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GAMING IN INDIANA

Gaming in Indiana
By Oliver M. Barie

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PROMOTING A CULTURE OF POSITIVE ENGAGEMENT

By Clayton C. Miller

Not long after becoming ISBA president, a neighbor of mine in Indianapolis shared his family scrapbook which included news clips and other items relating to his grandfather, attorney William W. Miller of Gary (not a known relation of mine) who was among my esteemed predecessors in this role. Sadly, that President Miller died a few months before the end of his ISBA term in 1931. Among the public encomia after his passing was this excerpt from a tribute by his close friend and Indiana Court of Appeals Judge Harvey Curtis: “He had the keenest appreciation of the opportunities afforded by his profession, and he fully understood that with these opportunities came also corresponding obligations.”

What do you suppose this meant some nine decades ago? What might it mean to us today?

Each reader can assess for themselves the many and various opportunities we enjoy by virtue of our JD degree. As for corresponding obligations, at a minimum I agree with Washington State Attorney General Bob Ferguson who, addressing the ABA House of Delegates earlier this year, called upon members of our learned profession to regularly "engage with the issues of our time."

We are not to be passive observers, quietly lamenting the current state of affairs, but rather pursuing with creativity and zeal improvement of our collective lot, not just as lawyers, but as citizens. The path of least resistance may be not to rock the boat, and one person’s positive change might be perceived as disruptive or as another’s loss. But it is my conviction that by virtue of our training and experience lawyers are uniquely suited to contribute constructively to the public discourse and societal progress. And I further submit that by advocating for the rule of law, equal opportunity, and rational decision making, we can indeed leave the world a better place for subsequent generations.

Whether liberal or conservative, progressive or otherwise, informed good-faith advocacy is essential for our democracy to achieve optimal outcomes. Especially in the current political climate, Indiana and our nation need lawyers’ voices to be part of the conversation. And our younger members are increasingly expecting their bar association to play a role. Input from member survey responses informed development of the
first area of focus specified in our latest strategic plan - “to educate and advocate for issues that align with ISBA's mission,” which includes empowering individual member advocacy.

Working for positive change isn’t reserved for only the weightiest questions or contexts. For example, while beyond the ISBA’s purview, PTAs, charitable boards, and church councils all benefit from the service and participation of wise honest brokers – a role I might add not limited to the senior members of our bar, but also available to newly minted lawyers bringing their fresh perspectives. Merrillville attorney George Carberry observed during his remarks at a meeting of the Lake County Bar Association I attended this past spring that each of us has “reasonable and attainable opportunities to use our time, talent, and resources to contribute to and enhance the positive culture of those institutions – personal, professional, charitable, and spiritual – in which we have chosen to spend our time.” He went on to note that all institutions have a culture, which can shift over time based on various influences and influencers.

I suspect most of us can recall instances when we’ve encountered negative influencers, including within the bar, who through their attitude or approach undermine cohesion, making the necessary work harder rather than easier by dint of their involvement. Healthy, productive cultures need nourishing from positive influencers to sustain and thrive. To be sure, some influences are beyond our control. But each of us can serve as an influencer for positive change. Is your work environment toxic? If you stick around, perhaps you can strive through word and deed to foster a more collegial culture. Have you joined a board that feels stagnant? Proactively seek opportunities to inject life and enthusiasm, even excitement, about your common purpose. Discouraged by prevailing policy priorities? Speak up to articulate a counter narrative reflecting your vision for a better neighborhood, community, state, or nation.

My wish for the ISBA as I prepare to hand the reigns over to my capable successor Amy Noe Dudas is that we foster a culture of engagement by our members. It’s the kind of culture displayed in one of my favorite law-related movies, “Bridge of Spies.” Expertly helmed by master storyteller Steven Spielberg and starring the great Tom Hanks as well as Mark Rylance in an Oscar-winning supporting actor role, this 2016 Best Picture nominee is based on the true story of Manhattan insurance lawyer
James B. Donovan. The genesis for Donovan's impactful involvement in international prisoner diplomacy is when the local bar association taps him to defend an accused Soviet spy in the 1950s.

To be sure, taking that assignment from the bar association was not all sunshine and accolades. Through the course of the film, we see vivid examples of the challenges Donovan faced both at home and abroad, as well as in court, representing first his client, and then later the U.S. government. At times doing the right thing exacted a toll on his family and law practice. The senior partner at Donovan’s law firm (played by Alan Alda), who had initially expressed enthusiasm for Donovan doing his patriotic duty, changes his tune when he sees Donovan mounting an actual defense of the foreigner on trial for espionage, and in one poignant scene the senior partner is shown shutting Donovan out of a meeting with a client after having redirected some of Donovan’s billable work to others. But the film also masterfully demonstrates the lawyer’s adept skill at negotiation, whether in the opening scene on behalf of his insurance company client or later for a young American graduate student caught on the wrong side of the under-construction Berlin Wall. Donovan's legal training and experience clearly served his clients well and, when coupled with a dogged determination to stand on principle in the face of not inconsiderable outside pressure, yielded impressive results. Although not covered in the movie, the real Donovan was later awarded the CIA’s Distinguished Intelligence Medal for his “performance of outstanding services or for achievement of a distinctly exceptional nature in a duty or responsibility.”

I recognize that to varying degrees we all have work or family or other commitments that require our attention and, well, commitment. My point is not that we should all drop what we’re doing, ignoring these other responsibilities in order to become crusaders for causes important to us. I suppose my goal is more modest but, hopefully if not profound, then at least resonant: To call-out the destructive forces of cynicism and apathy and their more extreme cousin hopelessness, and to elevate the benefits of hope and its natural extension, engagement beyond our immediate personal spheres. We won’t always be successful in pursuing a particular advance, nor even will we always make the right call in hindsight. But on balance, the best way – indeed, the only way – we move the needle of progress is by engaging with the issues of our time. Our bar, culture, community, society, and future will be better off for our individual and collective efforts. Thanks for reading. 🌟
AS MEMBERS LOOK TO HEALTH INSURANCE RENEWALS, ISBA HIGHLIGHTS LEGAL SERVICES HEALTH INSURANCE PLAN

The Indiana State Bar Association teamed up with UnitedHealthcare to provide a fully insured health care plan for law firms and legal service providers. As employers look towards open enrollment, here’s what they need to know about the health care plan for the Hoosier legal community.

WHY ISBA HELPED CREATE THE PLAN

“Members have been asking for health insurance since I was a young lawyer,” said Todd Spurgeon, ISBA past president and partner at Kightlinger and Gray. “As the solution provider for Hoosier legal professionals, it just made sense that ISBA would spearhead creating
this plan. Regulations made this incredibly difficult for a long time, but the opportunity finally arose for us to make this possible for large and small firms across the state.”

Though the regulations did not allow for ISBA to create a plan that covered solo practitioners, the association does hope to eventually find a way to help cover this prolific group.

WHO IS ELIGIBLE?

To be eligible, organizations must meet both of the following requirements:

- Have two or more full-time employees (second employee cannot be a spouse); AND
- Be members of the ISBA Employer Association. Membership is free, but 20% of the company’s Indiana licensed attorneys must be members of the ISBA. Learn more at www.inbar.org/employerassociation.

HOW DOES THE PLAN WORK?

In short, the plan allows Indiana law firms to join together to get benefits typically enjoyed by larger companies – including potentially lower premiums, reduced administrative costs, and more coverage options to help meet the needs of their employees.

The plan is medically underwritten, which means rates are determined based on the actual individuals within the plan. Companies with less than 20 employees must submit health forms for UnitedHealthcare to review before returning a customized rate. The health forms collect basic information about each employee in the form of yes/no questions. Employees are asked to provide additional details about their “yes” answers. Employees are also asked to provide a list of current medications.

