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THE CONSTITUTION,
FACTIONS, AND THE
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THE CONSTITUTION

The Constitution, Factions, and the Rule of Law
By Judge Edward W. Najam, Jr.
SMALL FIRM PRACTITIONERS

What can solo, small firm practitioners learn from pilots?
By David Frangos
Presented by the ISBA GP, Solo & Small Firm Section

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Contributors

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

Judge Edward W. Najam, Jr.
Judge
Indiana Supreme Court
edward.najam@courts.in.gov

Norm Tabler
Retired Partner
ntabler6@gmail.com

Justice Steven David
Justice
Indiana Supreme Court
steven.david@courts.in.gov

Angka Hinshaw
Attorney
Marion County Public Defender
angkahinshawesq@gmail.com

Elizabeth Houdek
Indiana Public Defender
Indiana Public Defender Council
msmith@inbf.org

David Frangos
Attorney
Frangos Legal, LLC
dcf@frangos-legal.com

Hon. G. Michael Witte
Retired
gmwitte@hotmail.com

Maggie L. Smith
Member
Frost Brown Todd
mlsmith@fbtlaw.com

Brock C. Bucher
Associate
Frost Brown Todd
bbucher@fbtlaw.com
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Music, Lawyers, and Riots: The Blurred Lines of the First Amendment and Professional Conduct

By Michael E. Tolbert

On January 6, 2021, protestors marched to Capitol Hill where Congress was meeting to certify Joe Biden as the 46th President of the United States. While the House and Senate convened to confirm Biden’s Electoral College victory, an angry mob was gathering outside the Capitol. Before it was all over, about 800 rioters forced their way inside.

The aftermath was not pretty. At least 138 law enforcement officers suffered injuries ranging from minor bruising to major lacerations. Five people died.

Many professionals participated in the assault, including a prominent lawmaker. Derrick Evans, a former House member in West Virginia, was charged with entering a restricted area of the U.S. Capitol after livestream video footage was uncovered that showed him with rioters. He would later resign from office. Shockingly, some lawyers were also involved.

To date, one of the most embarrassing experiences I have had as President of the ISBA was fielding phone calls from colleagues, friends, and news media about the participation of some Indiana lawyers in the assault on the Capitol building. Apparently, some lawyers were brazen enough to post about their potential involvement on social media. In all fairness, Indiana was not the only state to receive a professional black eye. A North Texas lawyer, Paul Davis, lost his job after a video surfaced of his participation in the mayhem at the Capitol. Many individuals lost their jobs for participating in the assault and have since been charged criminally.

While the world watched the events unfold in horror, I searched to find the right words to explain to my family, colleagues, and news reporters just how
any lawyer could be connected to the Capitol assault. How did we get here? In a country that believes in the “safety valve theory” and discourages prior restraint on speech, how could this happen? Does the First Amendment provide us all the same, unabridged right to share our views - even if those views are unpopular? Can the Indiana lawyers that participated face discipline under our Rules of Professional Conduct for their role in the assault on the Capitol? These are all complicated questions for which there is no easy answer.

**THE FIRST AMENDMENT DOES NOT PROVIDE FORT ‘KNOX’ PROTECTION**

After being arrested in 2012, aspiring Pittsburg rap artist Jamal Knox wrote a song titled, “F#@% tha Police.” Ironically, another song with the same exact title sparked similar controversy when legendary rap group NWA produced the track back in 1988. Much like the NWA rendition of “F#@% tha Police,” Knox’s version of the song was just as controversial and caught the ear of local authorities. This came after the rapper posted the song on his Facebook page and YouTube account, disparaging the Pittsburgh police officers he felt had wronged him. Posting the song led to Knox’s immediate arrest and subsequent conviction.

In 2013, Knox was found guilty of terrorist threats and conspiracy to commit terrorist threats. Knox’s arguments that his song was speech protected under the First Amendment were rejected. The court hearing Knox’s case held that his song amounted to a “true threat.” Knox was sentenced to time in prison for the song. No police were injured or killed after the song was posted to social media. In 2019, the U.S. Supreme Court declined to take Knox’s case which would have offered much needed clarity about what is considered “true threats” outside the confines of First Amendment.

**CAPITOL RECORDS: MUSIC TO DRIVEBY**

After the tragic events that took place at the Capitol, a second impeachment trial of former President Donald Trump began on February 9, 2021. Trump was charged with incitement of insurrection. Like Knox’s lawyers, Trump’s lawyers mentioned he had the right to express his opinion on the election results and other matters based on the protections provided by the First Amendment of the U.S. Constitution, which protects freedom of speech. Technically, this defense could only apply in a legal proceeding, not an impeachment trial. The sole issue presented at the impeachment proceeding was whether Trump violated his oath of office by inciting insurrection. Nevertheless, the First Amendment was the elephant in the room.

