SEPT 2023

INDIANA STATE BAR ASSOCIATION

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VOL. 67 NO. 2

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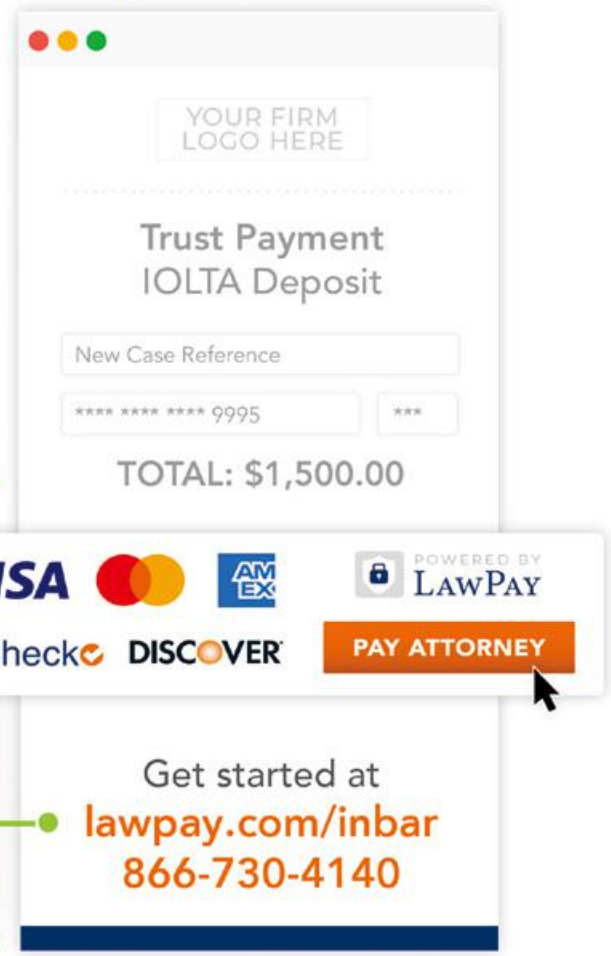

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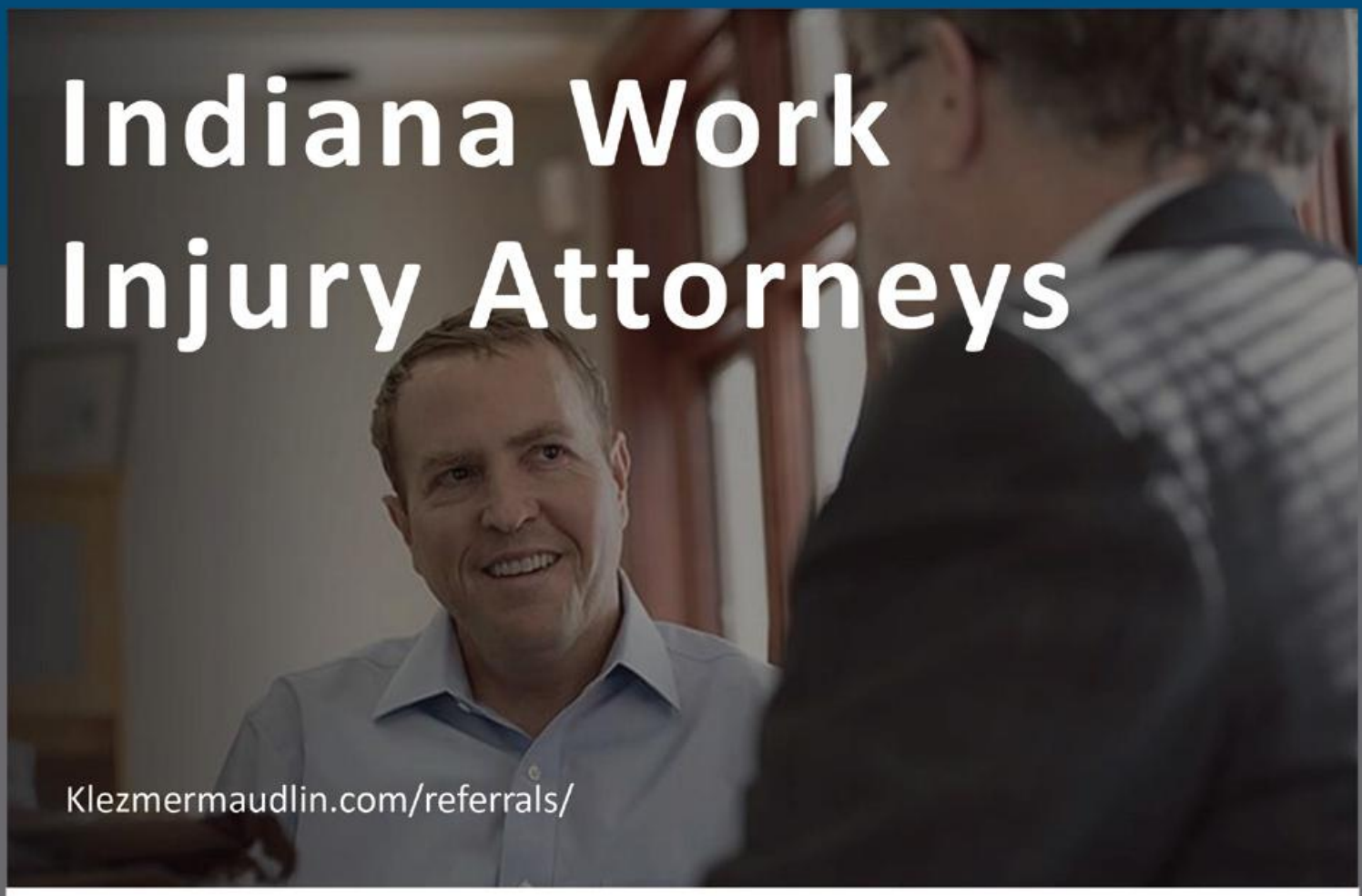

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President's Perspective

ACTUALLY, I ALWAYS WANTED TO BE A LAWYER

By Amy Noe Dudas

PRESIDENT'S PERSPECTIVE

When I first had the privilege of gracing this space about a year ago, I told you that I never wanted to be a lawyer. I never had a lawyer in my life who inspired me to such greatness or felt myself mysteriously called to the law by a higher power. I just kind of fell into it.

With the opportunity to lead this great organization, and faced with a rapidly evolving profession that some feel is robbing lawyers of their traditional role in society, I embarked upon a project to explore what qualities lawyers have that make us uniquely qualified to do what we do. But to answer that question, I rather sought to uncover *who we are*—not just as professionals but as human beings.

Lawyers work and live by a set of fiercely guarded ideals, many of which are codified in the Rules of Professional Conduct. We have committed to the highest of standards in our public and private conduct, even if no one is looking. Not only are new doctors of jurisprudence required to prove they actually learned what their degree says they did by taking one monster of a final exam, they also have the burden of proving that they have the requisite character and fitness to be considered a practicing attorney. Their lives before and during law school are scrutinized—not only do we consider convictions and arrests, academic misconduct, and overall poor judgment, we also consider traffic tickets, financial slip-ups, and minor disclosure omissions.

Sometimes there just aren't enough of us to go around. And even in places where there are, too many people face legal problems without the financial means to get help. Because of that, many states have begun experimenting with ways to improve people's access to legal information, the justice system, and law-related assistance.

This will require redefining the practice of law. In addition, law school accreditation and admission are being examined for ways in which access to a legal education could become more equitable and accessible. The bar exam is being re-evaluated for fairness and whether it's an accurate predictor of minimum competence to practice. Bar admissions requirements are getting new scrutiny for being too exclusionary and making "character and fitness" overly broad, especially considering that the rules are not always applied equitably to our BIPOC and LGBTQ+ friends.

Many lawyers have launched vigorous opposition to these initiatives, citing tradition, core values, and the need to protect the public. But as I emphasized last year when I started

this journey, we have to do more than register our opposition; we must do a better job expressing what the big deal is. What is it about what lawyers do that requires it to be so heavily regulated such that only a select few qualify?

Are we drawn to this profession by innate qualities and traits that end up making us good lawyers? Over the past year, I've narrowed it down.

CURIOSITY

As a kid, I was interested in everything, and I never stopped trying new things. When I saw someone doing something that looked interesting, I wanted to learn how. And most of the time, things came pretty easily to me. I've told you several times about how, at age four, I was able to immediately find the *Close Encounters* melody on the piano after hearing it in the movie. While I eventually spent years in music lessons and still try to cultivate that love of music, I was able to re-create music without ever being taught what a note was. I was born with it, and no one knows why. (Well, I'm sure some pretty smart scientists know why. But I'm talking about the rest of us.)

"We seek not only to know, but to understand. We work until the work is done (sometimes to a fault)."

Most other lawyers I've known over the last twenty-some years are naturally curious. They love this profession because they always get to learn something new with every case.

INQUISITIVENESS

When I started going to preschool a few days a week, I would wake up in the morning and ask if I "got" to go to school today. As I got older, even in those troublesome teenaged years, my parents never needed to bug me to finish my homework because I tackled it as soon as I got home from school and worked until it was done. I questioned everything. I wanted to know how things worked, and *why*. I loved to learn as a little kid, and I still do.

I've never known a lawyer who doesn't ask a lot of questions, not only when they're taking someone's deposition but also when they're chatting with a friend or meeting someone new. They want *details* and seek to explore the depths. We seek not only to know, but to understand. We work until the work is done (sometimes to a fault).

EMPATHY

Even though I am introverted and a little bit socially awkward, I got along with all kinds in school. I could hang with the nerds, the preps, and the stoners. I got along with my peers, and I was comfortable hanging with adults (who usually found me delightful). I somehow knew how to speak everyone's language, which made me authentic and trustworthy. I didn't learn how to read people and

"As a result of what's driven you to this profession, you've developed and cultivated some really important qualities that are crucial for good lawyering: tact, self-control, emotional intelligence, prudence, self-awareness, flexibility, grit, resilience."

make them feel like I heard them, much less understood them. It was just there.

Really effective lawyers are great communicators and relate well to others. They write concisely and clearly, speak commandingly and persuasively, and establish relationships with a variety of people, many of whom don't even come close to having the same experiences and backgrounds.

Sure—as we get older, learn more about the world, take college courses called "Transcending Boundaries: The Science of Synchronicity and Interpretive Dance," and, above all, make mistakes, we learn by experience and example. But we don't study how to be curious, inquisitive, and empathetic. For the most part, lawyers—*good* lawyers—just are.

As a result of what's driven you to this profession, you've developed and cultivated some really important qualities that are crucial for good lawyering: tact, self-control, emotional intelligence, prudence, self-awareness, flexibility, grit, resilience.

It's important to continue to scrutinize whether some individuals who have these qualities are kept away by the current system of law school accreditation and admission, along with bar admission requirements. We don't want to lose them, so let's find a way to catch them without compromising what's really important about who we are and what we do.

To wrap, I'm overwhelmed and grateful by how much I've learned from all of you, how much you've shown me about what really matters, and how inspiring being in your presence really can be. I started this series by telling you, "I never wanted to be a lawyer." But I was wrong.

Turns out, I've always wanted to be a lawyer. And it's been my privilege.

ISBA UPDATE

By Res Gestae Editor

INDIANA PRO BONO ACADEMY AND RESOURCE CENTER

The ISBA—in conjunction with the ISBA Pro Bono Committee, Class 10 of the Leadership Development Academy, and other pro bono partners—has launched the Indiana Pro Bono Academy and Resource Center. It is available at www.inbar.org/ProBonoAcademy.