While collecting and submitting these health forms can be burdensome, the return is a health coverage option that can be very reliable and predictable.

WHO BEST FITS THE PLAN?

This fully insured plan is designed just for Hoosier law firms and legal services providers. Employers with between two and 99 employees are the best fit. Because the plan is still just a few years old, it typically offers especially lucrative savings for “healthier” companies, while companies with several “high risk” employees may not receive as competitive rates – at least not this year.

As the plan, and the number of people covered by the plan grows, the rates will continue becoming more competitive for everyone.

ISBA STAFF USING THE PLAN

As an employer, the ISBA provides the plan to its employees.

“The plan returned significant savings for ISBA’s employee health care. Another big benefit is that as a medically underwritten plan, the rates should be more predictable, especially as the plan grows. That’s key for an association like ours that depends on long-term cost control,” said Executive Director Joe Skeel.

LOOKING AT THE FUTURE OF THE PLAN

ISBA is working to encourage adoption of the plan to aid its growth and help keep rates competitive.

Skeel says the goal is to have a dependable option for all law firms. “This plan might not be the best option for everybody, but we are delighted to say now there is an option for everybody. Our goal is to continue providing something that will support our members and ultimately the entire Hoosier legal community,” said Skeel.

GET STARTED

Now’s the time to ask your insurance broker for information about the plan. If you don’t have a broker, contact Ritman and Associates, ISBA’s endorsed vendor for its health insurance plan. Visit www.ritmanassoc.com or call 1-800-581-8810 for a quote.

If you aren’t the administrator at your company responsible for health coverage, consider making sure the responsible person knows about the option. ☀️
GAMING IN INDIANA
The history of gaming in Indiana can be divided into three distinct moments: 1) the pivotal State v. Nixon decision, whereby the Indiana Supreme Court ruled the Pari-Mutuel Wagering Act of 1977 unconstitutional; 2) the Indiana legislature’s passage of the 1989 State Lottery Act; and 3) the Indiana legislature’s passage of riverboat gambling in 1993. This two-part article will discuss these distinct moments in history, as well as the subsequent court challenges that combined to shape Indiana’s gaming industry.

STATE V. NIXON

For three consecutive legislative sessions between 1975 and 1977, the Indiana General Assembly tried to legalize pari-mutuel wagering. The first two attempts were thwarted by Governor Bowen’s veto. A third veto in 1977 was overridden by a Republican controlled House of Representatives and a Democrat controlled Senate, thus enacting the Pari-Mutuel Wagering Act (PMWA).

At the time of PMWA’s passage, the Indiana Constitution prohibited a state lottery. Article 15, Section 8 stated, “No lottery shall be authorized; nor shall the sale of lottery tickets be allowed.” The question of what is a lottery had been answered by the Indiana Supreme Court decision in Tinder v. Music Operating, Inc. The Court in Tinder held that a lottery is “a scheme for the distribution of prizes by lot or chance; especially, a scheme by which one or more prizes are distributed by chance among persons who have paid or promised a consideration for a chance to win them.” The Court reasoned the winning of a prize in a lottery is mainly dependent upon chance. Accordingly, the Court held that “if any substantial degree of skill or judgment is involved, it is not a lottery.”

As a result of PMWA’s passage, Tinder would be revisited by the Indiana Supreme Court. In May 1977, Joseph H. Nixon, publisher of the Wabash Plain-Dealer and vice-president of Nixon Newspapers Inc., which operated a chain of newspapers throughout Indiana, sued in Marion Superior Court the State of Indiana and...
Governor Bowen, claiming that the PMWA was unconstitutional. Indiana Attorney General Theodore L. Sendak, who had spent considerable time criticizing the measure over the previous three years, was now in the awkward position of having to defend the measure.

Nixon sought a declaratory judgment that the PMWA was unconstitutional and an injunction forbidding Governor Bowen from appointing members to the Indiana Racing Commission established by the PMWA. After a change in venue from Marion County Superior Court to the Johnson County Circuit Court, Judge Robert W. Young held for Nixon. Judge Young reasoned that pari-mutuel wagering constituted a lottery under Article 15, Section 8 of the Indiana Constitution. Subsequently, Attorney General Sendak would appeal to the Supreme Court on behalf of Governor Bowen and the State of Indiana.

On appeal, the Indiana Supreme Court affirmed the Circuit Court holding in a 3-2 decision. The majority opinion, dated January 5, 1979, was written by Justice Dixon Prentice and joined by Justices Givan and Pivarnik. The majority held that pari-mutuel wagering fell within the category of a lottery, both in the literal definition as prescribed in *Tinder*, as well as under a broader constitutional concept. The Court did not go so far as to overrule *Tinder* but noted that it was not “determinative of this case.”

The State (Sendak) argued that pari-mutuel wagering was not a form of lottery but a game of skill, thus *Tinder* would dictate the PMWA be held constitutional. While the Court acknowledged the strong argument that “picking horses for speed and endurance requires considerable skill and study,” it also pointed out that under the pari-mutuel system, “[players] were wagering upon the outcome of the race in combination with what the wagers of other players would be – both as to selection of horses and amounts wagered.” In other words, because a player’s wager not only depended on his own selection and wager amount, but also depended on that of another player’s selection and wager amount, a certain degree of chance or luck was inherent in the pari-mutuel system. The Court held “the element of luck in guessing the odds outweighs the element of skill in predicting the outcome of...
Subsequently, because a certain degree of luck was inherent in the pari-mutuel system, a Tinder analysis would find pari-mutuel wagering to be a form of lottery.

Under its broader constitutional analysis, the Court held that while it had accepted a literal definition of the term “lottery” in prior cases, “it is not bound to accept a definition applied at another time and for another purpose as definitive of the constitutional intent of 1851.”

In analyzing what the Founders intended when drafting Article 15, Section 8 of the State Constitution, the Court found it obvious that lotteries, in the traditional sense, were “commercial ventures, where the operators for a percentage of the wagers, promoted and provided a game of chance in which the players as a class could not win, and the operators could not but profit.” As a result, the Court held that the concern of the Founders in drafting Article 15, Section 8 was “to minimize the harmful effects of gambling by sheltering the people from gaming enterprises promoted and operated for monetary gain by those who because of the methods employed, are, in essence, purveyors rather than players.”

The Court then took its analysis one step further. Because the intent of the Founders was to shelter citizens from those gaming enterprises, the degree of luck or chance within the pari-mutuel system was immaterial. The Court held that the effects of the pari-mutuel system were “precisely those sought to be prevented by Article 15, Section 8.”

The Court summarized its alternative argument best when it said, “[a]pplying the word ‘lottery’ in its literal sense would serve to proscribe but one form of commercialized gambling, while leaving those whom the proscription sought to protect exposed to the same mischief by methods identical in substance and different in form only.”

“it is apparent to us, however, that in 1851, pari-mutuel gambling would have been regarded as a mischief of the class sought to be eliminated.” In its conclusion, the Court held that only the people of Indiana, acting by referendum upon a proposed constitutional amendment, could decide that protection from lotteries was no longer necessary.

Justice Hunter’s dissent was particularly unrelenting, contending that the majority “has resorted to a public policy reasoning under the guise of liberal constitutional interpretation.” Hunter noted that public policy of the state had long been “declared by the constitution and by the legislative acts, and where these two sources are silent, by the declarations of the court.” Moreover, “to interpret a statute or constitution in a way which it might consider expedient and desirable, such action would be nothing short of judicial legislation.” Hunter argued that such construction by the majority here, “could lead to capricious, mischievous, or absurd results based upon an individual judge’s notions concerning social, moral, or economic controversies.”

