographic location of the firm’s offices; and
- the firm’s language fluency.

These limitations were consistent with Indiana’s status as one of the more conservative states when it comes to regulating lawyer advertising. For instance, many states permit a lawyer to advertise results and statistical outcomes, provided the data is accurate and accompanied by a disclaimer that results may not be typical. Indiana has declined to update its rules to allow lawyers to advertise results and statistics. Even with the update to Rule 7.5, lawyers must be cognizant of the restrictions imposed by Rule 7.1.

II. Trade names must not be false or misleading

Importantly, Rule 7.1 prohibits lawyers from making a “false or misleading communication about the lawyer or the lawyer’s services.” Comment [1] reminds that Rule 7.1 applies to “all communications” about a lawyer’s services. Further guidance comes from Comment [5] to ABA Model Rule 7.1, which explains “[f]irm names, letterhead and professional designations are communications concerning a lawyer’s services.” Accordingly, Indiana lawyers must ensure any newly adopted trade name is not misleading. Similarly, because Rule 7.1 generally bars comparisons to other lawyers, the authors of this article advise you against offering services under names akin to “Most Successful Litigators in Indiana.”

In contrast to superlatives, comparisons and other trade names that might mislead consumers by creating unjustified expectations, it appears Indiana lawyers can use trade names describing their practice style. Thus, a lawyer could practice under the name “Prudent Advisors” or “Compassion Injury Law.” A lawyer might even be able to get away with something nonsensical in a name such as “Lawyers Who Like Llamas” although it is not at all clear it would be a commercially viable option. It also appears the door is open for lawyers to coin new words that convey a sense of the lawyer’s values or practice style. Without mentioning any famous trade names in this article, one can imagine certain brands names for camera film, tissues, and copy machines that started out as made-up words. With a clever marketing team, Indiana lawyers now can create a wholly unique brand.

III. Applying Rule 7.5 and 7.1 to lawyer communications

While there are no Indiana disciplinary cases discussing the new 7.5(a), there are a few cases that demonstrate what the Indiana Supreme Court has considered to be a false or misleading trade name. In In re Miller, 462 N.E.2d 76, 78
(Ind. 1984), the respondent posted road signs in Marion County using the trade name “Area Attorneys.” Without much explanation, the court's order concluded the respondent's signs were “misleading as to the identity of the respondent practicing under said trade name,” presumably because the respondent was a sole practitioner, not a plural group of “attorneys.” *Id.*

Similarly, the respondent in *In re Schneider*, 710 N.E.2d 178 (Ind. 1999), operated a solo law and accounting practice with no employees and used a single letterhead. The letterhead listed the name of the practice as “Professional Services Group” and listed names of attorneys and CPAs who were not actually associated with the respondent's practice. The Indiana Supreme Court found this practice was “deceptive and misleading” and explained it “would understandably create confusion regarding the identity and responsibility of those practicing law or performing services in support of the law practice. It leaves the impression that those listed are associated with the law practice, when in fact they are not.” *Id.* at 180.

At the time of the *Schneider* decision in 1999, the Indiana Rules of Professional Conduct prohibited trade names under any circumstances because of the belief they were “inherently misleading.” *Id.* at 179. Nonetheless, this name would likely be considered misleading today if used by a sole practitioner with no employees. As the Indiana Supreme Court explained, “[t]here was no ‘group’,” thus “[r]eferring to his practice as part of a group created a false impression that the other attorneys were associated with respondent in the practice of law.” *Id.* at 180. It is helpful to understand how other states are governing the use of trade names. South Carolina's Rule 7.5(a) is identical to Indiana's new Rule 7.5(a). In Ethics Advisory Opinion 03-04, the South Carolina Bar Association attempted to help attorneys navigate this rule. In that ethics opinion, the bar considered whether attorneys may “engage in the practice of law under the firm name, ’Capitol Counsel, L.L.C.’” The bar's conclusion was this trade name does not violate the South Carolina Rules of Professional Conduct.