The Pro Bono Academy is a one-stop shop for Indiana attorneys, paralegals, and staff who provide pro bono or civil legal aid to low-income Hoosiers. On the site, legal professionals can find:

- On-demand CLE covering the most common pro bono and civil legal aid topics (including landlord-tenant issues, expungements, immigration, and more);
- Training videos and materials with tips for doing pro bono;
- Information about how to find pro bono organizations and opportunities; and
- Resources to help current and prospective volunteers have a successful experience.

"In addition to being incredibly important for our community, we're hearing more and more from ISBA members that pro bono is important for attorneys' mental health and professional longevity," said Amy Noe Dudas, ISBA President. "It allows attorneys to leverage their unique skillsets and work one-on-one with their community members, often providing more visible, immediate results than they see in their private practice."

Despite the growing interest in and need for pro bono opportunities, however, many attorneys were struggling to get started. The pro bono community can be intimidating for a first-timer; and with no guide to make navigating the process easier, taking that first step can seem impossible. That's where the Pro Bono Academy comes in. It supports volunteers by:

1. **Offering an entry point.** Indiana has no shortage of pro bono providers and opportunities; in fact, it's the sheer number of them, scattered across separate websites and locations, that makes knowing where to start difficult. The academy aggregates links to Indiana's major pro bono organizations and places everything into one easy-to-access space, so that attorneys can start on the academy's webpage, find an organization in their area, and be off on their pro bono journey.
2. **Training attorneys on the most relevant pro bono topics.** An interest in doing pro bono is often not enough; attorneys must also have some knowledge about the legal topic in concern. With the help of pro bono partners, the committee has identified and provided training on the most common pro bono cases. Access a curated selection of on-demand CLE, training videos, and materials on the issues Hoosiers need help with—from immigration to intestate succession to evictions and everything in between.

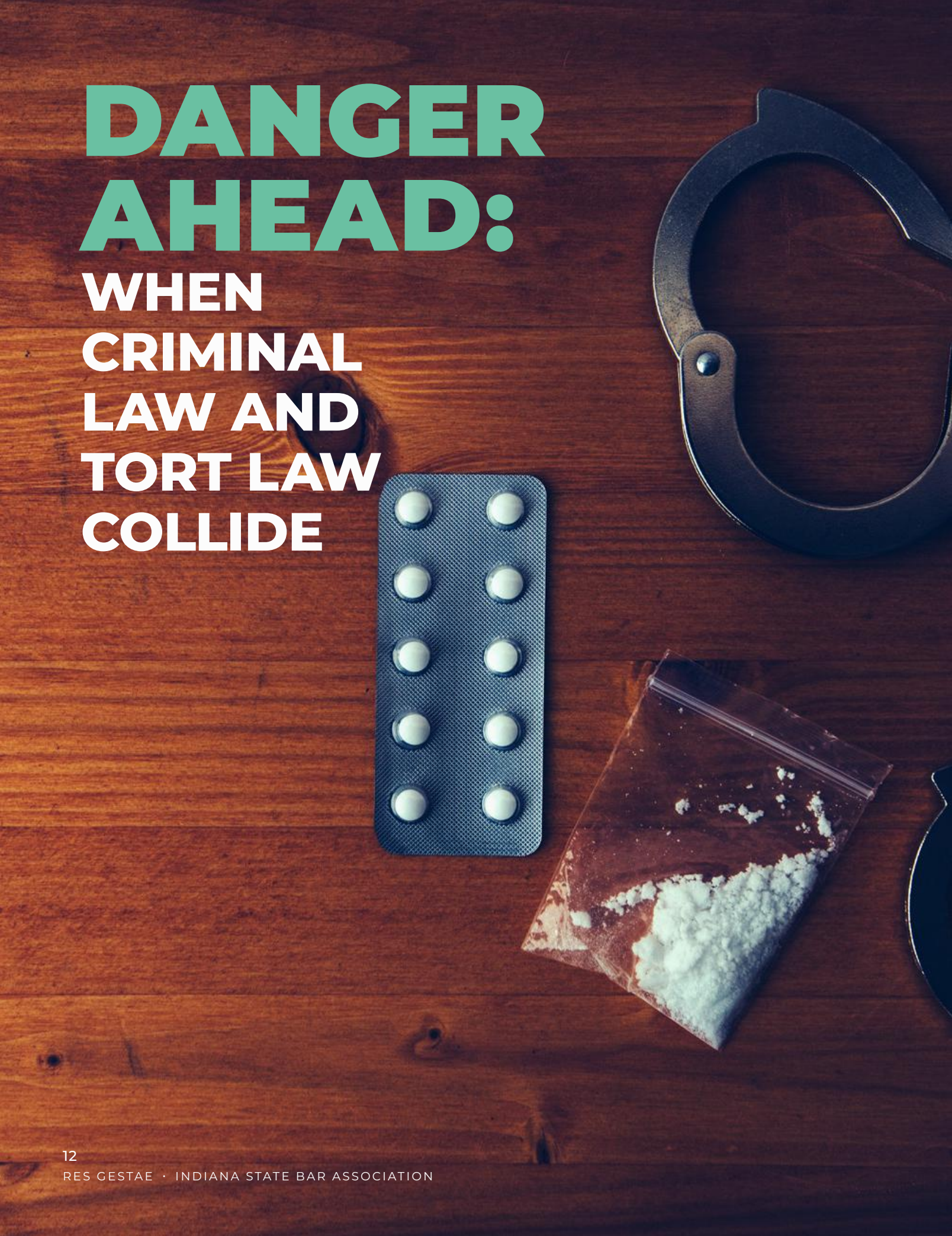
A BRIEF NOTE ON MALPRACTICE INSURANCE

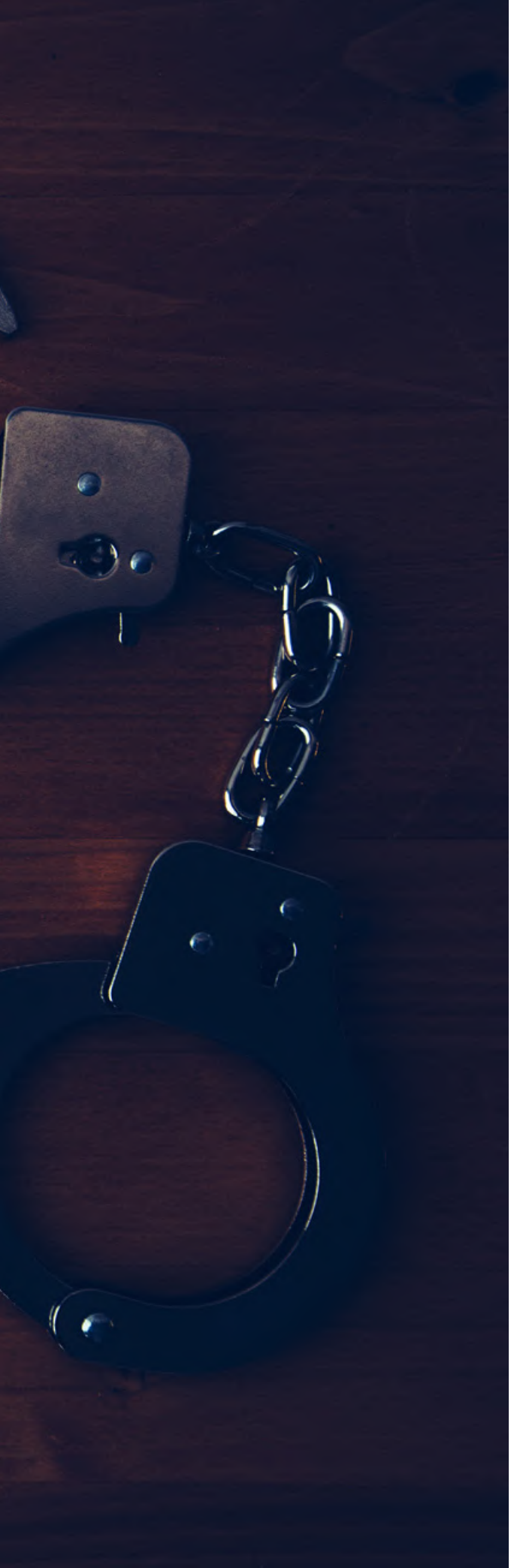
Another barrier many attorneys face when deciding to do pro bono is finding malpractice insurance. But good news! Your pro bono work is most likely already covered. Many pro bono providers have malpractice insurance that covers their volunteers. Likewise, most individual malpractice insurance policies cover pro bono work. Just be sure to reach out and ask before engaging in pro bono if you're not sure.

The Pro Bono Academy and Resource Center is a joint project of the Indiana State Bar Association Pro Bono Committee and Leadership Development Academy Class 10. The ISBA is grateful for these groups and all pro bono volunteers who have dedicated their time and talents to serve those in need.

DANGER AHEAD:

WHEN CRIMINAL LAW AND TORT LAW COLLIDE





FEATURE

By Hon. Marianne L. Vorhees

State Representative Greg Steuerwald proposed legislation in 2018 to help fight the battle against illegal drugs. "Too many Hoosiers are losing members of their families because of drug overdoses," he said. "We need to keep drug dealers who are responsible for these deaths in prison for as long as we can."[1]

Before the new legislation took effect, Indiana prosecutors were limited in drug-death cases. They could file a case for the dealing itself, and they could add a reckless homicide charge for the death, with a one-to-six-year sentence.[2]

The legislation passed with a July 1, 2019, effective date. The "Dealing in a Controlled Substance Resulting in Death" statute provides: A person commits a Level 1 felony if, when a person uses, injects, inhales, absorbs, or ingests the substance, it "results in the death of a human being who used the controlled substance."[3]

The statute also provides two "excluded defenses": It is not a defense that the human being (1) voluntarily used the substance or (2) died as a result of using the controlled substance in combination with alcohol or another controlled substance or with any other substance.[4]

This article does not intend to argue the policies behind the legislation. The Indiana General Assembly decides what behavior to criminalize and the penalties that should result. This article does not intend to argue what cases prosecutors should or should not file under the statute. Prosecutors have always had broad discretion to decide what cases to file and not to file and how to charge the cases they file.

This article argues that when the criminal law intersects with tort law principles such as "proximate cause," "resulting in death," and "foreseeability," jurors need clear instructions and guidance to assist them in navigating the difficult factual and scientific issues. This article proposes: (1) using the phrase "responsible cause" instead of "proximate cause," as in Indiana civil cases; (2) providing clear direction to trial courts on what jury instructions to use; and (3) ensuring defendants have access to resources to investigate and defend the scientific evidence involved in these cases.

DRUG-INDUCED HOMICIDE (DIH) STATUTES

Some states, such as Arizona and Oklahoma, include drug-induced homicides within their murder statutes.[5] In other states, prosecutors file drug-induced homicides under their felony murder statutes.[6]

Indiana joined the states who passed statutes addressing drug-induced homicides as stand-alone felonies. Some DIH statutes, such as New Jersey's and New Hampshire's, define their offenses as strict liability.[7] The approaches to DIH vary from state to state.[8]

Indiana's DIH statute has been described as "somewhat unique" from other states' statutes due to the two excluded defenses set out above.[9] The first appellate case concerning Indiana's DIH statute challenged the excluded defenses provisions, arguing they relieved the state of the burden to prove causation. That is, the state did not have to prove the victim died from using the controlled substance, and the state did not have to prove the victim's death was reasonably foreseeable to the defendant. This leads us to the *Yeary* case.

YEARY V. STATE: THE INDIANA COURT OF APPEALS ADDRESSES THE DIH STATUTE

The *Yeary* case[10] presents a tragic event. A young college student bought two grams of heroin for $200 from Yeary on a Friday night, and his parents found him dead in his bedroom the next afternoon. The toxicology report showed therapeutic levels of Xanax and an antidepressant in his system at the time of his death, and an elevated level of fentanyl within the range known to be fatal. The report did not show heroin or its metabolite in the decedent's system.