The General Assembly passed the PMWA and overrode the Governor’s veto. As such, Hunter concluded, “that should have been the end of any public policy argument concerning pari-mutuel.”

It would be nearly a decade after the Nixon decision before the Indiana General Assembly would again act to legalize gambling. Despite this inaction, the Indiana

Continued on page 34...
I would like to start this article with an acknowledgment that the language surrounding disability is problematic and confusing, to say the least. Some say the term “disabled” is in itself offensive (favoring instead some variation of the term “alternately abled”), while others advocate its use as a pragmatic, neutral, and universally recognizable concept. The term “special needs” is also commonly used, both in legal circles and in more informal settings like social media, but debate rages on as to whether it is condescending and demeaning to individuals with disabilities. I frequently use the term “special needs” in conversation with clients simply because “special needs trust” is a widely recognized legal concept that serves as a convenient and easily recognized shorthand for lawyers and non-lawyers alike. However, I am trying to work the phrase out of my idiom and favor instead the term “supplemental needs trust,” as this is an accurate legal description for how this type of trust is in fact used (as a supplement to a disabled individual’s means-tested benefits). For an excellent article discussing this very debate, and how to approach the nuances of vocabulary with respect and compassion, I recommend reading the article titled “Here Are Some Dos and Don’ts of Disability Language,” published by Forbes.com on September 30, 2020.

Vocabulary challenges aside, one fact is indisputable – parents of disabled children carry a much larger burden when it comes to their estate planning. This article will
address several of the additional questions you should consider when approaching estate planning for parents of a disabled child.

**IS THERE A NEED FORGuardianship?**

I am frequently contacted by parents of disabled children who are approaching, or have just passed, their 18th birthday. As soon as a disabled individual turns 18, it becomes much more challenging for his parents to communicate with educators, doctors’ offices, the Social Security Administration, Indiana’s Family and Social Services Administration, and a myriad of other service providers.

The question at this juncture becomes whether guardianship is necessary. Of course, not all disabled individuals lack legal capacity, and it has become widely accepted public policy that guardianship should be a method of last resort. It is always preferable to pursue less restrictive alternatives to guardianship. Since 2019, this preference for the least restrictive option has been codified at Indiana Code 29-3-1-7.8, requiring a guardianship petitioner to provide the court with evidence that nothing short of guardianship will serve to adequately protect the disabled individual, and the disabled individual is not legally capable of understanding and executing a financial power of attorney and health care advance directive. Without this evidence, guardianship should not be granted by an Indiana court.

It often comes down to the estate planning attorney to make the preliminary call on this most difficult question of whether to pursue guardianship. As I am decidedly NOT a medical professional, this always makes me nervous. My first step is to discuss the child’s diagnosis and day-to-day life in detail with the parent. If it seems even remotely plausible that the child may have legal capacity, I next arrange to sit down one-on-one with the child without the parents present. I use this meeting to discuss the meaning of power of attorney and health care directive documents, and I ask the child to explain to me, in her own words, her understanding of the ramifications of this type of estate planning. If doubts still linger at this point, I provide a questionnaire to the child’s doctor, asking some questions about the child’s mental state and ability to understand legal documents. Or, in some instances, at this point I may provide the guardianship physician’s report to the doctor and assess the doctor’s response. If possible, I try to arrange a short phone conference with the child’s doctor, but this is not always an option.

If guardianship is determined to be the right choice, here are a few handy tips:

- If a child’s disability is severe and persistent from birth or early childhood,
he may not have any assets or any possibility of future employment. In these circumstances, the child is likely to receive only SSI (Supplemental Security Income) monthly upon attaining the age of majority. In these circumstances, the guardian is not required to file a biennial accounting under Indiana Code 29-3-9-6 because the child is under the asset and income limits under Indiana Code 29-3-9-6.5. Ask for a waiver of the biennial accounting requirement as part of your initial pleadings, and include this waiver language in your proposed order, so you do not have to deal with it in two years when the first accounting would otherwise be due, and the court asks you to show cause why it has not been filed.

- Most lawyers in Indiana are familiar with the phrases “guardianship of the person” and “guardianship of the estate.” As this language indicates, it is possible to customize a guardianship so a guardian’s powers are not universal but are somewhat limited in scope. Due to the nature of a particular disability, an individual may be intellectually and legally capable of handling her own health care decision-making (particularly with the help of an appointed health care representative) but may not be capable of the type of complex and long-range planning involved in financial decision-making. In the spirit of “less restrictive alternatives,” consider asking that a guardianship be tailored to the disabled individual’s unique circumstances and needs. But beware: “guardianship of the person” and “guardianship of the estate” are NOT creatures of the statute. Reciting one of these phrases in your guardianship order and letters is not sufficient. The order and letters must be tailored specifically to indicate which of the enumerated guardianship powers in Indiana Code 29-3-8-2 are actually granted by the court.

- Whenever a guardianship is being put in place, make sure the guardian signs a standby guardianship declaration under Indiana Code 29-3-3-7. This document indicates who is to take over the guardianship in the case of the guardian’s subsequent death or incapacity, as well as grants the standby guardian some stop-gap authority until a hearing can be held and a formal guardianship appointment made.

Continued on page 37...
In June, the Indiana Supreme Court issued opinions addressing depositions, invited error, and jurisdiction. The Court of Appeals addressed the new crime exception to the exclusionary rule, leaving a child home alone, traffic stops, and home detention orders.

**SUPREME COURT**

**DEPOSITIONS OF CHILD WITNESSES**

In *Church v. State*, No. 22S-CR-201 (Ind. June 23, 2022), the Indiana Supreme Court upheld the validity of a statute limiting a criminal defendant’s ability to depose a child under 16 alleged to be the victim of a sex offense. The Supreme Court held the statute is substantive and therefore does not conflict with the Indiana Trial Rules.

The Court adopted a “predominant purpose” test to decide whether a statute is procedural or substantive: “If the statute predominantly furthers judicial administration objectives, the statute is procedural. But if the statute predominantly furthers public policy objectives involving matters other than the orderly
dispatch of judicial business, it is substantive.” Slip op. 11. Acknowledging the child deposition statute has procedural elements, the Court found its true nature was substantive. It chiefly furthers public policy objectives by creating a substantive right for a particular class of victims while limiting the substantive right of defendants to take depositions. The Court also held the statute does not violate separation-of-powers principles or the defendant’s constitutional rights, as a defendant has no constitutional due process right to discovery.

Justice Goff wrote a separate opinion concurring in the judgment. He argued the statute is procedural and conflicts with the trial rules but believed there should be an exception for an otherwise conflicting statute that “harmonizes with our long-held concern for the welfare of children.” Slip op. 10.

INVITED ERROR

In Miller v. State, 188 N.E.3d 871 (Ind. 2022), the state charged the defendant with multiple offenses, including unlawful firearm possession by a serious violent felon. The defendant was found guilty on all charges after a jury trial except the firearm charge, which was dismissed. On appeal, the defendant argued fundamental error resulted from a preliminary jury instruction informing jurors about his prior felony conviction. The Court of Appeals agreed and reversed and remanded for a new trial.

On transfer, a split Indiana Supreme Court affirmed Miller’s convictions. It held – assuming the instruction amounted to fundamental error – defense counsel invited the error by confirming the instruction looked correct and requesting it as part of an explicit strategy. Because the fundamental error was invited, the defendant could not challenge it on direct appeal. But the Court noted counsel’s strategy choice could be challenged in post-conviction relief proceedings.