“The concern of the Florida bar appears to be that legal consumers would be duped into thinking a lawyer is not focused exclusively on one area of law.”

Although trade names that imply “a connection with a government agency or with a public or charitable legal services organization” are problematic “both in their confusion for the client and the potential unfair advantage for the law firm in question,” the South Carolina Bar opined “Capitol Counsel, LLC” does not violate Rule 7.5 because in South Carolina:

No state agencies include the word “capitol” in their nomenclature. Without conducting an exhaustive review of all of this state’s “public legal aid agency(ies),” it seems unlikely that any such agency in South Carolina employs the word “Capitol” in its name. Inclusion of the corporate designation “L.L.C.” further clarifies that the entity is a private corporation, not a public entity.

Florida State Bar Ethics Opinion 93-7 provides a contrasting example of what could be considered a misleading trade name:

Use of a trade name such as “Entertainment Law Center” . . . could be misleading . . . if it falsely suggests to the public that members of the trade name firm limit their practice to entertainment law. Prospective clients could then reasonably infer that the trade name firm's members possess special skills and qualifications in the area of entertainment law that may not be possessed by attorneys who have chosen not to limit their practice to one area of the law, or that clients will be dealing with a firm whose members concentrate their efforts totally in one area of the law, when in reality those attorneys handle not only entertainment law matters but other types of cases as well.

The concern of the Florida bar appears to be that legal consumers would be duped into thinking a lawyer is not focused exclusively on one area of law. There does not appear to be any concern with a trade name that accurately describes a focused law practice, especially in Indiana where Comment [2] to Rule 7.2 explicitly permits lawyers to advertise the fields in which they practice.

As with most ethical guidelines, Rule 7.5 is a rule of reason and should be interpreted with the goal of consumer protection in mind. For instance, comment [5] to ABA Model Rule 7.1 provides guidance that a firm name that could imply an association with a legal aid organization or a government agency might require “an express statement” disclaiming such association to avoid a misleading
implication. Likewise, legal ethics commentators opine that disclaimers should be used to remedy any confusion that might arise from geographical trade names. Trade names may be valuable marketing tools if they are either informative or creative and memorable. Lawyers who carefully assess the potential interpretations of a trade name will enjoy the benefits of the new Rule 7.5.

Footnotes

1. See, e.g., Illinois Rule of Professional Conduct 7.1, Comment [4] (“The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.”); Pennsylvania Rule of Professional Conduct 7.1, Comment [4] (same). Cf. Indiana Rule of Professional Conduct 7.1, Comment [2](2) (“a communication will violate Rule 7.1 if it contains statistical data or other information based on past performance or an express or implied prediction of future success.”).

2. See Rule 7.1, Comment [2](5) (barring communications that “compare[] the services provided by the lawyer . . . with other lawyers’ services, unless the comparison can be factually substantiated.”)


4. https://www.floridabar.org/etopinions/etopinion-93-7/#:~:text=The%20inquiring%20attorney%20requests%20an,Opinions%2083%2D1499%20and%201253


PRACTICAL TAKEAWAYS

• Choose a trade name that is honest and not misleading
• Choose a trade name that does not violate Rule 7.1 by listing statistics, past results, or other impermissible content
• Choose a trade name that does not contain a superlative or other unverifiable ranking
• Test your proposed trade name with other lawyers and non-lawyer consumers to ensure that they do not find it misleading
• Consider a disclaimer if you are concerned about ambiguity
HONESTY AND
RAW TRUTH
A STORY OF ADDICTION,
SUPPORT, AND BECOMING
INTENTIONAL ABOUT LIFE

By K. Aaron Heifner

I grew up in central Indiana, in a town of approximately 5,000 residents where everyone knows everyone. I had loving parents and grandparents who were always present. I was the middle child with a sister and brother, each of us two years apart. My parents where 18 and 19 when my mother gave birth to my sister, therefore I was 20 years younger than my parents. I witnessed my parents working hard. Both attended and finished college when I was 10 or 11. I learned to value hard work.