The forensic pathologist testified the cause of death was "acute fentanyl, citalopram, and alprazolam intoxication. . .The combination of all three of those drugs together caused an intoxicated state resulting in respiratory depression and cardiac arrest or his heart stopping."[11]

Yeary challenged the Indiana DIH statute as unconstitutional, arguing the defense exclusions effectively relieved the state of the burden to prove a causal connection. The Court of Appeals rejected that argument, holding "the State remained obligated to prove Tyler's death resulted from the drugs Yeary distributed and that the death was reasonably foreseeable."[12]

The Court of Appeals reversed the conviction in *Yeary* because the trial court's instructions did not "properly convey to the jury the necessity of finding Yeary's drugs were the actual cause and proximate cause" of the decedent's death. *Yeary* stands for the proposition that Indiana's unique excluded defense in the DIH statute does not relieve the state of the burden to prove actual and proximate causation.

Next, let's examine briefly how Indiana law defines proximate cause in criminal cases.

PROXIMATE CAUSE ANALYSIS IN INDIANA'S CRIMINAL LAW

Proximate cause issues are not contested in many criminal cases. For example, a batterer seriously injures their victim, an impaired driver crashes the car and kills a passenger, or someone shoots a gun into a house and kills an innocent bystander.

In criminal cases where proximate cause was an issue, the Court of Appeals has held it is not enough for a defendant's actions to be a *contributing cause* of an injury, they must be a *proximate cause* of the injury:

> A finding of proximate cause embodies a value judgment as to the extent of the physical consequences of an action for which the actor should be held responsible. "[P]roximate cause questions are often couched in terms of 'foreseeability;' an actor is not held responsible for consequences which are unforeseeable."[13]

So, it is not enough for a defendant to set into motion a chain of events that leads to a death. It is not enough for a defendant to contribute to the death. Indiana sets a limit on liability: An actor is responsible only if the consequences of their actions are foreseeable. Proximate cause issues in DIH cases can be *very* fact-sensitive, as we will see in the next section.

PROXIMATE CAUSE IN DIH CASES

In some DIH cases, the actual causation issue is clear-cut. The seller delivers a white powdery substance to the buyer, who snorts the powder and dies. Some of the substance is left behind, and lab tests show it is heroin. The buyer died of a heroin overdose. One drug, one sale.

What about the foreseeability test? Was the death too far removed from the defendant's act to hold the defendant responsible? Take, for example, a scenario proposed by a commentator: Dan sells Vickie drugs, and as she walks away from the sale, a piano falls on her, killing Vickie. But for the drug sale, Vickie would be alive. But Dan could not foresee that selling Vickie drugs would result in her death from a falling piano. The drug sale was not a proximate cause of Vickie's death.[14]

"Indiana sets a limit on liability: An actor is responsible only if the consequences of their actions are foreseeable."

This is an extreme example where no reasonable trier of fact should, without more facts, find the drug delivery resulted in the user's death.

Real-life DIH cases are much more complex, especially in mixed-drug intoxication. When a decedent has consumed a combination of substances, any one of which may have been lethal by itself, "it is often not possible for the forensic pathologist to opine with a reasonable degree of medical certainty that any one of the substances represents a 'but for' cause of death."[15]

AFTER *YEARY*: INDIANA'S DIH CASES AND CAUSATION

Next, let's look at three decisions by the Indiana Court of Appeals addressing the DIH causation issue, paying particular attention to the expert testimony: *Brockman*, *Moody*, and *Veach*.[16]

Brockman was convicted of four counts of Dealing in a Controlled Substance Resulting in Death, involving two decedents. Brockman, Z.G., and C.R. were in a Michigan City motel room using drugs. Police found methamphetamine and etizolam, a Schedule I controlled substance, in the room. Brockman thought the etizolam was heroin and admitted all the drugs were his.[17]

Autopsy results showed both victims had consumed alcohol, amphetamine,

methamphetamine, and etizolam. The state's expert testified: (1) the cause of death was an overdose, in part, of methamphetamine; (2) the etizolam was not relevant and had no impact on their deaths; and (3) he did not know how the etizolam, methamphetamine, and amphetamine would interact with each other.

Brockman challenged the convictions related to etizolam based upon cause-in-fact: Was etizolam the drug that actually killed Z.G. and C.R.?[18] The state conceded in its brief that whether etizolam caused their deaths was a "close call" because the pathologist testified the amounts in their systems were within normal limits.[19]

To prove etizolam was the cause-in-fact of the overdose deaths, the state presented testimony from another individual, P.M., who used drugs with the three individuals two or three days before Brockman's arrest. P.M. testified he used methamphetamine and six to eight hours later used a light gray drug he thought was heroin or fentanyl. P.M. passed out within seconds and woke up with Brockman placing ice down his pants and a cold cloth over his head.[20]

In a memorandum decision, the Court of Appeals accepted the state's causation analysis, holding "a reasonable trier of fact could have determined that etizolam, when combined with methamphetamine, could *foreseeably cause death*."[21]

The state's expert testimony could not answer the cause-in-fact question: Did the etizolam cause the deaths? The CCS entries in the case indicate the defendant did not request money to hire an expert. The state used P.M.'s testimony, which was admitted under Evidence Rule 404(B) to show plan, identity, and opportunity, to establish causation.

The Mya Moody case presented what appears to be the most straightforward set of facts you could have in a DIH case. But as is common in DIH cases, the causation issue became a little more complicated than you would expect.

Moody was arrested. She had a balloon containing a white powdery substance, which she swallowed prior to the book-in procedure. Once she was placed in her block, she regurgitated the balloon and shared the substance with her cellmates. Moody shared many of the details with a person outside the jail via a recorded jail phone call.

"Since everyone seems to agree the term 'proximate cause' is confusing to jurors, and since the standard is the same in civil and criminal cases, why not go 'all in' and adopt 'responsible cause' in criminal cases?"

A cellmate snorted the substance and began to contort as if having a seizure, and her skin turned blue. The woman died. The jailers did not know what caused the seizure-like symptoms, and so they did not administer naloxone. They also did not find any of the substance in the cell block after the inmate's death.[22]

During the autopsy, samples were drawn and sent to a lab for toxicology studies. Based on the results, the pathologist testified the cause of death was "acute fentanyl intoxication." The autopsy report was admitted without objection.[23]

On appeal, Moody challenged the chain of custody for the samples sent by the pathologist to the lab for testing. The trial court ruled, and the Court of Appeals agreed, the chain of custody question went to the weight of the evidence, not its admissibility.[24]

At trial, Moody did not challenge the opinion testimony from either the pathologist who performed the autopsy or the toxicologist from the lab that the victim died of acute fentanyl intoxication. Moody argued an inmate *other than Moody* provided the substance that resulted in the inmate's death.

The evidence indicated Moody's drug of choice was heroin. The cause of death was fentanyl, which is a distinct chemical substance.[25] Because none of the substance was found in the jail after the death, the state could not offer evidence directly linking Moody to

the substance the victim ingested. The Court of Appeals affirmed the conviction.[26]

The lessons from *Moody*: (1) pay attention to the chain of custody evidence, and (2) the state should establish the samples' integrity from autopsy to lab. And although this case appeared clear-cut from a factual standpoint—no drugs in the jail, defendant brings drugs into the jail, hands them out, inmate uses drugs and dies—the one sticking point remained: What exactly did Mya Moody bring into the jail? The jury certainly had sufficient circumstantial evidence to find beyond a reasonable doubt the substance Moody brought into the jail caused the death. But was it heroin? Fentanyl? Heroin laced with fentanyl? Could an expert have clarified this point?

Benjamin Veach sold drugs to J.E. at 10:30 p.m. At 5:30 a.m., J.E.'s girlfriend returned home from work and found J.E. unresponsive. J.E. was declared dead on the scene.

Toxicology results showed J.E. had fentanyl, norfentanyl, and acetyl fentanyl in his system. Acetyl fentanyl is another type of fentanyl, not a metabolite produced when fentanyl breaks down in the body. The pathologist found the cause of death was fentanyl toxicity.

After J.E.'s death, police officers found a baggie stamped with a blue "# 1" next to his wallet. Testing "indicated the presence of Fentanyl, a controlled substance; however, this could not be confirmed due to insufficient sample concentration."[27] Unused plastic baggies stamped with the same blue "# 1" symbol were found in a bedroom where Veach had been staying during the time period when the transaction with J.E. occurred.[28]

Veach was convicted and appealed. He did not challenge the delivery element. The state argued on appeal that the residue on the baggie near J.E.'s wallet was presumptively positive for fentanyl and had similarities to acetyl fentanyl. A jury could reasonably infer Veach sold a baggie stamped with a blue "# 1" to J.E., and the drug was fentanyl and/or acetyl fentanyl. J.E. had both substances in his blood. A reasonable jury could infer either or both substances killed J.E.[29]

Veach argued the evidence showed only a "suspicion" that acetyl fentanyl might have been present, and that issue should not have gone to the jury.[30] As for the fentanyl, Veach made an interesting argument: This was a "novel opiate." The state's chemist could not identify the substance as fentanyl because it lacked the "signature molecular ion," and the mass spectrograph did not match it to known fentanyl substances.[31]

The Court of Appeals rejected both arguments, holding the chemist's testimony constituted "persuasive evidence that the residue at issue did contain Fentanyl," even though the chemist could not testify to a scientific certainty. Because "any amount of Fentanyl can cause death," the Court of Appeals held, the state had presented sufficient evidence from which the jury could conclude the substance delivered by Veach to J.E. caused J.E.'s death.[32]

SHOULD INDIANA ADOPT "RESPONSIBLE CAUSE" FROM TORT LAW?

When asking a jury to decide proximate cause, Indiana judges know the concept is difficult for a lay person to understand. The Indiana Model Civil Jury Instructions, drafted by Indiana judges, addressed this concern in Instruction No. 301 and gave "proximate cause" in Indiana's civil law a new name: "responsible cause." The comments explain why "responsible cause" is a better term. A study found "proximate cause" was the most misunderstood of 14 jury instructions. The jurors thought "proximate cause" meant "approximate cause," "estimated cause," or "some fabrication."[33]

"Instructions in DIH cases should not distract jurors from answering the critical 'but-for' and 'foreseeability' questions."

Instruction No. 301 combines causation in fact and proximate cause into one jury instruction: The death would not have occurred without the conduct, and the death must be a natural, probable, and foreseeable result of the conduct. Instruction No. 302 defines foreseeability: A death is foreseeable when a person should realize that their act might cause harm.[34]

Does the criminal law proximate cause standard differ from the standard set out in instructions No. 301 and 302? According to the Criminal Instructions Committee, also made up of Indiana judges, it does not. The Criminal Jury Instruction defining "proximate cause" takes the exact wording from the Model Civil Jury Instruction defining "responsible cause" and calls it "proximate cause" instead.[35]

The Criminal Jury Instruction Committee agreed with the Comments to the Model Civil Jury Instructions that "'proximate cause' is a term often misunderstood by jurors and lamented by legal experts."[36] Since everyone seems to agree the term "proximate cause" is confusing to jurors, and since the standard is the same in civil and criminal cases, why not go "all in" and adopt "responsible cause" in criminal cases? This may assist jurors in resolving the difficult causation issues that often arise in DIH prosecutions.