Chief Justice Rush dissented, arguing defense counsel’s motives were unclear, so any doubts should be resolved against finding invited error. “With a record lacking any indicia of a reasonable basis for counsel’s assent to [the instruction], the Court should carefully review Miller’s claim for fundamental error.” Id. at 879.
In State v. Neukam, No. 21S-CR-567 (Ind. June 23, 2022), a split Indiana Supreme Court determined neither the juvenile court nor the criminal court had jurisdiction over a defendant who allegedly committed a child molesting as a minor but was not charged criminally until he was over age 21. The case fell within a “jurisdictional gap” because the criminal court has no jurisdiction over a delinquent act committed before a person turns 18. And under the Supreme Court's decision in D.P. v. State, 151 N.E.3d 1210 (Ind. 2020), a juvenile court has no jurisdiction over delinquency petitions once the accused is over 21. The Court said it was not blind to the weighty and far-reaching policy concerns in its decision but emphasized only the General Assembly could close the jurisdictional gap if it wants to. “We find it plausible – not absurd – the legislature would prioritize this policy for juvenile offenders who have matured into adulthood – in hopes they would leave behind their delinquent past.” Slip op. 5.

In a dissenting opinion joined in part by Justice Massa, Justice Goff argued the juvenile jurisdiction statute is ambiguous and should be interpreted to avoid the unjust and absurd result of the majority opinion. Justice Massa parted with Justice Goff’s proposed procedural fix, where criminal court judges could decide case-by-case whether to exercise jurisdiction over delinquent acts.

In Theobald v. State, No. 21A-CR-2746 (Ind. Ct. App. June 30, 2022), the Indiana Court of Appeals adopted the new crime exception to the Miranda exclusionary rule. This exception applies to a statement by a person subjected to custodial interrogation without Miranda warnings. Under those circumstances, a statement is admissible when the statement itself is evidence of a new crime.

Police stopped the defendant after he allegedly punched the side mirror of a detective's undercover car as he drove by on his motorcycle. The defendant was handcuffed on the side of the road for 45 minutes and told he was not free to leave. When questioned, the defendant denied hitting the mirror. But after being urged repeatedly to admit he did it, the defendant said, “I’d pay, I’d give you a hundred dollars in my pocket right now.” The state charged him with felony bribery.

On interlocutory appeal from the denial of Theobald’s motion to suppress, the Court of Appeals held the statement was admissible in a bribery prosecution as evidence of a new crime. The court acknowledged it was plausible the defendant offered to pay restitution rather than a bribe but determined that was a question for the factfinder.

In Becklehimer v. State, No. 21A-CR-1646 (Ind. Ct. App. June 24, 2022), the Indiana Court of Appeals reversed a mother’s conviction for felony child neglect after she left her son home alone for the weekend. Thirteen-year-old J.K. had stayed home alone overnight several times. He was given cash, food, a cell phone, and instructed to have no guests over. J.K. was to call his grandparents nearby if he needed anything and
dial 9-1-1 in an emergency. J.K. called 9-1-1 after another juvenile came to his house around midnight and tapped on the windows to scare J.K. When the responding officers tried to contact his mother, she was not answering her phone. At trial, J.K. testified his friend’s actions made him afraid, not the fact he was home alone. The Court of Appeals reversed the jury verdict for insufficient evidence. “Looking at all the surrounding circumstances of this case, we agree with Becklehimer that the State failed to develop testimony from any of the witnesses it called to establish that by leaving J.K. alone for the weekend she was subjectively aware of a high probability that she would be exposing J.K. to a dangerous situation that would endanger his life or health.” Slip op. 13.

TRAFFIC STOPS

In Powers v. State, No. 21A-CR-1915 (Ind. Ct. App. June 22, 2022), the Indiana Court of Appeals reversed the denial of a motion to suppress evidence found in a traffic stop prolonged for a canine sniff. The defendant was a passenger in a car police stopped for having a broken taillight and crossing the center line. After giving the driver a warning ticket, the officer questioned the occupants and brought his canine out to conduct a free air sniff. Relying on Rodriguez v. United States, 575 U.S. 348 (2015), the Court of Appeals held the purpose of the stop was completed once the officer saw no signs of an impaired driver and had issued a warning ticket for the violations. Reasonable suspicion was needed to extend the traffic stop further and it had to be based on more than the occupants’ nervousness. With no meaningful indicators of criminal activity, the dog sniff and questioning violated the Fourth Amendment.

In Paul v. State, No. 21A-CR-1704 (Ind. Ct. App. June 15, 2022), the Indiana Court of Appeals held reasonable suspicion existed to stop a vehicle that pulled up to a house under police surveillance in a homicide investigation. The location of the vehicle and its evasive behaviors when police approached it justified the ensuing investigatory stop.

CHARGES BASED ON HOME DETENTION ORDERS

On interlocutory appeal from the denial of the defendant’s motion to dismiss, the Indiana Court of Appeals held there could be no prosecution for escape because the trial court did not issue a valid home detention order. Russell v. State, No. 21A-CR-2313 (Ind. Ct. App. June 20, 2022). The defendant was convicted of misdemeanor theft and sentenced to home detention, which the trial court imposed as a direct commitment to community corrections even though misdemeanants are not eligible for community corrections. When the defendant was later charged with escape, the Court of Appeals held that because the trial court did not enter detention as a condition of probation – the only possibility for a misdemeanor – it did not enter any “home detention order.” The state thus had no basis for charging Level 6 felony escape based on the defendant’s alleged violation of a “home detention order.”

Suzy St. John is a staff attorney with the Indiana Public Defender Council.
Every so often when I walk into the office carrying my leather bag and wearing my long coat, a person sitting in our reception room will stand up and ask, “Are you the attorney?” It’s a question I get quite often. Except the answer is no, I assist in the legal practice or, as attorneys have called me, I’m the right-hand man. It can be a common misconception, and it makes sense. I am a young legal professional who talks a great deal about history and legal topics. I fit the typical profile of a young associate. But no, I am not a member of the Bar. I have an almost different profession entirely, that of the paralegal.

**Paralegal Life**

I feel that most people flipping through *Res Gestae* are not paralegals, but I do believe that it is a developing profession with a growing affiliate membership in the ISBA. It’s an occupation that I enjoy but one that I am still relatively new to. For the past five years I’ve worked for attorney Richard Busse in Valparaiso as well as Amy Commean, who came to us in 2020. Having little experience of my own, I am grateful to work with people who have been in the profession as long they have – over 40 combined years of experience. There is not a day that goes by that I do not learn something new.

Former ISBA President Todd Spurgeon once penned an article in *Res Gestae* titled...
“Influencers,” which I felt was a true testament to how young and somewhat inexperienced professionals can feel. But by simply being themselves, more seasoned veterans can become mentors to younger ones.

Paralegals, sometimes referred to as Legal Assistants, have often been called the workhorses of law firms. When it comes to qualifications, backgrounds can vary. As time has progressed, though, many firms require that paralegal candidates have some form of legal education. Their abilities and duties can be vast depending on the firm. For smaller practices, such as us, paralegals can wear many different hats. The majority of my time is spent doing legal work such as drafting documents, gathering discovery, calendaring, communicating with clients, e-filing with the state Odyssey and federal Pacer system, and researching what John Austin transcribed as “the opinions or sentiments held or felt by an indeterminate body of men.” But I also engage in other responsibilities that one may not always think of, such as recording deeds or sorting mail. For those employed by larger firms the duties may be more specialized, like gathering and organizing specific types of medical records or dealing with UCC filings.

A paralegal is busy, at times, doing the grunt work that is quite frequently behind the scenes. It is often said that behind every successful attorney is an overworked paralegal. Although I am fortunate that I never feel overworked, I do feel that paralegals, and all other non-lawyer assistants, are the backbone to a successful and modern legal practice.