I loved money. I was obsessed with becoming wealthy and all the material things that came with it. I was the kid who was mowing grass at age 9, selling vegetables from my grandfather’s garden and delivering newspapers at age 13. My drive for success and money was encouraged by my extended family. I was so focused on success that I avoided alcohol and marijuana in the early 90s while attending high school. I played sports all four years which kept me busy. Waking at 4 a.m. to deliver newspapers seven days a week required discipline.

I attended college immediately following high school, but I did not enjoy my classes. I did enjoy the freedom and I found I loved the way alcohol made me feel. As with many college students, Thursday, Friday, and Saturday nights involved drinking alcohol, usually to excess for me. I was interested in making money which allowed me to welcome the risk of home ownership at age 19. I purchased a four-plex and leased out the other three units. At the same time, a young doctor who was a family friend was looking to invest in real estate. He approached me and we went into business together in 1997.

By this time, at age 20 and buying real estate with a doctor, I determined a college education was a waste of time. My business partner and I started a construction company to build apartments. Within two years we had over 40 properties and I was overwhelmed. The drinking increased and I found I could escape the stress by consuming prescription pills. Instead of asking for help, I escaped further into my addiction until I was unable to live without using both alcohol and drugs daily. My family intervened in October 2001, and I landed in Fairbanks for rehab. I learned many tools during treatment which I use in recovery today.

With many people in early recovery, I thought I was fine after 22 months sober. Alcohol was not a problem for me, I just had too much stress for a young person. In less than two years I was fortunate to make it back to rehab. My addiction became more destructive as I added other drugs. By the grace of God, my family was still there for me as long as I was willing to get sober. This same cycle continued for another six years, and I entered five more treatment centers between 2005 and 2011. During brief periods of sobriety, I had surrounded myself with great people who ran my real estate company while I was missing in action. By 2011, the Board of Realtors had seen enough of my unethical behavior. I had managed
me without sharing those with Joe or my two relief pitchers, Scott and Justin. I must deal with my emotions today. I love practicing law but what we do is tough and stressful. I am dealing with particularly important matters in someone’s life. When a judge makes the “wrong” decision, I get angry and I still lose it at times. Three weeks ago, a judge denied my petition and I completely lost control. My wife said to me, “You better call Joe.”

I also am grounded in my faith. I attend church, serve there, and worship every Sunday. My church is extremely important for my recovery. I frequently find myself telling clients they must find what works for their recovery. Recovery must be personal. Whether you attend 12-step meetings, which I support and take part in at times, or you are a member of a local church, you must find a place to belong. I do not spend time with others who do not value the same principles I hold dear. I am selfish with my time today. I love my family and friends and spend most of the time I am not at work with them. My family and friends are available to help me, always. Today I am eager to ask for help. I could not find recovery from alcohol and drugs without the help of others.

Most attorneys are independent, high achievers who handle anything in their path. You cannot handle addiction to alcohol or drugs without help and support from others. Groups such as the Judges and Lawyers Assistance Program are there to help, but you must reach out and ask. I have found that nearly every attorney I have asked for help is eager to lend a hand to help a fellow colleague. It is who we are.

Today I am blessed to practice criminal defense, family law, and personal injury law. I get to work with two brilliant attorneys, Spenser Benge and Thomas Beeman at Beeman Heifner Benge P.A. As every practicing attorney knows, our work is incredibly stressful. As a person in recovery from drugs and alcohol, I must manage the level of stress in my life. I never allow major emotions to consume me without sharing those with Joe or my two relief pitchers, Scott and Justin. I must deal with my emotions today. I love practicing law but what we do is tough and stressful. I am dealing with particularly important matters in someone’s life. When a judge makes the “wrong” decision, I get angry and I still lose it at times. Three weeks ago, a judge denied my petition and I completely lost control. My wife said to me, “You better call Joe.”