JURY INSTRUCTIONS IN DIH CASES

The trial court judge in *Veach*, over objection, gave the jury an instruction which was word-for-word the two "excluded defenses" to Indiana's DIH statute. Veach argued the instruction was mandatory in nature and mislead the jury. Veach also argued giving this instruction invaded the province of the jury to evaluate whether Veach caused the death, or whether an independent intervening cause caused the death. Citing the *Yeary* decision, the Court of Appeals disagreed.[37]

The Indiana Pattern Criminal Jury Instructions do not include the "excluded defenses" from the DIH statute as an instruction. Instead, the committee placed the "excluded defenses" in the comments section.[38] Veach further argued giving this instruction was error because he carefully did not raise either prong of the excluded defense statute in the case: "Causation was the issue litigated in the case—a failure to prove causation based on the State's inability to prove the substance delivered by Veach was in [J.E.'s] system at the time of his death."[39]

"Indiana is not a strict liability state, and drug dealers, no matter how heinous the crime may be, should not be held responsible for deaths unless their drug was, beyond a reasonable doubt, the actual and proximate cause of the death."

Instructions in DIH cases should not distract jurors from answering the critical "but-for" and "foreseeability" questions. An instruction based on the excluded defenses, when the defendant has not asserted either defense, could mislead the jury in making this critical decision. Look at it from the lay juror's standpoint: The judge reads the DIH statutory elements, then gives the definition of proximate cause, what "resulting in death" means. Then the judge tells the jury, "it is not a defense that the human being died … as a result of using the controlled substance … in combination with" any other substance.

If, as in many cases, the victim has used multiple substances prior to death, could the excluded defense instruction confuse the jury into doing what *Yeary* said the DIH statute's excluded defenses were *not* intended to do and relieve the state of the burden to prove actual and proximate causation?

DO INDIANA'S PUBLIC DEFENDERS HAVE ADEQUATE RESOURCES TO DEFEND DIH CASES?

A defendant found guilty under Indiana's DIH statute faces a Level 1 felony, which carries a mandatory, non-suspendable 20-year minimum sentence, up to a 40-year maximum sentence.[40] These cases rely heavily on expert witnesses, which weighs in the state's favor, because the state generally has the resources to consult with and bring these witnesses to trial to testify. Defendants relying on a public defender office for resources may not have the same access to expert assistance. If a defendant cannot locate an expert or afford an expert, even deposing the state's experts may prove too costly.

In capital murder cases, counties must provide reasonable funds to a defendant to engage experts, investigate the case, etc. Given the complex scientific issues involved in DIH cases and the substantial penalty involved, should a defendant in a DIH case have access to funds to consult with an expert? Should all counties be required to provide at least some funds to defendants in DIH cases? As the cases discussed above show, some expert assistance to the defendants could have made a significant difference in the defenses they were able to assert.

CONCLUSION

This article does not intend to condone drug dealing or give any sympathy to those who deliver drugs to other people. This article does not intend to criticize the legislature's decision to enact the DIH statute or prosecutors' charging decisions.

The argument advanced is that the penalty is very severe, and defendants who face these penalties should have minimal resources to help them address the complex scientific issues involved in these cases. The jury should have clear instructions on what "proximate cause," or even better, "resulting cause," means. Indiana is not a strict liability state, and drug dealers, no matter how heinous the crime may be, should not be held responsible for deaths unless their drug was, beyond a reasonable doubt, the actual and proximate cause of the death.

ENDNOTES

1. Press Release, House supports Steuerwald's effort to increase penalties for drug dealers who cause death (Jan. 29, 2018), https://www.indianahouserepublicans.com/news/press-releases/house-supports-steuerwald-s-effort-to-increase-penalties-for-drug-dealers-who-cause-death/.
2. Olivia Covington, *Prosecutor: Dealing Resulting in Death Charge Targets Violence, Addictions*, The Indiana Lawyer (Oct. 17, 2019), https://www.theindianalawyer.com/articles/prosecutor-dealing-resulting-in-death-charge-targets-violence-addictions.
3. Indiana Code Section 35-42-1-1.5. *See* P.L. 198-2018, Section 7. A Level 1 felony carries a sentencing range from 20 to 40 years, with a 30-year advisory sentence.
4. Indiana Code Section 35-42-1-1.5(d)(2).
5. Ariz. Rev. Stat. Section 13-1105(A)(2); Oklahoma Stat. Ann. Section 21-701/7(D).
6. Mark Neil, *Prosecuting Drug Overdose Cases: A Paradigm Shift*, Attorney General Journal (Feb. 12, 2018), https://www.naag.org/attorney-general-journal/prosecuting-drug-overdose-cases-a-paradigm-shift/.
7. N.J.S.A. 2C:35-9; N.H. Rev. Stat. Ann. Section 318-B:26. Even though it is framed as a strict liability statute, New Jersey's statute does contain a causation requirement similar to Indiana's statute.
8. The article cited in endnote 6 is interesting if you want to learn more about the different DIH statutes around the United States.
9. *Brief of Appellant, Justin Yeary*, filed in *Yeary v. State*, 186 N.E.3d 662 (Ind. Ct. App. 2022). The brief, at page 27, notes other states' statutes may contain one of Indiana's excluded defenses, but no statute apparently contains both.
10. 186 N.E.3d 662 (Ind. Ct. App. 2022).
11. *Id.* at 8.
12. *Id.* at 20. The court went on to hold, "The legislative intent is clear: to ensure a defendant does not escape liability merely because the person who died used other drugs or drank alcohol while ingesting the drug provided by the defendant." The Court of Appeals also rejected Yeary's challenge to the DIH statute based upon vagueness and his right to present a defense.
13. *Thrash v. State*, 88 N.E.3d 198, 207 (Ind. Ct. App. 2017) (quoting *Gibbs v. State*, 677 N.E.2d 1106, 1109 (Ind. Ct. App. 1997)).
14. Phil Dixon, *Defending Death by Distribution Cases*, North Carolina Criminal Law (Jan. 21, 2020), https://nccriminallaw.sog.unc.edu/defending-death-by-distribution-cases/.
15. Thomas P. Gilson, Carole Rendon, and Joseph Pinjuh, *Rules for Establishing Causation in Opiate/Opioid Overdose Prosecutions—The Burrage Decision*, 7 Acad. Forensic Pathol. 87 (2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6474483/. A part of the U.S. Department of Health and Human Services, NIH is the largest biomedical research agency in the world.
16. *Brockman v. State*, 190 N.E.3d 990 (Ind. Ct. App. 2022); *Moody v. State*, 202 N.E.3d 447 (Ind. Ct. App. 2022), *transfer denied*; *Veach v. State*, 204 N.E.3d 331 (Ind. Ct. App. 2023), *transfer denied*.
17. *Id.* at paragraphs 5-6 and endnote 1. Etizolam, according to Wikipedia, possesses anxiolytic, amnesic, anticonvulsant, hypnotic, sedative, and muscle relaxant properties. It is used to treat OCD and anxiety disorders. The Court of Appeals reversed the convictions related to methamphetamine, finding the three individuals in the hotel room obtained the drug simultaneously, and therefore Brockman did not deliver the drug to the others.
18. State's brief, p. 43; appellant's brief, pp. 42-44.
19. State's brief, pp. 43-44.
20. *Id.* at p. 44.
21. 190 N.E.3d 990 at Paragraph 14. *Note the Court of Appeals did not say the drug was the cause-in-fact of the death, just that it was foreseeable that etizolam and methamphetamine together could cause death*. Brockman is serving a nearly 32-year total sentence in this case.
22. The author was the trial judge in this case, and this case sparked the author's interest into DIH causation issues.
23. Memorandum decision, paragraphs 2-5.
24. *Id.*, paragraphs 8-11.
25. *Id.*, paragraph 11.
26. Interesting note: Although it was a unanimous opinion, Judge Vaidik concurred in the result without opinion. Moody's projected release date from the Department of Correction is 2052. She was sentenced to an additional six years due to the habitual offender enhancement.
27. 204 N.E.3d at 334.
28. The discussion about the science involved in this case is complicated, and space limitations preclude further discussion.
29. State's Brief, pp. 13-14.
30. Veach's Reply Brief, p. 11.
31. *Id.*, p. 6.
32. 204 N.E.3d at 337. Veach is serving an executed sentence at the Department of Correction until 2047.
33. Indiana Model Civil Jury Instruction No. 301.
34. Indiana Model Civil Jury Instruction No. 302.
35. Indiana Pattern Jury Instructions Criminal Instruction No. 14.3260.
36. *Id.*, *see* Comments.
37. 2023 Ind. App. LEXIS at paragraphs 24-26. *Veach* was tried before the Court of Appeals issued the *Yeary* opinion.
38. Veach Reply Brief, p. 12. *See, e.g.*, Instruction No. 8.0900.
39. Veach Reply Brief, p. 9.
40. I.C. 35-50-2-2.2(c); I.C. 35-50-2-4.

SOCIAL MEDIA AND ATTORNEY ADVERTISING

By Cari Sheehan

Social media has become the preferred mode for attorney advertising. It is an ever-evolving platform that offers a variety of benefits for attorneys to advertise their legal services. Most social media platforms are primarily free and reach a diverse audience across multiple states and countries. These benefits are unparalleled to any other advertising medium. However, attorney advertising on social media comes with a lot of ethical risks if the Rules of Professional Conduct (RPC) are not followed. The hard part is the rules do not directly speak to attorney advertising on social media platforms like TikTok, LinkedIn, X (formerly known as Twitter), Facebook, or Instagram. The rules only reference application to "electronic" modes of communication.[1] Therefore, attorneys must interpret and apply the rules that were historically written for traditional forms of advertisements (e.g., television commercials, print ads, or Yellow Pages listings).

WHAT CONSTITUTES ATTORNEY ADVERTISING ON SOCIAL MEDIA?

In Indiana, the term "advertise" as used in RPC 7.2(a) refers to "any manner of public communication *partly or entirely* intended or expected to promote the purchase or use of the professional services of a lawyer, law firm, or any employee of either involving the practice of law or law-related services."[2] This is a broad definition and potentially encompasses both an attorney's personal and professional social media pages.

Obviously, if a firm maintains a website or other social media account, then the rules regarding advertising apply. Issues arise, however, when an attorney is utilizing their personal social media pages for both personal and professional purposes, even if the professional use is limited (e.g., promoting court wins, advertising the law firm, stating practice areas, or posting notices about certain laws and regulations).

"Once a personal account becomes blended with a professional use, then the account must comply with the advertising rules in the RPC. This standard could potentially include every attorney's personal social media pages."

The question then becomes: When is a predominantly personal Facebook page treated as a professional account and subject to the RPC? Answer: Once a personal account becomes blended with a professional use, then the account must comply with the advertising rules in the RPC. This standard could potentially include every attorney's personal social media pages. Therefore, it is essential to keep business separate from personal.

An example of when the content on a personal social media page may cross the line is when an attorney posts content about an area of the law in which they practice or information about their legal services even if not overtly suggesting that people retain them. Then the personal social media page could potentially be deemed as attorney advertising and must adhere to the RPC. The intent of the attorney does not matter if the content posted crosses the line and comingles the personal and the professional.

Another example is when attorneys make comments on their personal social media accounts thinking they are just "chatting" with friends but are talking about clients or cases on which they are working. Such comments may be construed as attorney advertising and be subject to the RPC.[3] Again, the intent of the attorney does not matter.

IF AN ATTORNEY'S SOCIAL MEDIA PAGE IS DEEMED ATTORNEY ADVERTISING, WHAT RULES APPLY?