**PARALEGAL CHALLENGES**

Then there is the big issue that all non-lawyers must always be vigilant of: the unauthorized practice of law. Although this may sound rather easy
"Although a lot of times I am one of the few non-attorneys present, I am able to see how important meeting, learning, and even just socializing with members of the legal community is."

To avoid, the issue comes up almost daily, particularly for those of us in small firms who routinely have close contact with clients. It can be very tricky at times, especially if you are alone with the client. You have a duty to assist them but must stop short of advising them. Many times, I have been asked legal questions but could not answer. This can cause clients to become rather cross – and with due reason I will admit. They are paying for legal services but cannot get a simple answer to a question when only I am available. Unfortunately, many do not know or understand that only attorneys may advise them, even after you inform them of this. I find it very important to get this fact known right away if you are meeting or talking with a client for the first time. You can still be a great help but must always mind what you say. This can become trickier as you gain more experience in certain areas of the law, but this subject comes with the job and can be overcome.

**Paralegal Advice**

If I were to give advice to anyone else who may be thinking of a career as a legal professional, it would be this: get involved and make connections. It is one thing I wished I’d have done earlier when I was still in college. As well as being a member of the ISBA, I am also a member of the ABA, the Indianapolis Bar Association, and my local bar, the Porter County Bar Association. I also attend CLE, such as the Solo and Small Firm conference in French Lick, and have had opportunities to meet and engage with lawyers and judges from all over the state. Although a lot of times I am one of the few non-attorneys present, I am able to see how important meeting, learning, and even just socializing with members of the legal community is. Much has often been said about the benefits of bar association memberships, especially these days with declining members, but it is most important to get involved in these groups early on in your career.

An occupation that was once thought of as no more than a glorified legal secretary has now evolved into nearly an entire profession of its own, and it is still continuing to grow. My favorite jurist, Oliver Wendell Holmes, Jr., made the point that the common law is always changing and is never stagnant. As the needs of the public change, as well as how legal services are administered, the paralegal profession has become a useful and cost-effective way to assist the public with their needs and goals. Many a lawyer will agree that in today’s world, a law practice cannot function without the paralegal pushing and pressing the front forward. It is a helpful and at times challenging career that I am proud to be a member of.
BYPASSING ANOTHER LAWYER – A VERY AWKWARD SCENE

About one hour and 40 minutes into most Hallmark romance movies, the leading couple develops a communication problem that threatens their relationship. The misunderstanding progresses until about the one hour and 55 minute mark when a co-worker, friend, or relative corrects the misperception. This leads to the inevitable kiss at the one hour and 59 minute mark. Roll credits.

It’s been a successful formula for them for decades.

So, too, have lawyer ethics rules tried to create patterns for successful communication in legal relationships. Lawyers know they are duty-bound to have meaningful communication with their clients as well as truthful
communications with opponents and courts. Truthful communication is one of the foundational requirements for lawyers from our first day in the bar. “I will employ for the purpose of maintaining the causes confided to me, such means only as are consistent with truth...” This article explores one facet of communication that seems to challenge lawyers with some regularity: talking to someone else’s client and bypassing their lawyer.

**HOW WE GOT HERE**

The ban on dealing directly with represented parties is more than a century old. Before states adopted their own ethics rules, the 1908 ABA Canons of Professional Ethics were the primary source of law for imposing lawyer discipline. Canon 9 said in part, “A lawyer should not in any way communicate upon the subject of the controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel.” This has been the law (with different wording) through the ABA’s Code of Professional Responsibility and into the Rules of Professional Conduct.

This ran along for 80 years, like the first one hour and 40 minutes of a Hallmark movie, until the Thornburgh Memo in June 1989. Then-Attorney General Richard Thornburgh sent a memo to Justice Department lawyers that, in essence, declared state ethics rules didn’t apply to them. It was okay if DOJ lawyers wanted to follow those rules as a matter of conscience, but the Thornburgh Justice Department would not hold their lawyers to those standards. This set the DOJ on a collision course with state lawyer discipline authorities. It didn’t take long. In August 1990, Virginia Ferrara, the director of New Mexico’s lawyer discipline agency, began a disciplinary action against a lawyer referred to as John Doe. Doe was an assistant United States attorney in Washington, D.C., but was originally admitted to practice in New Mexico. He represented the federal government in a murder case against a defendant named Smith. Doe interviewed Smith several times without Smith’s attorney present. The defense attorney complained and, eventually, a New Mexico disciplinary case began for violating their no-bypassing rule. Immediately, the Justice Department began an injunctive action and Ferrara’s case was halted. All was not lost, however. U.S. Attorney General Janet Reno thereafter promulgated the “Reno Rules” in the Code of Federal Regulations to soften the polarizing position in the Thornburgh Memo. It wasn’t a perfect solution, but it led the ABA and state bar authorities to revisit the bypass rule for the first time in decades.

**INDIANA’S ANSWER**

The current version of Indiana’s Rule 4.2 expanded the no bypassing prohibition from a party to any represented person. It provides,

In representing a client, a lawyer shall not communicate about the subject of the representation

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with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law or a court order. [Emphasis added by author]

The rule covers a vastly wider spectrum of scenarios than any prior version of the rule. Still, lawyers have the duty to comply with the rule.

**THE ONE HOUR AND 55 MINUTE MARK OF THE MOVIE**

Exposing the errant communication is an interesting facet of the rule.

"That leads to the question, how can that lawyer consent unless someone tells them?"

Ironically, neither the rule nor the commentary imposes an express duty for one lawyer to tell the other lawyer of the communication. By contrast, Rule 4.4 requires a lawyer who receives accidentally disclosed secret information from an opponent to notify the opponent of the disclosure. No such express requirement is present in Rule 4.2. An argument could be made that it is implied, but no express duty is present in this specific rule.12

Simultaneously, the unique feature of this rule is that only the bypassed lawyer can consent to the communication. That leads to the question, how can that lawyer consent unless someone tells them? Unlike conflict-of-interest rules where the client can consent to a conflict, Rule 4.2 is not analogous. The comments repeat, reiterate, and rehash in redundant fashion that only the lawyer may consent. Comment number 3 says,

The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

The rule is (and always has been) aimed at protecting a represented person. The client cannot waive this protection on the lawyer’s behalf. Only the lawyer can determine the extent to which his or her representation has been damaged by the communication. Despite the absence of an express duty, there are good reasons for informing the affected lawyer. The other lawyer and client might be cooperative. Failure to disclose the contact might become an aggravating issue in the underlying representation and needlessly complicate the whole matter. Although it’s purely advisory, the preamble to the rules says, “[t]he Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules.”13

**SORRY, COLLEAGUES. NO LAST-SECOND KISS**

One of the dangers here, no matter how innocent the contact, is the
potential for reputational damage to the contacting lawyer. Lawyers – oddly enough – talk to other lawyers and judges. The story about one lawyer bypassing other lawyers’ clients can have long lasting negative effects on that lawyer’s reputation. Once squirted, the toothpaste cannot be returned to the tube. On the other hand, ethical lawyers hate the idea of calling or writing another lawyer to confess they have communicated with their client improperly, but that may be one important step in defusing a problem. When talking with, texting, or emailing people about a representation, lawyers need to be mindful of asking whether the other person is represented. Willful blindness to the representation doesn’t help. This duty also carries through to support staff and investigators. Training staff to ask this important question would be a good topic for a lunchtime pizza party – er – training session. In the end, it could save a lawyer the embarrassing experience of calling someone else’s lawyer. Conscientious lawyers will find a way to get this scenario to the credits and close an awkward episode.