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Most attorneys are independent, high achievers who handle anything in their path. You cannot handle addiction to alcohol or drugs without help and support from others. Groups such as the Judges and Lawyers Assistance Program are there to help, but you must reach out and ask. I have found that nearly every attorney I have asked for help is eager to lend a hand to help a fellow colleague. It is who we are.
For the third time, the Supreme Court addressed the constitutionality of the forfeiture of Tyson Timbs’s Land Rover in *State v. Timbs*, No. 20S-MI-00289, (Ind. June 10, 2021). The U.S. Supreme Court in 2019 held that the Eighth Amendment’s Excessive Fines Clause was incorporated under the Fourteenth Amendment’s Due Process Clause to apply to the states. But the court left it to the states to decide how to determine whether a fine is excessive. In *Timbs II*, the Indiana Supreme Court found forfeitures like Timbs’s Land Rover could be constitutional if (1) the forfeited property was an instrument in the underlying offense and (2) the penalty’s harshness was not “grossly disproportional” to the offense’s gravity and the claimant’s culpability. The Supreme Court found the Land Rover was used in the underlying offense but remanded to the trial court to determine whether Timbs could establish gross disproportionality. After a hearing, the trial court found he did.
The Supreme Court affirmed. The court recognized that Timbs’s use of the Land Rover in committing the underlying offense put him at the “high end of the spectrum” of culpability. Yet the punishment was harsh and the underlying offense’s severity—dealing in a controlled substance—was minimal. The Supreme Court affirmed the trial court’s analysis on the variety of factors including the fact the Rover was Timbs’s only asset, its forfeiture made it difficult for him to maintain employment and seek addiction treatment, the vehicle’s value was three-and-a-half times the maximum fine of the underlying offense but only the minimum penalty was actually imposed by the sentencing court, and there was minimal harm caused by dealing two grams of heroin to an undercover police officer to feed Timbs’s addiction to drugs.

In City of Marion v. London Witte Group, LLC et al., No. 20S-MI-00567, (Ind. June 17, 2021), the Supreme Court adopted and applied the adverse domination doctrine, which tolls the statute of limitations for claims by corporations against officers or others who controlled the entity and acted against its interests.

During the tenure of Marion Mayor Wayne Seybold, the city entered into an agreement to contribute $2.5 million to redevelop an old YMCA building into a hotel, restaurant, retail, and recreation space for a total of $5.5 million. As alleged in the complaint, Mayor Seybold directed the hiring of the accounting firm London Witte to oversee the administration of funds in 2009. In the ensuing years, the city alleged there were many disbursements for never-completed work on the building, monetary transfers
between developers, London Witte, and Mayor Seybold’s campaign and family members, and a City Council investigation faltered due to non-cooperation at Mayor Seybold’s direction. In 2016, a newly elected mayor hired an expert to assess the YMCA situation that was alleged to bring into question nearly $1 million of disbursements.

The city sued the developer, London Witte, and others, but on London Witte’s motion for summary judgment the trial court held the negligence and breach of fiduciary duty claims were barred by a two-year statute of limitation. The Supreme Court reversed the trial court in part and affirmed in part, adopting the equitable tolling doctrine of adverse domination as a logical corollary of Indiana’s discovery rule where the statute of limitations does not begin running until the plaintiff knows, or could have discovered in the exercise of ordinary diligence, it had been injured by tortious conduct. Under the doctrine, statutes of limitations are tolled until the corporate plaintiff is no longer dominated by malfeasant officers and directors. After surveying tests adopted by other jurisdictions, the court determined (1) intentional wrongdoing must be alleged; (2) the doctrine may apply to both private and municipal corporations; and (3) the doctrine extends to “outside” defendants who did not directly control a corporation but were nonetheless co-conspirators in the wrongdoing.