If a social media page, personal or professional, is subject to the advertising rules, it should contain the basic information as set forth under Ind. RPC 7.2(c), including the name of the firm, at least one attorney, and the office address or location.[4] In addition, the website should be maintained, or a copy maintained, for a period of six years, and it should comply with the basic permissible subjects of what can and cannot be included in attorney advertising.[5]

Social media pages deemed to be attorney advertising are subject to RPC 7.1, which provides that attorneys shall not make false or misleading communications about themselves or their services.[6] A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.[7] Misleading statements are generally judged from the view point of the probable target receiving the message, not the view point of the attorney drafter.[8]

The ways an attorney can unknowingly run afoul of this rule in advertising are limitless. However, a few items that could potentially be misleading include, but are not limited to, the use of testimonials, comparisons, statistic data on past performance to indicate future success, and/or dramatizations.[9] In addition, hiding behind fake screen names or anonymous posts can be deemed false, misleading, and untruthful conduct.[10]

Social media pages deemed attorney advertising also are subject to RPC 7.4, which provides an attorney may not hold out as a "specialist" or "expert" in any legal field unless the attorney has been certified as such by an Independent Certifying Organization (ICO) accredited by the Indiana Commission for Continuing Legal Education and the certifying organization is identified on the webpage.[11]

Social media pages also cannot violate RPC 7.3 regarding no solicitation of clients unless a limited exception applies to the situation.[12] RPC 7.3 provides, in part, that attorneys "shall not by in-person, live telephone, or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain" unless the person contacted is a lawyer or close family member, personal friend, or a prior professional relationship.[13] This would apply to any messaging apps, direct messages in all platforms, email, blogs, chat rooms, or any social media platform such as TikTok and YouTube.

Attorneys also cannot use tradenames or professional designations as social media handles unless they comply with RPC 7.5.[14] Under RPC 7.5, an attorney "shall not use a firm name, letterhead or other professional designation that violates Rule 7.1" (false or misleading).[15] Names that have been deemed to be false or misleading include: (1) implying a connection with a government agency or public or charitable organization,[16] and (2) implying practice area limitations or other designations that might be misleading or untrue.[17]

If an attorney or a firm has a national presence, then the rules that apply may not be the RPC where the attorney is located or the state in which they practice. When attorneys and firms practice in multiple states and hold offices in multiple states, it is always advised that the attorney or firm adhere to the strictest state's advertising rules in which it practices.[18] However, most jurisdictions require the same general guidelines set forth in RPC 7.1, 7.2, and 7.4.[19]

WHAT SPECIFIC PLATFORMS CARRY A HIGH RISK OF BEING ATTORNEY ADVERTISING SUBJECT TO THE RPC?

YOUTUBE AND TIKTOK: COMMERCIALS

YouTube and TikTok generally always qualify as attorney advertising. These platforms are the new mediums for posting commercials, responding to social happenings in real-time, and reaching out to target audiences using creative short videos that can be posted multiple times a day, week, or month. Attorneys with traditional television commercials during the nightly news are behind the times. However, attorneys should use caution because these sites are subject to all the attorney advertising rules.

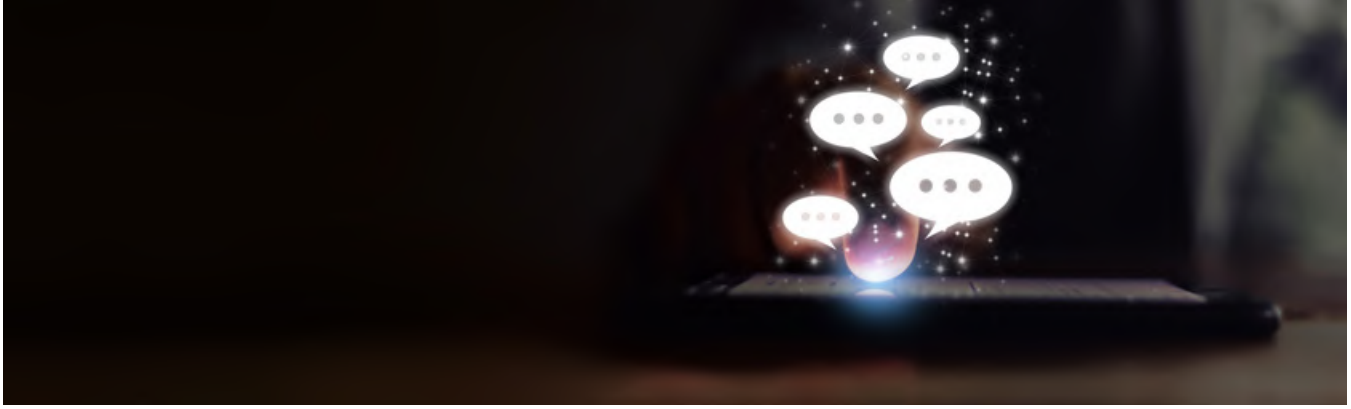
When using YouTube and TikTok, an attorney should strive to accomplish three things: (1) educate/inform, (2) entertain/humanize, and (3) inspire viewers about the law. If an attorney can accomplish these three things, they are more likely to get followers and potential clients. Many attorneys have had great success in using these platforms.[20] Attorneys have used these platforms to hire new attorneys, collect evidence, investigate, and educate. However, attorneys cannot post just any content. All content must be consistent with the applicable RPC.

LINKEDIN, FACEBOOK, X, INSTAGRAM: ENDORSEMENTS, TAGGING, POSTING, LIKING

Most social media platforms allow third parties to comment, like, post, tag, and/or endorse other people for certain skills and expertise. While this is a great feature for many professionals and jobseekers, it can be harmful to attorneys under the RPC.

LinkedIn is the most popular social media website among professionals for networking and job searches. LinkedIn allows users to endorse and recommend individuals under categories titled "specialties" and "skills and expertise." This feature was designed as a one-size-fits-all functionality and was not created with the RPC in mind. Attorneys who do not otherwise qualify as an "expert" or "specialist" should not use this feature on LinkedIn.[21]

LinkedIn became aware of the legal issues surrounding this section and



"When attorneys and firms practice in multiple states and hold offices in multiple states, it is always advised that the attorney or firm adhere to the strictest state's advertising rules in which it practices."

recently modified the terminology of the feature and changed the title to "skills."[22] However, when listing out any skills the LinkedIn prompt states, "Do you have any of these skills or areas of expertise?"[23] As such, the concerns under the RPC are not alleviated by LinkedIn's change in terminology. Attorneys should not use this feature or allow third parties to use it on their behalf, because comments and testimonials made by strangers, friends, family, clients, and/or former clients could be deemed in violation of the RPC, particularly RPC 7.4 and RPC 7.1.[24]

For example: Betty Smith is the proud mother of attorney John Smith and wants to brag about his accomplishments on social media to help him get business. Betty, through her LinkedIn account, endorses John for legal writing, litigation, legal research, and other legal sounding categories. Betty has never personally used John's services, but he is her son, and she knows in her heart he is the best in these categories. The endorsements are populated onto John's LinkedIn profile for public viewing. The endorsements also classify John as an expert litigator, which is true in John's opinion since he has been litigating for 20 years and is biased about his own abilities. John does not know his mother endorsed him because he is too busy to routinely check his LinkedIn account. Has John and/or Betty violated the RPC? Yes. John could potentially be held in violation of RPC 7.1 for false or misleading advertising and RPC 7.4 for holding himself out as an expert in litigation without proper certification.[25] This is true even if he did not solicit or post the endorsements himself.

Attorneys are held to a high standard when it comes to compliance with the RPC. Attorneys must proactively cure any violations, even if made by a third party, through clarification or deletion.[26] If attorneys do not take proactive measures to delete violative comments, tags, likes, or posts made by third parties, attorneys can be subject to discipline as if they personally posted the content.[27]

This standard also applies when attorneys "like" or react with a "thumbs-up," "heart," or another emoji on a third party's post and/or comment. When an attorney takes these actions, the attorney adopts the third party's post and/or comment as their own.[28] For instance, if an attorney scrolls through social media and "likes" all their friends' posts for that day (to be nice), the attorney just adopted each of the posts as their own. If any of the posts violate the RPC, the attorney is liable and can be disciplined.

So, how do attorneys protect themselves when social media platforms allow for endorsements, tagging, and allowing third parties to post freely on other people's social media webpages? Answer: Turn off the feature that allows for this conduct! The use of privacy control settings on social media platforms is vital to adherence with the RPC, and attorneys should be competent on what features need to be turned-off on each platform and how to undertake such action.[29]

BLOG POSTS

Blogs, personal and professional, are potentially subject to all advertising rules under the RPC so long as the blog posts meet the definition of advertising under RPC 7.2. Personal blogs should be scrutinized closely because many cross the line into attorney advertising. Legal topics, cases, and clients cross over the line into attorney advertising and would make a personal blog subject to the RPC even if the blog is private.[30]

"If attorneys do not take proactive measures to delete violative comments, tags, likes, or posts made by third parties, attorneys can be subject to discipline as if they personally posted the content."

GOOGLE ADWORDS

Google AdWords are embedded in websites and designed to drive traffic to a particular website. AdWords can be a permissible form of attorney advertising so long as the advertisement is otherwise compliant with the applicable RPC and the keywords are not purchased with the intent to mislead the public or engage in other prohibited conduct.[31] The purchase of a competitor's name is tantamount to misconduct in most jurisdictions.[32]

CAN DISCLAIMERS PROTECT AN ATTORNEY FROM ADVERTISING VIOLATIONS ON SOCIAL MEDIA?

The use of a disclaimer may not be a complete shield against violations of the RPC; however, it is highly recommended on all social media platforms, personal and professional, which *may* be deemed attorney advertising.

A disclaimer can be as simple as stating, "attorney advertising" or "prior results do not guarantee similar outcomes" or "#Disclaimer." The disclaimer should be conspicuously displayed on the social media page or platform. There are several potential places to include disclaimers on social media pages.[33] An attorney just needs to be creative and proactive.

CONCLUSION

Advertising online has many economic and client benefits for attorneys. However, it does not come without its cautions. It is easy to get wrapped up in being the next "influencer" or having the most advertisements online. However, attorneys need to always remember that the rules apply. There is no "pause" on the RPC just because conduct is online and not in person. The rules apply 24 hours a day, 7 days a week, in person and online, and in an attorney's professional and personal capacity. Attorneys should always remember that if they cannot do it in person, they cannot do it online.

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ENDNOTES

1. See generally Ind. Rules of Prof. Conduct.
2. Ind. Rule Prof. Conduct 7.2(a) (2023) (emphasis added).
3. Ind. Rule Prof. Conduct 1.6 regarding

confidentiality also could be violated depending on the content and if the content discloses client confidences as defined by the rule.