Charles M. Kidd, member Indiana State Bar Association, recently retired deputy executive director of the Disciplinary Commission. AV rated in Lawyers.com. Graduate IU McKinney School of Law. The opinions herein are solely the views of the author.

FOOTNOTES:

1. Indiana Rule of Professional Conduct 1.4
2. Indiana Rules of Professional Conduct 3.3 and 8.4(c)
3. Admission and Discipline Rule 22, the Oath of Attorneys.
4. Indiana Rule of Professional Conduct 4.2
5. American Bar Association, Canons of Professional Ethics (1908). This was reinforced by ABA Formal Ethics Opinion 108 in 1934 holding the language of Canon 9 was clear. Lawyers should not negotiate directly with represented parties. See also ABA Opinion 187.
6. ABA Model Code of Professional Responsibility, DR 7-104:
   A. During the course of his representation of a client a lawyer shall not:
   1. Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.
   2. Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have reasonable possibility of being in conflict with the interests of his client.
7. Rules of Professional Conduct, Rule 4.2 (As adopted by the Indiana Supreme Court in July 1987): In representing a client, a lawyer shall not communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so. [Emphasis added by author]
10. There is a good discussion of the evolution of this regulation in the article, “Toward a Revised 4.2—No Contact Rule,” 60 Hastings Law Journal 797 (2009) [Hazard & Irwin]. One of the authors, Geoffrey Hazard, Jr., was one of the best-known scholars on ethics rules in the country.
11. This isn’t a screed on the criminal justice bar. Bypassing was just as common in civil law matters. See, Matter of Capper, 757 N.E.2d 138 (Ind. 2001).
12. For instance, Rule 4.4, referring to third persons, provides in part, “In representing a client, a lawyer shall not...use methods of obtaining evidence that violate the legal rights of such a person.”
14. Rule of Professional Conduct 5.3 (Responsibilities Regarding Non-lawyer Assistants)
LEGISLATIVE COUNCIL SETTING EMERGENCY SESSIONS AND OTHER JUNE DECISIONS

In June, the Indiana Supreme Court decided 4 civil cases and granted transfer in 2 civil cases. The Indiana Court of Appeals issued 17 published civil opinions. The full texts of all Indiana appellate court decisions are available on the Indiana Courts website, www.in.gov/judiciary/opinions.

INDIANA SUPREME COURT

HOUSE ENROLLED ACT 1123 (HEA-1123) VIOLATES ARTICLE 4, SECTION 9 AND ARTICLE 3, SECTION 1 OF THE INDIANA CONSTITUTION BY ALLOWING THE LEGISLATIVE COUNCIL TO SET EMERGENCY SESSIONS BY SIMPLE RESOLUTION

During the 2021 legislative session, the Indiana General Assembly passed HEA-1123 which allowed a subset of legislators called the “Legislative Council” to commence an “emergency session” by simple resolution. Governor Holcomb sued the Indiana Senate President Pro Tempore, the Indiana House Speaker, the Legislative Council Vice Chairman, the Legislative Council, and the Indiana General Assembly (legislative parties) to declare HEA-1123 unconstitutional. The trial court rejected the legislative parties’ argument that the governor’s
claims were non-justiciable but nevertheless declared HEA-1123 constitutional. The Indiana Supreme Court granted the governor's request for direct transfer in Holcomb v. Bray, 187 N.E.3d 1268 (Ind. 2022).

The Indiana Supreme Court held HEA-1123 is unconstitutional. Under Article 4, Section 9 of the Indiana Constitution, legislative sessions must be “fixed-by-law,” and HEA-1123 violates this requirement by allowing the Legislative Council to set an emergency session by simple resolution rather than by passing a law. Furthermore, Article 3, Section 1’s distribution-of-powers mandate requires that no branch of government exercise the functions of another except as expressly provided in the Constitution. Because Article 4, Section 9 grants the governor the power to proclaim special sessions should the public welfare require, and HEA-1123 grants the legislature essentially the same power, it violates Article 3, Section 1. Although HEA-1123 is unconstitutional, the legislature can still set additional sessions by passing laws during legislative sessions or through an Article 16 amendment which would grant them the power to call emergency sessions.

Furthermore, the governor's lawsuit is justiciable. The governor is a “person” under the Declaratory Judgment Act because he is vested with specific constitutional rights and powers which he alleged were infringed. The governor also has standing because he alleged injury when HEA-1123 infringed his exclusive authority to call a special session. In addition, the issue of HEA-1123’s constitutionality is ripe because the governor alleged the law is unconstitutional on its face, and the issue can be addressed without setting legislative sessions is not solely the legislature's function.

INDIANA’S APPELLATE COURTS HAVE BROAD DISCRETION TO REACH THE MERITS OF MOOT CIVIL-COMMITMENT CASES UNDER THE “PUBLIC INTEREST EXCEPTION”

E.F. was taken to St. Vincent Stress Center because she displayed symptoms of a “manic” episode. St. Vincent applied for and a trial court granted an involuntary commitment order. E.F. appealed, but her commitment order expired while the appeal was pending, making her case moot. Under the “public interest exception,” Indiana's appellate courts have discretion to decide moot cases that present questions of great importance likely to recur. However, the Court of Appeals dismissed E.F.’s appeal by interpreting T.W. v. St. Vincent Hospital and Healthcare Center, Inc., 121 N.E.3d 1039, 1042 (Ind. 2019), reh'g denied, to create a rule that the merits of moot civil-commitment appeals should only be reviewed in “rare circumstances.”

In E.F. v. St. Vincent Hospital and Health Care Center, Inc., 188 N.E.3d 464 (Ind. 2022), the Indiana Supreme Court clarified T.W. v. St. Vincent Hospital and Healthcare Center, Inc., and held that appellate courts have broad discretion on whether to reach the merits of otherwise moot civil-commitment cases under the public interest exception. The Court remanded the case so that E.F. can argue the public interest exception should apply since civil commitments are a significant deprivation of liberty that require due process protection. In his dissent, Justice Slaughter argued the “public interest exception” cannot be squared with the judiciary's limited role in resolving “actual, ongoing controversies between adverse parties.”

"The Court remanded the case so that E.F. can argue the public interest exception should apply since civil commitments are a significant deprivation of liberty that require due process protection."
THE COURT OF APPEALS ABUSED ITS DISCRETION WHEN IT REVERSED THE TRIAL COURT'S AWARD OF A CONSULTANT'S FEE TO A COMMERCIAL LOAN BROKER

Neal Bruder is a general contractor who purchases and flips homes. He entered a “consulting agreement” with Seneca Mortgage Services, a commercial loan broker. The consulting agreement provided that Bruder would pay a “consultant’s fee” whenever Bruder consummated a transaction for which Seneca procured a financing offer. The consulting agreement included a non-circumvention clause requiring payment of the consultant’s fee regardless of whether Bruder accepted the financing offer.

Seneca procured a financing offer on an Indianapolis property which Bruder eventually purchased, but Bruder declined Seneca’s loan because the lender wanted Bruder to pay for certain permits on the property before closing. Bruder refused the offer because he would be “committing fraud” on the City of Indianapolis by “pull[ing] a permit on [property] that [he] didn’t [own] yet.” However, the trial court found the parties were bound by the non-circumvention clause and entered judgment against Bruder. The Court of Appeals reversed, concluding Seneca could not recover the fee because the financing offer was contingent on a “fraudulent and/or illegal act.”

In Bruder v. Seneca Mortgage Services, LLC, 188 N.E.3d 469 (Ind. 2022), the Indiana Supreme Court held the Court of Appeals abused its discretion in reversing the trial court’s judgment because there was no evidence the loan’s contingency perpetrated fraud on the city. There was no evidence Seneca asked Bruder to “pull” permits rather than merely pay for them or that a permit applicant breaks the law by requesting the permit issue before closing.