"If you don't fight like hell you're not going to have a country anymore" were some of the words uttered by former President Trump just before protesters stormed the Capitol building. Democrat impeachment managers said Trump also indicated “you'll never take back our country with weakness. You have to show strength, and you have to be strong.”

The impeachment managers laid out their case: For months before protesters stormed the Capitol, Trump brutally criticized election officials for allegedly engaging in fraud. Despite evidence to the contrary, he publicly said the election was “rigged.” Trump urged people to “fight” for him and not let the election be stolen.

Like Jamal Knox, Trump communicated his message through social media, albeit a different platform. Knox used Facebook and YouTube to get his message out. Trump used Twitter and rallies to get his message across. Trump used tweets to inform his followers about events, specifically about the rally just before the Capitol building was stormed. Unlike Knox, who appeared to upload only one song on an isolated day, Trump’s communication was steady all the way up to the attack on the Capitol.

On February 13, 2021, the Senate voted to acquit Trump of inciting an attack on the Capitol. Unlike Knox, Trump has not been charged criminally for his comments leading up to the assault.

**Taking the Work Uniform Off**

Considering recent events and some lawyer participation in the storming of the Capitol, age-old debates about privacy have resurfaced. The lawyers involved in the events at the Capitol were not operating in their professional capacity. These lawyers
were on their own private time. To the extent they engaged in peaceful protest, their activity would be protected by the First Amendment. However, as we learned on January 6, things can quickly escalate. A peaceful protest can turn into a riot in a matter of seconds. The question always raised is whether lawyers can ever truly be “off the clock” and shielded from charges of professional misconduct arising out of private activity. A close reading of the Indiana Rules of Professional Conduct would suggest the answer to this question is no.

Whenever the Indiana Rules of Professional Conduct are discussed, lawyers often overlook the most important part of the rules – the preamble section. This section has good information and can provide much needed guidance. Preamble 5 states:

“A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.”

In conjunction with Preamble 5, Rule 8.4 provides lawyers with guidance relating to conduct that may occur off the clock. Rule 8.4 (b) provides that it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects. Rule 8.4 (d) also provides that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice. Even if a lawyer has the cover of the First Amendment, that still may not be enough to shield them from their obligations under the Indiana Rules of Professional Conduct.

The lines drawn by the First Amendment and the Indiana Rules of Professional Conduct are not always clear. However, in the context of private activity engaged in by lawyers, Preamble 5 may be the most helpful. We should always strive to conform to the requirements of the law in business and personal affairs. If a lawyer sees a peaceful protest transform into something other than a legal demonstration, they should immediately leave the scene. That is most likely the best way to swim the murky waters of the First Amendment and the Indiana Rules of Professional Conduct.

That, and never become a rapper.
THE CONSTITUTION, FACTIONS, AND THE RULE OF LAW
In 1878 British Prime Minister William Gladstone wrote:

"The American Constitution is, so far as I can see, the most wonderful work ever struck off at a given time by the brain and purpose of man."

He was right. Our Constitution was no accident. The Founders were an extraordinary gathering of intellectual firepower. They were thoughtful, well-educated men familiar with the great 17th and 18th century English and French political theorists, and they were motivated by the highest purpose. They were students of history and political philosophy, students of government, and students of human nature. And in the summer of 1787—just as Prime Minister Gladstone later said—they discovered a recipe for the most remarkable system of self-government ever created.

The Constitutional Convention imagined a new form of government that was a hypothetical. It has often been told that when the convention adjourned, a woman confronted Benjamin Franklin and asked him, “what have we got[, a republic or a monarchy?]” Franklin responded, “A republic if you can keep it.” From that comment our former Governor Mitch Daniels fashioned the title for his 2011 book Keeping the Republic: Saving America by Trusting Americans as did Justice Neil Gorsuch for his 2019 book A Republic, If You Can Keep It. And Christine Barbour and Gerald Wright, on the Indiana University Bloomington political science faculty, are co-authors of an American government textbook entitled, Keeping the Republic: Power and Citizenship in American Politics, now in its 10th edition.

Preservation of the rule of law has been our nation’s response to Benjamin Franklin’s challenge. The rule of law has been the glue, the common denominator, the foundation – whichever metaphor you prefer – which has enabled us in Benjamin Franklin’s words to “keep the Republic” and preserve our representative democracy.

The Constitution was designed to compensate for human nature and contain political factions as threats to the rule of law. But the Constitution is not self-sufficient. It
requires assistance from an engaged citizenry, a traditional free press, and an independent judiciary.

THE RULE OF LAW

The rule of law is the condition precedent for all worthy human endeavor and a well-ordered and just society. The rule of law is the essential condition for the preservation of life, liberty, and property, or as Thomas Jefferson wrote in the Declaration of Independence, “life, liberty and the pursuit of happiness.”