4. Ind. Rule Prof. Conduct 7.2(c) (2023).
5. Ind. Rule Prof. Conduct 7.2(c), comment 2 (2023) (providing the permissible subjects/content of attorney advertising).
6. Ind. Rule Prof. Conduct 7.1 (2023).
7. Ind. Rule Prof. Conduct 7.1, comment 2 (2023).
8. *Id.*
9. *Id.*
10. Generally, Ind. Rule Prof. Conduct 7.1, comment 2 (2023).
11. Ind. Rule Prof. Conduct 7.4(d) (2023); New York State Bar Association Committee on Professional Ethics, Opinion 972 (June 26, 2013) (providing that a law firm may not list its services under heading of "specialties" on a social media site, and lawyer may not do so unless certified as a specialist by an appropriate organization or governmental authority).
12. Ind. Rule Prof. Conduct 7.3 (2023).
13. Ind. Rule Prof. Conduct 7.3(a) (2023). Note: The other subsections of Ind. RPC 7.3, including sections (b)–(f) would also apply to social media pages if pertinent to the content.
14. Ind. Rule Prof. Conduct 7.5 (2023).
15. Ind. Rule Prof. Conduct 7.5(a) (2023).
16. Ind. Rule Prof. Conduct 7.5 (2023); Ind. Rule Prof. Conduct 7.1, comment 3 (2023). For example, if a private law firm uses a trade name based on a geographical location, such as "Springfield Legal Clinic," then an express disclaimer that it is not a public legal aid agency may be required to avoid the misleading implication that the law firm relates to the city or the state. Any communication by a private law firm that includes a trade name like "Springfield Legal Clinic" must clearly identify the firm as a private law firm and not a charitable legal services organization. This is accomplished by use of a byline under the trade name, for example: "Springfield Legal Services, Trade Name for Sue Ellen, Attorney at Law." Alternatively, the private law firm can insert a footnote like "A private law firm operating under the name Sue Ellen, Attorney at Law, and not affiliated with any charitable legal services organization." The Supreme Court has held the phrase "legal clinic" in and of itself does not inherently mislead the public. *Bates v. State Bar*, 433 U.S. 350 (1977). However, jurisdictions have held the use of the phrase "legal clinic" should include a disclaimer that the law firm is not affiliated with a public or charitable organization. *In re Vincenti*, 704 A.2d 927 (N.J. 1998); *see also, e.g.*, Cal. Ethics Op. 04-167 (2004)(firm's name, "Worker's Compensation Relief Center," improperly implies affiliation with governmental agency); Conn. Information Ethics Op. 95-22 (1995) ("[X] County Legal Services" requires disclaimer of any connection either government agency or public charitable legal services organization); Md. Ethics Op. 2010-02 (2009)(firm's use of "generic name of a state administrative agency" is improper); Md. Ethics Op. 04-10 (2004)("Consumer Legal Services" is improper trade name because it implies firm is a public or charitable legal services organization); S.C. Ethics Op. 98-35 (1998)("[Community Name] Legal Clinic" permissible if accompanied by a disclaimer).
17. *In re Shapiro*, 656 N.Y.S2d 80 (App. Div. 1996); *In re Shannon*, 638 P.2d 482 ("Shannon and Johnson's Hollywood Law Center" not misleading regarding services offered of identity of the lawyers); Phila. Ethics Op. 98-17 (1998) (law firm may call itself "Medical Malpractice Trial Attorneys, Inc." only if it actually handles medical malpractice cases through trial).
18. Jan L. Jacobowitz and John G. Browning, *Legal Ethics and Social Media* (2nd ed. 2022).
19. *Id.*
20. By Aries, *10 Lawyers on TikTok to Follow in 2022* (July 27, 2022), https://byaries.com/blog/10-lawyers-on-tiktok-to-follow-today/#:~:text=%231%20Mike%20Mandell&text=His%20videos%20are%20well%2Dproduced,to%20his%20style%20and%20approach).
21. Jan L. Jacobowitz and John G. Browning, *Legal Ethics and Social Media*, (2nd ed. 2022).
22. *Id.*
23. *Id.*
24. Ind. Advisory Opinion #1-20 (July 2020); Ind. Rule Prof. Conduct 7.1 (2023) (providing that attorneys are prohibited from making comments that are false and/or misleading, as well as making any "representation, testimonial, or endorsement of a lawyer or other statement that, in light of all the circumstances, is intended or likely to create unjustified expectation about a lawyer or law firm or a person's legal rights."); Ind. Rule Prof. Conduct 7.4 (2023) (providing that attorneys are prohibited from holding out as a "specialist," and prohibited from allowing third parties to endorse, comment, identify the attorney as an expert, or provide testimonials about the attorney's services on social media); Ind. Advisory Opinion #1-20 (July 2020) (citing Ind. Rule Prof. Conduct 7.1, comment 2(3) and (8)); Ind. Rule Prof. Conduct 7.4(d) (2023); Ind. Rule Prof. Conduct 7.1 (2023); Debra Cassens Weiss, *Does Your Legal LinkedIn Profile Have Off-Base Endorsements? Ethics Opinion Has a Problem With That* (March 30, 2015);, http://www.abajournal.com; and Rachel M. Zahorsky, *Do LinkedIn Endorsements Violate Legal Ethics Rules?* (Mary 21, 2013), http://www.abajournal.com.
25. Ind. Advisory Opinion #1-20 (July 2020); Ind. Rule Prof. Conduct 7.1 (2023); Ind. Rule Prof. Conduct 7.4 (2023).
26. Ind. Advisory Opinion #1-20 (July 2020).
27. *Id.*
28. *Id.*
29. Ind. Advisory Opinion #1-20 (July 2020); Ind. Rule Prof. Conduct 1.1, comment 6 (2023) (providing "[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, ***including the benefits and risks associated with relevant technology***, engaging in continuing study and education.").
30. Ind. Rule Prof. Conduct 1.6 (2023). Rule 1.6 may also be violated in blogs if the post discloses confidential client information.
31. Jan L. Jacobowitz and John G. Browning, *Legal Ethics and Social Media* (2nd ed. 2022).
32. *Id.*
33. NY State Bar Assoc., *Social Media Ethics Guidelines* (May 11, 2017). Facebook: include in the *impressum* or statement of ownership; LinkedIn: include in the "About" section where a person states biographical information; Instagram: include in the description under your name; TikTok: include in the description under your name and/or your link tree (if applicable); X: include in the 280 characters of the post, e.g., "This post contains attorney advertising. Prior results do not guarantee similar outcome."

LETTER TO THE EDITOR

By Brent E. Steele

DEAR EDITOR:

I TOOK THE OPPORTUNITY TO READ THE ARTICLE IN THE JUNE 2023 *RES GESTAE* called "Eviction Trauma: Rethinking an Extreme Remedy to a Contract Dispute."

I am actively involved in the practice of law and have been for 51 years, and I am at a quandary to understand the statement that ascertainable economic loss in the form of damages is an adequate remedy at law to the landlord.

That statement would be true if, in fact, the tenant had any means to satisfy the assessment of damages. I have represented tenants and I have represented landlords. I have watched countless dozens of property owners who have been in the Small Claims Division of our county court, when the judge tells them that he is giving them a judgment for damages but to not expect to collect any of it because, in all probability, they will never collect a dime. In fact, one time I heard Judge Blanton say that his father gave him a good piece of advice, which was, "if you have a piece of property that you are renting out, you have a piece of property you need to be selling."

The property owner who is renting out that piece of real estate might be a pregnant woman, too, and looking to this income as a supplement or maybe her sole source of income. What about the woman who inherits a piece of property from her parents and decides to rent it out as a single mother who is otherwise unemployed? The property owner has real estate taxes, fire and extended parallel insurance, liability insurance, and general upkeep expenses. If they are not paid their rental, then these items do not get paid and to state that eviction is an unwarranted equitable remedy was doing the bar no favor. I hope the young lawyers of the next generation don't believe that eviction is somehow an unnecessary tool or one that is to be avoided by our judicial system.

Respectfully submitted,

Brent E. Steele
Steele & Steele, LLC
Attorneys at Law

CRIMINAL JUSTICE NOTES

By Suzy St. John

JURY'S ROLE IN HABITUAL OFFENDER TRIALS, SANCTIONS FOR DISCOVERY VIOLATIONS, AND MORE

In June, the Indiana Supreme Court issued opinions on the jury's role in habitual offender trials, sanctions for discovery violations, and foundational requirements for opinion testimony on truthfulness. The Court of Appeals addressed voluntariness as a defense to violating probation conditions.

INDIANA SUPREME COURT

TRIAL COURTS MAY EXCLUDE EVIDENCE AS A SANCTION FOR EGREGIOUS DISCOVERY VIOLATIONS

In *State v. Lyons*, 23S-CR-163, 2023 WL 4194729 (Ind. June 27, 2023), the defendant agreed to a polygraph examination and entered an agreement stipulating that the results would be admissible in a criminal proceeding. During the polygraph, the defendant revealed his bipolar diagnosis and discussed how spiritual shadows communicated with him. The police sergeant administering the examination became concerned that the defendant's mental condition made him an unsuitable candidate for a stipulated polygraph. The sergeant unilaterally decided to make the examination unstipulated, meaning the results would not be admissible in criminal proceedings. The sergeant did not note this change on the polygraph examination form but only noted it in papers in his personal file, to which the prosecutor's office lacked access.

At a hearing on the defendant's motion to suppress the polygraph results and his answers to questions that

followed it, the sergeant testified about the admissible nature of a stipulated polygraph, provided a general step-by-step recollection of the nearly four-and-a-half hours he spent with the defendant before and after the examination, and relied on his notes when testifying. Yet, he never mentioned changing the polygraph to a non-stipulated examination due to his concerns about the defendant's mental condition. The trial court denied the motion to suppress.

Days before the scheduled jury trial, the sergeant revealed he had changed the polygraph to a non-stipulated examination. After holding a hearing on this new development, the trial court entered a detailed order sanctioning the state's discovery violation by "excluding any and all evidence generated or acquired by [the sergeant]."

The Indiana Supreme Court upheld the trial court's sanction on interlocutory appeal. Indiana Trial Rule 37 authorizes courts to impose sanctions for discovery violations. The sanction here was based on a finding that the sergeant misled the court, which the record supported. The Indiana Supreme Court has previously held that excluding the state's evidence is proper for discovery violations that are grossly misleading or show bad faith. "Because the trial court found that level of culpability here, and the record supports (even if it does not compel) that conclusion, the trial court did not abuse its discretion." *Id.* at *6.

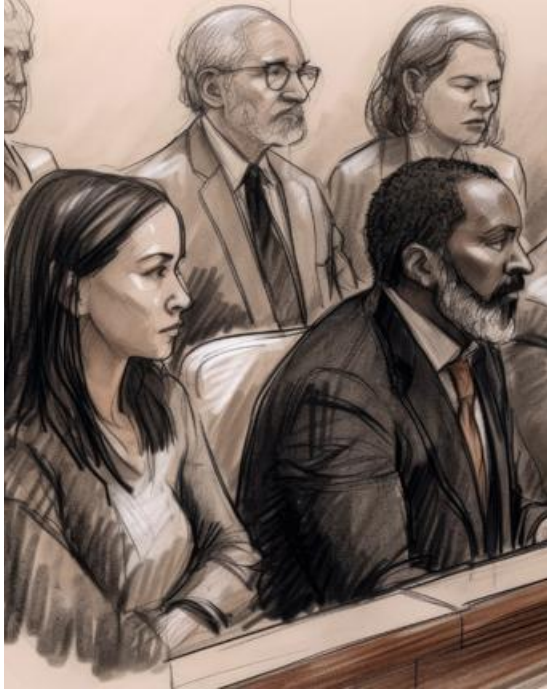
IT IS THE JURY'S ROLE TO DECIDE A DEFENDANT'S ULTIMATE HABITUAL OFFENDER STATUS

In 2014, the General Assembly amended the habitual offender statute to say, "The role of the jury is to determine whether the defendant has been convicted of the unrelated felonies." Ind. Code § 35-50-2-8(h). At the defendant's habitual offender trial in *Harris v. State*, 23S-CR-165, 2023 WL 4246130 (Ind. June 29, 2023), the trial court refused to let the defendant testify about the circumstances of his prior convictions to convince the jury he was not a habitual offender. The Court of Appeals affirmed, concluding the 2014 statutory amendment superseded the longstanding precedent holding that it is the jury's right to determine habitual offender status.

The Indiana Supreme Court disagreed with that conclusion, finding the statute ambiguous because the 2014 amendment is susceptible to two reasonable interpretations. To preserve the statute's constitutionality under Article 1, Section 19 of the Indiana Constitution—which gives the jury the right to determine the law and the facts "in all criminal cases whatever"—the jury retains the right to decide a defendant's ultimate habitual offender status.

Despite agreeing with the defendant's argument that evidence beyond the mere fact of a conviction would inform the jury's discretionary decision about his habitual offender status, a majority of the Indiana Supreme Court found the proffered testimony irrelevant. The statutory scheme reflects an intent that jurors consider no evidence beyond the defendant's convictions and a defendant has "no constitutional right to present irrelevant evidence." *Id.* at *10.

Justice Molter, joined by Justice Massa, concurred in the judgment but believed this case could be resolved narrowly based on the habitual offender statute and rules of evidence without addressing the constitutional issues.