The court declined to resolve whether to follow the “disinterested majority” or the stricter “complete domination” control test because the question was irrelevant in the context of Mayor Seybold’s status as a “unitary executive.” Because the city established genuine issues of material fact as to whether Mayor Seybold intentionally failed to redress the city’s injuries and whether London Witte aided him, the case was remanded to the trial court for fact finding and application of the new doctrine.

In a case involving a divorce mediation gone awry, the Supreme Court held the admission of documents produced in anticipation of mediation were not admissible when a party later challenged the validity of the mediation agreement. Berg v. Berg, No. 21S-DC-00320, (Ind. June 29, 2021). The ex-husband disputed the plaintiff’s attempt to challenge the agreement under Trial Rule 60(B) because the challenge rested on balance sheets exchanged for the mediation. The court held Evidence Rule 408 protects as confidential any information exchanged specifically to assist in mediation, even if it was disclosed before the mediation. Because the balance sheets were exchanged to facilitate settlement, the evidence was inadmissible because doing so would violate Rule 408’s purpose of promoting “candor by excluding admissions of fact.” The court also found two exceptions to this rule did not apply: evidence otherwise discoverable outside the mediation under Alternative Dispute Rule 2.11(B)(2) and the admission of evidence for other purposes such as showing witness bias or prejudice. Ultimately though, the court found the evidence could be admitted for purposes of the spouse’s breach of contract claim to show the husband’s breach of warranty to accurately reflect his financial condition.

“The ex-husband disputed the plaintiff’s attempt to challenge the agreement under Trial Rule 60(B)”
FROM SOUTHWESTERN INDIANA TO WEST POINT:
C. ERIK CHICKEDANTZ SPENT THE ‘60S IN SERVICE TO HIS COUNTRY

By Steph Weber

When C. Erik Chickedantz arrived at the United States Military Academy at West Point in the summer of 1959—a long way from his small southwestern Indiana hometown of Washington—he began his “plebe year” with a grueling eight-week basic training session known as “Beast Barracks.”

“It was very regimented. Reveille every morning at 0530, except on Sundays. A lot of military training,” recalls Chickedantz. “We’d march to classes and to the mess hall for three square meals. You didn’t get to eat much and had to sit up straight on the front half of your seat, [bring] the utensil up in front of you and [make] a 90-degree turn.” Meals were punctuated by upperclassmen’s rapid-fire questioning, designed to acclimate cadets to organizing their thoughts and actions amid chaos. “While the entire four years were one of ‘be on time and be prepared,’” he adds, “plebe year was designed to be particularly difficult.”

Academics were largely standardized, though cadets retained some choice. For athletics, Chickedantz chose track and cross-country, training under coach Carleton Crowell, the legendary West Point figure, who became a mentor and eventual namesake of Chickedantz’s youngest son.

Following graduation in 1963, Chickedantz reported to Fort Benning in Georgia for infantry training. He subsequently completed Airborne School, then Ranger School. “If you’re going to go forward [as] an infantry officer, getting additional training is basically career advancement,” he explains.

A four-week intensive dedicated to military parachuting, Airborne School was held at Fort Benning, as were the first of three phases of Ranger School. For phase two, the group traveled north to the mountains of Dahlonega, Georgia, and conducted rappelling and night vision patrol and navigation exercises. “Part of the survival training in the mountains included a rattlesnake lunch,” he adds. The final phase at Eglin Air Force Base near Pensacola, Florida, offered a chance to navigate swampy environments.
With airborne wings and ranger tab, Chickedantz was assigned in early 1964 to the 1st Battalion of the 502nd Airborne Infantry, a division of the 101st Airborne Division at Fort Campbell, Kentucky. There he prepared for a yearlong tour of duty in Vietnam, completing crash courses in the country’s history, culture and tonal-based language. He learned enough of the language to make a fair effort at communicating—and still remembers some to this day.