THE LIQUOR LIABILITY EXCLUSIONS IN ITS BUSINESSOWNERS POLICIES ABSOLVED AN INSURANCE COMPANY OF ITS DUTY TO DEFEND OR INDEMNIFY ITS INSURED SHOW CLUBS AFTER A PATRON DROVE DRUNK, CAUSING AN ACCIDENT

On July 5, 2015, William Spence was removed from Big Daddy’s Show Club after drinking alcohol and getting “out of hand.” Christopher France was a bouncer who worked at Little Daddy’s Show Club and occasionally worked at Big Daddy’s, both owned by Dan Parks, but was off the clock that night. When France saw Spence lingering in the parking lot, he ordered him to leave. Spence drove off drunk with a blood alcohol content of 0.195% and collided with the Eberts’ car.

The Eberts filed a lawsuit against Big Daddy’s, Little Daddy’s, and Parks. They claimed that Big Daddy’s violated Indiana’s Dram Shop Act by serving Spence alcohol when knowing of his inebriation. They also claimed the defendants allowed Spence to drive drunk, failed to inform law enforcement that Spence was driving drunk, and failed to provide Spence alternate transportation. Illinois Casualty Company had issued separate businessowners and liquor liability policies to each show club. The businessowners policies excluded coverage for bodily injury claims where the insured may be liable by causing the intoxication of a person,
furnishing alcohol to an intoxicated person, or negligently failing to provide alternate transportation to an intoxicated person. Illinois Casualty filed a declaratory action seeking judgment that it did not owe a contractual duty to defend or indemnify the clubs. The trial court held Illinois Casualty owed a contractual duty under Big Daddy's liquor liability policy but not under the other three policies. The Court of Appeals held Illinois Casualty owed a duty to defend the clubs under the businessowners policies.

In Ebert v. Illinois Casualty Co., No. 22S-PL-8, 2022 WL 2166233 (Ind. June 16, 2022), the Indiana Supreme Court held Illinois Casualty did not owe a contractual duty to defend or indemnify the clubs under both businessowners policies and Little Daddy's liquor liability policy. The Court found that serving alcohol to an intoxicated Spence was the “efficient and predominant cause” of the Eberts' injuries, and the unambiguous language of both businessowners policies excludes coverage for claims of negligent service of alcohol and failure to obtain alternate transportation. Furthermore, Little Daddy's businessowners policy did not apply because France acted as a “volunteer worker” on behalf of Big Daddy's that night, and Little Daddy's liquor liability policy did not apply because Little Daddy's did not serve Spence alcohol. The Court therefore affirmed the trial court's judgment.

**TRANSFER GRANTS**

- Brown v. Rev. Bd. of Indiana
courts continued to see challenges against the state’s anti-gambling laws.

**POST NIXON CHALLENGES TO THE CONSTITUTIONAL BAN ON LOTTERIES**

The first notable challenge came eight years later in *Kaszuba v. Zientara.* Zientara had requested that a friend, Kaszuba, purchase an Illinois lottery ticket on his behalf. The ticket turned out to be a winning combination, worth nearly $1.7 million. Upon learning of the substantial prize amount, Kaszuba refused to give Zientara the winning ticket and instead attempted to collect the winnings himself. Zientara filed suit, and Kaszuba countered with a motion to dismiss, claiming both parties had entered into an illegal, and therefore, unenforceable transaction.

The issue before the Indiana Supreme Court was whether an Indiana agreement to purchase an Illinois lottery ticket, in Illinois, was an illegal and immoral agreement and therefore unenforceable by Indiana Courts. Writing for the majority, Justice DeBruler held that the agreement between Kaszuba and Zientara did not involve the operation of an illegal lottery in Indiana, but that of a legal lottery in the State of Illinois. The Court distinguished the case from that of *Swain v. Bussell and Others,* where plaintiff had purchased a chance in an Indiana lottery which was subsequently found to be illegal.

The Court reasoned, “while the law in Indiana may prohibit the resale of such a lottery ticket within the confines of this state, there is no law in Indiana prohibiting the possession of such a lottery ticket.” The Court saw no difference between the issue at hand than if Zientara had driven himself to Illinois and purchased the winning ticket himself. DeBruler concluded, “the act here was legal, therefore the underlying agreement is also legal and enforceable in Indiana courts.”

Recall that in *Nixon,* the Indiana Supreme Court decided 3-2 against gambling. Since then, the membership of the Court had changed. Justice Shepard had replaced Justice Hunter and Justice Dickson had replaced Justice Prentice. In *Kaszuba,* as they did in *Nixon,* Justices Givan and Pivarnik voted against gambling, and Justice DeBruler voted for gambling. Justice Shepard, like his predecessor, cast a pro-gambling vote. The *Kaszuba* decision hinged on the vote of Justice Dickson, who unlike his predecessor, cast his vote in favor of gambling. Legend has it that as Justice Givan cast the fourth vote, he stated, “We don’t enforce illegal agreements in Indiana!” Justice DeBruler, while casting the fifth and final vote, simply said, “We do today.” It is
important to note this shift in votes by the Justices, as it marked a major change in the Court’s ideology. The shift also raises the question, how would Justice Dickson and, for that matter, Justice Shepard, have voted in Nixon?

Another challenge to the constitutional ban on lotteries occurred in Lashbrook v. State. Here, the defendant was convicted of conversion, gambling, and professional gambling arising from his involvement in a pyramid scheme. The defendant appealed the conviction, contending that participation in a pyramid scheme did not constitute gambling because there was no evidence that money or property was risked for gain. In determining what constituted gambling, the court applied a two-part analysis: 1) whether there was a risk of money for gain; and 2) whether that risk for gain was based on some degree of chance. The court defined “gain” as the “direct realization of winnings.” The court held that because the defendant paid into the pyramid scheme for a chance to collect money from others recruited into the scheme, the defendant had risked money for gain.

Analyzing whether the defendant’s risk for gain was based on some degree of chance, the court looked to cases with similar facts in other jurisdictions. The court referenced a Rhode Island Supreme Court decision, which found pyramid schemes to include elements of consideration and prize. “The consideration is the $1,000 that each investor invests in the hope of receiving $32,000, which is the prize.” Additionally, the element of chance is present “because the financial gain of any participant is the result of factors outside his control: the action of prior participants, the degree of market saturation, and the prospects of an individual continuing in the recruiting chain.”

The court also referenced a Wisconsin Court of Appeals decision on another pyramid scheme. The Wisconsin court held that, “chance, rather than skill must be the dominant factor controlling the award in the lottery.” Both the Wisconsin and Rhode Island courts applied the “dominant factor” test. The test determines that a scheme is a lottery if “chance dominates even though some degree of skill or judgement is present.” Moreover, the Wisconsin court rejected the defendant’s claim that the pyramid scheme was a speculative investment. Rather, the Wisconsin court held that “unlike a speculative venture, the defendant’s club has a classic gambling trait: shuffling a given number of dollars between participants with no effect on the total wealth of the group.” As a result, the Lashbrook court held that a pyramid scheme was a form of illegal lottery, thus affirming the defendant’s conviction of illegal gambling.

Objectively, the dominant factor test is a simpler and more concise form of analysis when compared to the two-pronged analysis used in Nixon. Although the dominant factor test was developed post-Nixon, one might wonder if Nixon would have been a less controversial decision had the dominant factor test been applied.