Chief Justice Rush dissented in part with an opinion joined in part by Justice Slaughter. Chief Justice Rush disagreed that testimony about the circumstances of a defendant's crimes is irrelevant to the habitual offender determination. The text and history of Article 1, Section 19 establishes that juries have distinct constitutional authority in criminal cases, which the majority "dilutes if not nullifies" in the context of habitual offender trials. *Id.* at *20. Chief Justice Rush would vacate the habitual-offender adjudication and remand the case for a new habitual offender proceeding.

Justice Slaughter agreed with Chief Justice Rush's proposed disposition of the case but would address the issues raised on non-constitutional grounds.

THE FOUNDATION FOR OPINION TESTIMONY ABOUT TRUTHFULNESS IS LESS DEMANDING THAN FOR TESTIMONY ABOUT REPUTATION FOR TRUTHFULNESS

A defendant accused of child molestation sought to admit

opinions from three witnesses about the victim's character for untruthfulness. The trial court excluded the proffered testimony for lack of foundation.

In *Hayko v. State*, 23S-CR-13, 2023 WL 4115698 (Ind. June 22, 2023), the Indiana Supreme Court decided as an issue of first impression the requirements for a proper foundation for opinion testimony under Indiana Evidence Rule 608(a). Evidence Rule 608(a) allows a party to attack witness credibility through testimony about reputation for untruthfulness or testimony in the form of an opinion about a witness's character for untruthfulness. The Indiana Supreme Court held that the foundational bar for admitting opinion testimony—which reflects the judgment of a single individual—is lower than for reputation testimony reflecting the judgment of many. Following the approach of most jurisdictions, the court held the proponent must show the witness's opinion is rationally based on their personal knowledge and would help the trier of fact.

Here, the trial court's evidentiary ruling misinterpreted the law by conflating reputation testimony with opinion testimony. And because the defendant's proffered testimony was supported by a proper foundation, excluding it was an abuse of discretion.

In addressing whether the error was reversible, the Indiana Supreme Court noted confusion in the analysis of harm for non-constitutional errors. The court clarified that Indiana Appellate Rule 66(A) defines reversible error on appeal, not Trial Rule 61. Under Appellate Rule 66(A), the party seeking relief must show—given all the evidence in the case—how the error's probable impact undermines confidence in the outcome of the proceeding below. "Importantly, this is not a review for the sufficiency of the remaining evidence; it is a review of what was presented to the trier of fact compared to what should have been presented." *Id.* at *7. Thus, an appellate court must consider the likely impact of the improperly excluded evidence on a reasonable, average jury considering all the evidence in the case.

"Ultimately, we recognize that impeachment evidence can have a profound effect in child molestation cases, as they often turn on credibility determinations," the court said. *Id.* at *8. But because the victim's credibility was attacked through other evidence here, the erroneous exclusion of some impeachment evidence did not undermine confidence in the verdict.

INDIANA COURT OF APPEALS

LACK OF VOLITION IS NOT A DEFENSE TO VIOLATING A PROBATION CONDITION

In *Trejo v. State*, 22A-CR-2667, 2023 WL 3768336 (Ind. Ct. App. June 2, 2023), the defendant had been sentenced in 2008 to eight years in the Department of Correction (DOC) with five years suspended to be served on probation. One condition of the defendant's probation required that he meet with the probation department immediately and report to probation as directed.

Eighteen months later, the state petitioned to revoke the defendant's probation. The state alleged he violated the condition of reporting to probation as directed because he was in the custody of United States Immigration and Customs Enforcement (ICE) following his release from the DOC.

The trial court issued a warrant for the defendant's arrest in 2009, but he was not arrested for the alleged probation violation until 2022. At the probation revocation hearing, the state presented evidence showing the defendant never contacted the probation department. The trial court found a probation violation and ordered part of the previously suspended sentence served at the DOC as the sanction.

On appeal, the defendant did not dispute that he failed to meet with probation as ordered but argued there was no proof his failure to do so was voluntary. Finding sufficient evidence of a probation violation, the Indiana Court of Appeals held the defendant's "inability to meet with the probation department because he was in ICE custody at the time has no bearing on whether the probation violation occurred. Instead, his alleged inability to comply . . . bears on the trial court's sanction for the violation, which [the defendant] does not challenge." *Id.* at *2.

Suzy St. John is a staff attorney with the Indiana Public Defender Council and a part-time appellate public defender.

ETHICS

By James J. Bell

ETHICS AND THE NEW STATE OF OFFICE SPACE

Here's a question that is constantly on my mind: Where did everyone go?

Back in my day (in 2019), an afternoon walk in downtown Indianapolis would have resulted in my meeting several fellow lawyers and judges. Now all I run into are tumbleweeds, boarded up Starbucks cafes, and the haze of Canadian forest fire smoke.

It's no secret that lawyers are working from home and many lawyers work out of their backpacks and meet with clients in public settings. All those lawyers need is a laptop and a Wi-Fi connection. In addition, more lawyers are working in commercially provided virtual office space where they are surrounded by individuals working in other industries. Simply put, what it means to work "at" a law office has changed.

With all these changes come ethics questions, and the ABA's Standing Committee on Ethics and Professional Responsibility has dedicated two of its ethics opinions in the last two years to the subject of office space. In addition, Indiana cases have spoken about office sharing. Here are some ethical considerations when it comes to the new state of legal office space.

1. YOU CAN WORK ANYWHERE

In 2021, the ABA stated that "there is no requirement in the Model Rules that a lawyer have a brick-and-mortar office." ABA Formal Opinion 498, pp. 1-2. That was somewhat of a relief for lawyers who had an office but had abandoned it for a spare bedroom, but it was even more of a relief for those lawyers who had been working in virtual offices and coffee shops for years. (And, of course, it was a huge relief for the Lincoln Lawyer.)

ABA Formal Opinion 498 outlined ways to avoid problems when working from a virtual office, but in essence, it outlined what was true for all offices: No matter where lawyers are, they are required to preserve client confidentiality, continue to be diligent in their cases, and maintain communications with their clients.

"No matter where lawyers are, they are required to preserve client confidentiality, continue to be diligent in their cases, and maintain communications with their clients."

The real value of this opinion was its discussion of "some common virtual practice issues" that included topics like accessing client files and data, virtual meeting platforms, and virtual document and data exchange programs. The Indiana Rules of Professional Conduct require us to "keep abreast of changes in the law and its practice, including the benefits and risks associated with the technology relevant to the lawyer's practice." See Comment [6] to Ind. Rules of Professional Conduct 1.1. *Id.* at 4-8. If you work alone or are otherwise in charge of your own technology, then you should review this opinion.

2. INDIANA LAWYERS CAN PRACTICE INDIANA LAW FROM ANYWHERE

Remember in May 2020 when you wore a business suit on the top half of your body and a swimsuit and flip flops on the bottom half because you were in Florida attending a virtual status conference? Well, that was fine.

The ABA Standing Committee on Ethics has stated that "in the absence of a local jurisdiction's finding that the activity constitutes the unauthorized practice of law, a lawyer may practice the law authorized by the lawyer's licensing jurisdiction for clients of that jurisdiction, while physically located in a jurisdiction where the lawyer is not licensed if the lawyer does not hold out the lawyer's presence or availability to perform legal services in the local jurisdiction or actually provide legal services for matters subject to the local jurisdiction, unless otherwise authorized." ABA Formal Opinion 498, pp. 3-4. In other words, it is okay for an Indiana lawyer to advise Indiana clients on Indiana issues, while sitting in Florida. Flip-flops are optional.

3. OFFICE SHARING ARRANGEMENTS— CONFIDENTIALITY AND PHYSICAL LAYOUT OF OFFICE

Indiana lawyers have been sharing expenses in one way or another for years, but with the advent of commercial "virtual offices," where a lawyer may be sharing resources with strangers in different industries, new confidentiality considerations arise. Simply put, a shared space is not a "safe zone" for communications of any kind regarding client matters.

For example, unlike a traditional law firm where everyone in the office represents one side of an issue, the physical layout of a shared office needs to be considered. Confidentiality likes walls. If the workspace is "open" in your virtual office, consider who is listening to your calls, where you are leaving your files, whether you need to install privacy screens on computer monitors, who sees whom in waiting rooms, and locking your computer when it is not being used. ABA Formal Opinion 507 at p. 2.

4. OFFICE SHARING ARRANGEMENTS— CONFIDENTIALITY AND STAFF CONSIDERATIONS

If you are involved in an office sharing arrangement, does the staff work for you and your firm only or does the staff work for others as well? When you give your staff member a file or tell that staff member information about a case, does your staff member know not to share that information with others?

In *Matter of Recker*, 902 N.E.2d 225, a public defender shared confidential information about her client (Client A) with a second public defender. Afterwards, the second public defender used that information for the benefit of his client (Client B) and to the detriment of Client A. The second public defender was alleged to have violated several rules, including Rule 1.6 of the Indiana Rules of Professional Conduct, which prohibits the sharing of confidential information. The key issue in the case was whether or not the two public defenders were members of the same "law firm" and the determination of the issue came down to whether or not the sole staff member in the office shared confidential information. *Matter of Recker*, 902 N.E.2d 225, 226-7 (Ind. 2009).

In *Recker*, the court found that the one secretary employed by the public defender office kept all the files in a central location and "released a file only to an attorney who had appeared in that case." *Id.* at 228. Based on this conclusion, the court found that there was no sharing of confidential information, the two public defenders were not in the same law firm, and that the Respondent in *Recker* "did not violate any of the cited provisions in passing the information" that he learned about Client A. *Id.* at 229.

"Whether a lawyer must decline to take a case because of a conflict of interest due to the practice of another lawyer in an office sharing arrangement will come down to how well the lawyers keep their practices separate."

Regardless of this conclusion, it should be noted that "the Commission and Respondent disputed how much access each attorney had to the other's client files" and the issue may not have been as "clean" in real life as it appeared in a summary. *Id.* at 228. If your staff member has loyalties to others in a virtual office or to other lawyers in a more traditional law office sharing arrangement, how likely is it that your staff member could cause confidentiality problems for you? *Recker* shows that with the proper training, sharing a staff member and maintaining confidentiality is possible. However, as ABA Formal Opinion 507 notes "[i]n these situations, maintaining the confidentiality of client information is tested," so use caution when sharing staff members. ABA Formal Opinion 507 at p. 3.

5. OFFICE SHARING ARRANGEMENTS—CONFLICTS OF INTEREST CONSIDERATIONS

Similarly, the office sharing arrangements will raise concerns about conflicts of interest that will not be present in a traditional partnership where everyone is considered part of the same firm. ABA Formal Opinion 507 makes clear that "office sharing lawyers are not automatically treated as a single law firm for conflicts of interest purposes." *Id.* at p. 4.

Whether a lawyer must decline to take a case because of a conflict of interest due to the practice of another lawyer in an office sharing arrangement will come down to how well the lawyers keep their practices separate. "Office sharing lawyers who do not protect the confidentiality of their respective clients, regularly consult with each other on matters, share staff who have access to client information, mislead the public about their identity and services, or otherwise fail to keep their practices separate, are more likely to be treated as 'associated in a firm' for conflict imputation purposes." *Id.* at p. 4-5.