In January 1966, he deployed with U.S. Advisory Team 162. “Our job was to advise and assist the Vietnamese Airborne Division in planning and conducting combat operations, mainly in northern South Vietnam and [tactical zones] I and II Corps,” he explains. The team located enemy forces, like the North Vietnamese Army and Viet Cong units, and coordinated U.S. air and artillery support for the Vietnamese Airborne troops on the ground.

After six months in the field as the Assistant Battalion Advisor, Chickedantz spent most of the remainder of the tour in Saigon. Then, after a return to Fort Benning in January 1967 and a transfer to the 82nd Airborne Division at Fort Bragg, Chickedantz came back to Vietnam as part of a five-member Mobile Advisory Team.

“We were assigned to a regional Vietnamese infantry battalion and [trained] them to go on operations and nightly ambushes down in the IV Corps, which is in the delta south of Saigon, to provide as much security as they could for the populace,” he says. Located in Vietnam’s rural countryside, he advised and assisted local units, helping residents build schoolhouses and a water station, and spent time together celebrating holidays and weddings. “Putting aside the conflict, the Vietnamese people were very peaceful, polite and always [willing] to share a meal,” he says. “They were family-oriented and deeply religious—good people.”

In the summer of 1969, Chickedantz returned to the U.S., having fulfilled his six-year service commitment. He soon embarked on another lifechanging venture: law school at the University of Michigan.

Now a member of Burt Blee in Fort Wayne with a mediation practice, Chickedantz, who served as president of the state bar from 2011-2012, has nearly 50 years of experience in private practice. But the lessons he learned in the military still resonate. “The most effective and successful leaders are the ones that lead by the example they set,” he says. “And by that, I mean setting the standards for work ethic, discipline, knowledge of the job, dedication, honesty and showing respect and consideration for the people you work with—and probably more important, the people who work for you.”

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CRIMINAL LIABILITY FROM CONFIDENTIALITY CLAUSES CANNOT BE RULLED OUT

The language of confidentiality clauses or their enforcement could lead to a violation of I.C. § 35-44.1-2-2, Obstruction of Justice. That statute provides a person cannot knowingly or intentionally induce by threat or coercion a witness or informant in an official proceeding or investigation to “withhold or unreasonably delay in producing any testimony, information, document, or thing.” Even if an attorney is not charged criminally, an uncharged crime can result in disciplinary sanctions imposed by the Supreme Court.

CONCLUSION

Attorneys need to take the issues of confidentiality clauses in settlement agreements more seriously than they do. Though the clauses may be desired or valuable, they are no reason for attorneys to incur disciplinary sanction, civil liability, or criminal penalty. Careful and ethical attorneys will strive to eliminate those perils when they draft or review such clauses.

Footnotes

2. Rule 3.4 reads: “A lawyer shall not: (a) unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act. . . (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party. . . (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless: (1) the person is a relative or an employee or other agent of a client; and (2) the lawyer reasonably believes that the person’s interests will not be adversely affected by refraining from giving such information.”
4. Rule 5.6 reads: “A lawyer shall not participate in offering or making . . . an agreement in which a restriction on the lawyer’s right to practice is part of the settlement of a client controversy.”
5. Rule 1.16(d) reads: “Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests, such as . . . surrendering papers and property to which the client is entitled. . . The lawyer may retain papers relating to the client to the extent permitted by other law.”
7. e.g., Matter of Westerfield, 802 N.E.2d 927 (Ind. 2004).
8. Matter of Ross, 982 N.E.2d 295 (Ind. 2013). Rule 1.8(g) reads: “A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients . . . unless each client gives informed consent, in a writing signed by the client. . .”
11. This example happened in this writer’s practice.
12. Rule 1.8(h)(1) reads: “A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. . .”
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SPECIAL SERVICES


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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 hwwww.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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