STATE LOTTERY ACT OF 1989

In 1986 and 1987, the Indiana General Assembly passed a resolution to amend the State Constitution and repeal the ban on lotteries. Passing the resolution in two consecutive legislative sessions subsequently qualified the constitutional amendment for statewide referendum in the 1988 general election. The referendum on the constitutional amendment succeeded, with Hoosiers voting for the amendment by a vote of 62%–38%.

An amended Constitution ultimately allowed the Indiana General Assembly to pass laws that would authorize and regulate gaming in Indiana. The State Lottery Act of 1989 permitted three forms of gaming: 1) a weekly lotto drawing; 2) scratch-off lottery tickets; and 3) pari-mutuel horse race wagering.

A CHALLENGE TO THE STATE LOTTERY ACT

In 1995, the Indiana Court of Appeals faced the first significant challenge to the State Lottery Act. In L.E. Services v. State Lottery Comm’n, the court was presented with the issue as to whether a private vendor selling out-of-state lottery tickets to Indiana residents violated the State Lottery Act.

L.E. Services was a company registered to do business in Indiana.
L.E. Services appealed this ruling to the Indiana Supreme Court, but the Court declined to exercise jurisdiction.

**FOOTNOTES:**

1. Special thanks to Justice Frank Sullivan for his collaborative effort, mentorship, and friendship. Without him, this article would not have been possible.
2. 142 N.E.2d 610 (1957)
3. Id. at 614
4. Id. at 615
7. Id.
8. Id. at 156
9. Id.
10. Id.
11. Id. at 161
12. Id.
13. Id.
14. Id. at 161
15. Id. at 162
16. Id. at 165
17. Id.
18. Id.
19. Id. at 166
20. Id.
22. Id. at 2
23. *Swain v. Bussell and Others*, 10 Ind. 438 (1858)
24. Kaszuba 506 N.E.2d 2
25. Id. at 3
*Lashbrook* was decided after Indiana had adopted the State Lottery Act; however, the facts occurred prior to it, in 1987.
27. Id. at 774
28. Id. at 775
30. Id. at 1212
32. Id.
33. Dahlk, 330 N.W.2d at 618
36. Id. at 341
37. Id.
SHOULD I PREPARE A SUPPLEMENTAL NEEDS TRUST?

If you are preparing estate planning for the parents of a disabled child, you will almost certainly be employing some type of supplemental needs trust (SNT). Such a trust allows money to be reserved for the benefit of a disabled individual, but simultaneously allows those funds to be an exempt resource that does not jeopardize the individual's means-tested benefits such as Medicaid, SSI, HUD/Section 8, and SNAP. The questions are: which kind of SNT, and where?

Broadly speaking, SNTs can be third-party (i.e., funded with someone else's money for the disabled individual), or first-party (i.e., funded with the disabled individual's own money). First-party SNTs are also sometimes referred to as “qualified” SNTs or “(d)(4)(A)” SNTs (referring to 42 USC 1396p(d)(4)(A), the part of the federal law that first allowed disabled individuals under age 65 to establish first-party SNTs in 1993).

If parents are leaving an inheritance for the benefit of a disabled child, this is third-party money going into a third-party SNT. Such a SNT can either be testamentary or inter-vivos. I typically recommend the use of a separate, inter-vivos SNT, so the SNT is available for use by other family members, such as grandparents, who may also include the disabled individual as a beneficiary or contingent beneficiary of their estate planning.

If a disabled individual receives money of her own, such as through a personal injury settlement or direct inheritance, this money must never be placed in a third-party SNT. Rather, this money must be placed in a first-party SNT. First-party SNTs are only valid if they contain a “pay-back” clause, stating any funds remaining at the disabled beneficiary's death must be paid back to any state that provided Medicaid benefits to the disabled individual during his life.

Placing even one dollar of a disabled individual's own funds into a third-party SNT will taint the entire SNT, potentially subjecting the entire SNT to a state Medicaid payback requirement that otherwise would not have existed.

DO I NEED TO PLAN AROUND THE SECURE ACT?

Passed by Congress in December 2019 and effective January 1, 2020, the SECURE Act drastically shortened the time in which beneficiaries of inherited qualified retirement plans (most commonly, 401(k)s and IRAs) must pull money out of these plans and thereby realize the income. Most beneficiaries now must pull all funds out of an inherited qualified plan within approximately 10 to 11 years of the plan participant's...
death, as opposed to the lifetime stretch available prior to 2020. This loss of the stretch payout significantly increases the income tax burdens on qualified plan beneficiaries. However, disabled individuals (as well as SNTs created for their benefit) can still use the lifetime stretch in most cases, thereby minimizing the income tax burden.

Therefore, for parents of a disabled child who have significant retirement savings, it is worth considering whether the estate plan should be customized to direct more of the qualified money to the disabled child’s SNT, with a larger proportion of other assets passing to the other children or beneficiaries for equalization purposes.

**SHOULD THE PARENTS (OR THE DISABLED CHILD HERSELF) ESTABLISH AN ABLE ACCOUNT?**

In 2014, the Achieving a Better Life Experience (ABLE) Act added 529A plans to the Internal Revenue Code. Any individual whose disability began before age 26 may have one ABLE account, which can be funded with up to $16,000 annually. ABLE accounts can be funded with the disabled person’s own money, and/or through third-party gifts or inheritances. Funds contained in an ABLE account are an exempt resource for purposes of means-tested benefits, such as Medicaid and SSI, although SSI benefits will be suspended (not terminated) if an ABLE account exceeds $100,000. Funds in an ABLE account grow tax-free and are not considered income to the disabled person when spent if they are spent on a broad range of “qualified disability expenses.”

Many parents ask me if they can use an ABLE account in place of a SNT. My answer is almost always a resounding “no.” At death, ABLE accounts are treated like first-party SNTs, meaning they have a state Medicaid payback requirement at the owner’s death. Therefore, an ABLE account is not the best vehicle to accumulate third-party wealth on behalf of a disabled individual, because the likelihood that money will be lost to estate recovery at the disabled individual’s death is too high. Rather, an ABLE account should almost always be used as a smaller account, akin to a checking account, accessible to the disabled individual and providing him flexibility and freedom with respect to smaller and more manageable sums.

It is also worth noting that distributions from a SNT for a disabled individual’s food, rent, and necessary utilities are considered “in kind support and maintenance” by the Social Security Administration and will reduce a disabled individual’s monthly SSI benefits. However, distributions for these same purposes from an ABLE account will not reduce SSI in the same manner. Therefore, ABLE accounts are useful in tandem with SNTs to provide a trustee more flexibility in how to make distributions without a corresponding reduction of SSI benefits.

**CONCLUSION**

Parents of disabled children face many challenges. They must be fierce advocates for their children to get the best medical care, therapies, education, public benefits, and living arrangements available. There is no respite from this responsibility, and it lasts a lifetime. It is unfortunate but unavoidable that their estate planning concerns must also be significantly more complex. As estate planners, we have an opportunity and responsibility to help these parents and families to truly understand and utilize the various legal tools at their disposal. There is no one-size-fits-all estate plan for the benefit of a disabled child, and supplemental needs planning requires our utmost creativity and flexibility when planning for the future. 🌟

Kristin received her undergraduate degree Magna Cum Laude from the University of Notre Dame in 2004, and graduated Cum Laude from the Indiana University Maurer School of Law in 2007. Kristin is a certified trust and estate specialist, as certified by the Indiana State Bar Association’s Trust & Estate Specialty Board since 2017, a member of the Board of Directors of Indiana Legal Services, a member of the Indiana State Bar Association’s Trust and Estate Specialty Board of Directors, and a past President of the Board of Directors of the Allen County Bar Association. She has focused on estate planning, probate administration, special needs planning, elder law, and related areas of the law since 2007.
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