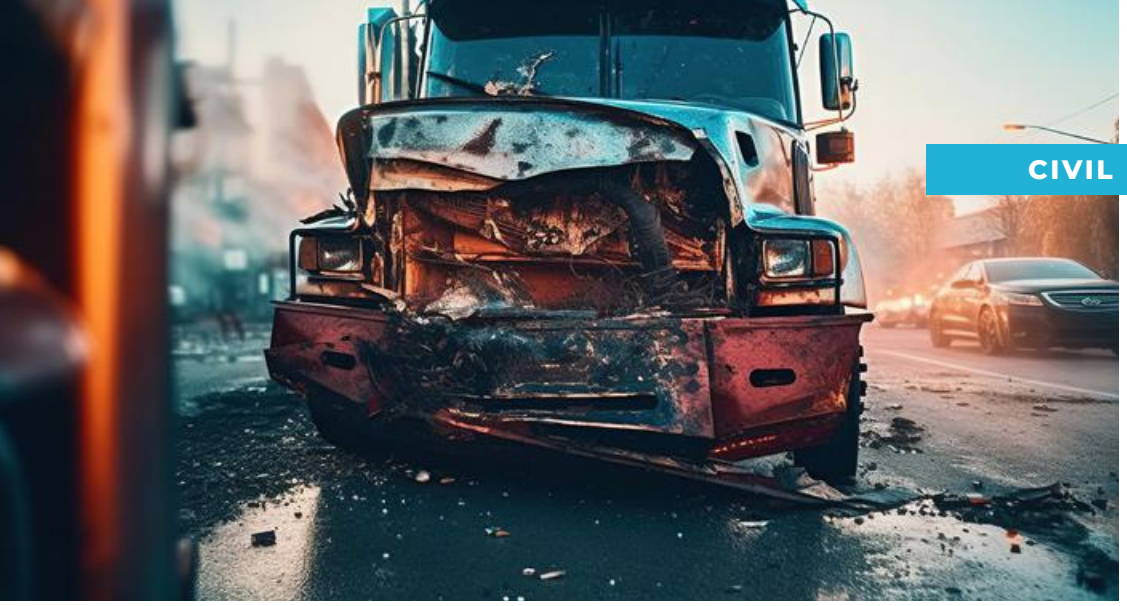
6. IF YOU SHARE SPACE, HOW ARE YOU COMMUNICATING YOUR SERVICES?

In *Matter of Sexson*, 613 N.E.2d 841 (Ind. 1993), an attorney was accused of having a conflict of interest when he filed a divorce matter against an individual who was represented by a lawyer in his office sharing arrangement in a personal injury case. Similar to the issue in *Recker*, the issue in the case was "whether the office sharing arrangement of Respondent" and others constituted a firm. *Id.* at 843.

The resolution of the issue not only came down to the sharing of confidential information with staff, but it also came down to how the lawyers presented themselves to the public. In this case, the Indiana Supreme Court noted that the attorneys used the same letterhead, phone lines, and staff and therefore, it was reasonable for the client to assume that her lawyer and the Respondent "were part of the same 'firm.'" *Id.* Therefore, it was determined that when the Respondent took adverse action against this firm's client, he violated Rule 1.7 of the Indiana Rules of Professional Conduct.

CONCLUSION—TAKEAWAYS

Where we work and how we work has changed quickly over the past several years. We can work anywhere, and we are not required to work in a brick-and-mortar office building. However, when we are not surrounded by walls or members of our own firm, protecting client information, training staff on confidentiality, and staying abreast of technology takes on new meaning. Taking measures to separate your practice from others will avoid unintended violations of the Indiana Rules of Professional Conduct.



By Jane Dall Wilson and Will Clark

JUNE CASES ADDRESS FUNDAMENTAL RIGHTS TO ABORTION, ISSUE PRECLUSION, MORE

In June 2023, the Indiana Supreme Court decided six civil cases and granted transfer in two other civil cases. The Indiana Court of Appeals issued 20 published civil opinions.

PLAINTIFF MUST SUE GOVERNMENTAL AND NON-GOVERNMENTAL TORTFEASORS IN SAME LAWSUIT TO AVOID ISSUE PRECLUSION

In *Davidson v. Indiana*, 2023 WL 4099102 (Ind. June 21, 2023), the court addressed whether, under the Indiana Comparative Fault Act, a plaintiff can maintain separate lawsuits against different governmental and non-governmental defendants arising from the same incident. Davidson was rendered quadriplegic following an accident while riding in a semi-truck driven by her boyfriend. She sued the driver's employer first for the express purpose of obtaining a final judgment to access insurance coverage from the employer's insurance. The driver was found negligent and the employer vicariously liable, and the case was settled for $725,000. In a second lawsuit, Davidson sued (among other defendants) the state and the Indiana Department of Transportation, alleging negligence in how they performed road construction.

The court first determined that claim preclusion does not apply because the second set of defendants were not parties to the first lawsuit. It held, however, that issue preclusion applied because the issue of negligence was "necessarily decided in a prior lawsuit by a court of competent jurisdiction." The act "requires the trial court to apportion 100 percent of the fault for both parties and

nonparties," so a finding of liability against only one defendant, without any nonparties named, necessarily apportions 100 percent of the fault to that sole defendant. Permitting a second suit against different defendants on liability would create a logically inconsistent result notwithstanding that the act does not apply to government defendants.

The court also approved the trial court's taking of judicial notice and the dismissal with prejudice based on a single defendant having filed a Rule 12(C) motion for judgment on the pleadings, which was treated as joined by all defendants.

UNAUTHORIZED PUBLIC SCHOOL CONTRACT FOR CONSTRUCTION OF WIND TURBINE WAS VOID

Under Indiana law, public schools cannot invest money, "except as expressly granted by statute." Ind. Code. § 36-1-3-8(a)(11). In *Performances Services Inc. v. Randolph Eastern School Corporation*, 2023 WL 4226265 (Ind. June 28, 2023), Randolph Eastern School Corporation (RESC) entered a contract with a company to construct a wind turbine and agreed to pay $77,000 biannually to the company. The school was to receive a credit against each payment in an amount proportionate with the turbine's net revenue. If net revenue exceeded plaintiff's scheduled payment, then plaintiff was entitled to the surplus. Plaintiff's then-superintendent hoped the school would receive "$3.1 million over and above the payments."

After the State Board of Accounts opined on the lack of school corporations' authority to invest in such projects, RESC brought a declaratory judgment action to void the contract, stating the agreement was an "investment" not authorized by statute.

The Supreme Court noted that absent a direction to the contrary from the legislature, it must give terms in a statute their ordinary meanings. The court thus determined that under I.C. § 36-1-3-8(a)(11), to "invest" means "to commit money in hopes of obtaining a financial return." Applying that definition, the court reasoned that because RESC hoped the turbine would generate future revenues in excess of future payments, it sought an impermissible financial benefit notwithstanding that RESC also sought educational benefits from access to the turbine's data. The court therefore declared the contract invalid as a matter of law.

ARTICLE I, SECTION 1 OF THE INDIANA CONSTITUTION DOES NOT PROVIDE A FUNDAMENTAL RIGHT TO AN ABORTION IN ALL CIRCUMSTANCES

Indiana's legislature passed a law in 2022 prohibiting abortion except in three circumstances: when there is (1) serious health risk to the pregnant woman, (2) lethal fetal anomaly, or (3) pregnancy resulting from rape or incest. Plaintiffs, who are abortion providers, sought a preliminary injunction, alleging the law was facially invalid under the Indiana Constitution for banning all other instances of abortion. In a divided decision in *Members of the Medical Licensing Board of Indiana v. Planned Parenthood Great Northwest, Hawai'i, Alaska, Indiana, Kentucky, Inc.*, 2023 WL 4285163 (Ind. June 30, 2023), the Supreme Court concluded the Indiana Constitution's guarantee of "life, liberty, and the pursuit of happiness" in Article 1, Section 1 of the Indiana Constitution does not provide a fundamental right to an abortion in all instances.

The court agreed plaintiffs had standing to challenge the law and rejected the argument that Article 1, Section 1 is not judicially enforceable because it does not provide any enumerated rights. But as to whether the law infringes on the Section's unenumerated rights, the court held plaintiffs did not show a reasonable likelihood of success on the merits. Plaintiffs needed to show there was no set of facts under which the law could be enforced. The court reasoned the state would not be able to outlaw abortions in instances of serious risk to a pregnant woman because that would infringe the inalienable right to life guaranteed in Section 1. But it could not be said that the framers and ratifiers of the Indiana Constitution believed the right to an abortion was fundamental. To the contrary, Indiana prohibited most abortions until *Roe v. Wade*. Based on text, history, structure, and purpose of Article I, Section 1, any further right to abortion is not protected by the constitution and must come from the legislature, rather than the judiciary. The court clarified that as-applied challenges could be pursued in the future, but the providers were not entitled to a preliminary injunction against

enforcement of the ban through their facial challenge.

GUILTY BUT MENTALLY ILL PLEA PREVENTED CRIMINAL DEFENDANT'S NEGLIGENCE SUIT AGAINST MEDICAL PROVIDERS

In a divided decision in *Miller v. Patel*, 2023 WL 4248574 (Ind. June 29, 2023), a former patient sued medical provider defendants for negligent medical care. Plaintiff contended the providers should have admitted him to the hospital before he killed his grandfather, after which he subsequently pled "guilty but mentally ill" to voluntary manslaughter. He alleged the defendants' failure to abide by normal standards of care resulted in the killing. Defendants filed a motion for summary judgment based in part on collateral estoppel, leveraging the guilty plea as preventing plaintiff from establishing negligence.

The court first noted many jurisdictions obey the "wrongful acts" doctrine, which prevents a person from "maintain[ing] an action if, in order to establish his cause of action, he must rely, in whole or in part, on an illegal or immoral act" and assumed without deciding its applicability. The court next held that guilty pleas have the same preclusive effect in subsequent litigations as prior jury verdicts. Plaintiff asserted in the negligence suit that he was criminally insane and did not have the required mens rea to be guilty of voluntary manslaughter. But that issue was already necessarily determined by his guilty plea. Plaintiff had a "full and fair opportunity to litigate" his mental state but waived it by pleading guilty. Plaintiff also could not show any compensable damages not barred by defensive issue preclusion. The court therefore affirmed the trial court's grant of summary judgment to the defendants.

NO APPELLATE JURISDICTION LIED FROM NON-FINAL ORDER IN ADOPTION PROCEEDINGS

In *P.L. v. M.H.*, 210 N.E.3d 1280 (Ind. June 20, 2023), the Supreme Court granted transfer and held that a temporary custody order issued in an action consolidated with adoption proceedings was not a final order. The father was not served with either the petition for adoption or the motion for temporary custody; he moved to set aside the temporary custody order one year after it was issued under Trial Rule 60(B)(6) on the ground that it was void *ab initio* for lack of notice (although he was not legally entitled to notice of the temporary custody petition). The trial court denied his motion, but the Court of Appeals reversed. The Supreme Court concluded the temporary custody order did not dispose of all claims for all parties while the adoption proceedings remained pending and was therefore not a final appealable judgment under Appellate Rule 2(H), nor did it include the Trial Rule 54(B) language that "there was no just reason for delay," and therefore dismissed the appeal.

TRIAL COURT'S EVIDENCE-BASED FINDINGS SUPPORTED A PROTECTIVE ORDER AGAINST FATHER

In *S.D. v. G.D.*, 2023 WL 4199461 (Ind. June 26, 2023), after observing an "intensif[ying]" public health crisis of domestic and family violence and "staggering" numbers of protective order filings last year—"over 37,000 cases . . . representing nearly 10% of all civil cases"—the Supreme Court affirmed the issuance of a protective order by the trial court, concluding the trial court could reasonably find that father presented an "objectively credible threat" to either mother or the parties' child based on the description of an altercation during a parenting time visit. The court would have to reweigh the evidence and reassess witness credibility to reach a contrary conclusion.

ADDITIONAL TRANSFER GRANTS

- *Expert Pool Builders, LLC v. VanGundy*, 203 N.E.3d 508 (Ind. Ct. App. 2023).
- *Indiana Office of Utility Consumer Counselor v. Duke Energy Indiana, LLC*, 205 N.E.3d 1026 (Ind. Ct. App. 2023).

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