Jefferson continued that, “to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.” Thus, the rule of law requires the consent of the governed and is based on respect for the individual. This contrasts with the legal systems of totalitarian regimes that do not rely upon the consent of the governed and do not respect the individual.

The rule of law is, of course, not confined to the relationship between the citizen and the state. The rule of law also applies to the countless private encounters and transactions that occur every day between individuals. The rule of law is the invisible hand that both guarantees our civil rights and brings order and predictability to our private relationships.

The rule of law is, as John Adams wrote in the Massachusetts Constitution, a government of laws and not of men. It means that laws are openly debated, enacted, and published, and fairly administered by officials who are accountable both to the law and to the people who elected them.

The rule of law in America is derived from English legal tradition and traces its origins to the Magna Carta, the great charter issued in 1215 by King John of England 806 years ago. In Chapter 39 of the Magna Carta, King John promised his barons that,

No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.
In the Magna Carta, the term “the law of the land” meant “the rule of law” and included “due process of law.”

The rule of law includes both substantive legal rights and the procedural rights, or due process, which secures them. Of course, substantive rights and procedural rights are closely intertwined. A declaration of substantive rights would be meaningless without corresponding procedural rights to ensure them.

The “due process” guarantee appears in the Fifth Amendment, which applies to the federal government, and again in the Fourteenth Amendment, which applies to the states. Both Amendments state that “no person shall be deprived of life, liberty or property without due process of law.” An equivalent provision appears in Article 1, Section 12, of the Indiana Constitution.

The Magna Carta’s recognition of “the law of the land” was a turning point in the history of Western civilization. The legacy of the Magna Carta surrounds us. For many years, and until recently, the Magna Carta was the first document in the hardbound volume of the Indiana Code.

The Magna Carta was and remains significant because it declared that the law of the land and the rule of law would control a man’s life, liberty, and property rather than the arbitrary and capricious whim of the king.

THE FRAMING OF THE CONSTITUTION

The Declaration of Independence in 1776 was largely a bill of particulars against King George III, a detailed complaint against the exercise of arbitrary power by a single individual and for his abuse of that power. Thus, the rule of law was very much on the minds of the Founders.

There was a spirited national debate over ratification of the proposed Constitution. Three of the Founders, Alexander Hamilton, James Madison, and John Jay, wrote 85 articles known as The Federalist Papers to persuade the states to ratify the Constitution. These historic articles explain the reasoning behind the structure of the Constitution and comprise a magnificent treatise on the theory of representative government.

James Madison, a Virginia delegate to the Constitutional Convention, is generally regarded as the father of the Constitution and the single best informed and most articulate authority for interpreting it. There were 55 delegates, and Madison and George Washington—who chaired the convention—were the only two delegates who later became president. In Federalist No. 51, Madison described the task which confronted the Constitutional Convention as follows: “In framing a government which is to be

Continued on page 32...
Santwon Davis now knows the difference between speaking a lie and texting one. Sadly, he learned it the hard way.

SANTWON TAKES TIME OFF

Santwon was employed at a Fortune 500 company in Atlanta. At the company’s COVID-19 training program in March 2020, he was delighted to learn that any employee testing positive for the virus would receive paid time off.
Santwon telephoned his supervisor to report that he had tested positive for COVID and would email documentation, including quarantine instructions.

By telephone the plant manager requested a copy of the test results and reminded Santwon that positive results would require the plant to shut down for cleaning, as well as quarantining all employees who had had contact with Santwon.

Santwon emailed a document titled “work/school excuse letter,” reciting that he had been admitted to a Wellstar hospital on March 20 and must quarantine for 14 days.

**SOMETHING LOOKED WRONG**

Santwon’s letter aroused suspicions. First, the letter didn’t say that Santwon had been diagnosed or treated for COVID. Second, there were no test results. Third, there was no letterhead or signature. Most puzzling of all, the letter said that Santwon had been discharged in November, some four months before his admission date.

A call to the hospital revealed that it did not provide COVID testing and that there was no record of Santwon’s treatment.

Reached by telephone, Santwon told the company’s HR manager that he now had additional symptoms and was back at the hospital for treatment. The manager reminded Santwon of the steps the company would need to take if he tested positive. When the manager texted Santwon for confirmation of their telephone conversation, Santwon texted back, “Okay.”

The company’s repeated efforts to contact Santwon over the next two days were futile. He was terminated at the end of the second day.

**THE STAKES GROW HIGHER FOR BOTH SIDES**

In normal times, a low-level employee’s fraudulent claim of sick leave costs the company relatively little. But the age of COVID is not a normal time. The day of the HR manager’s telephone conversation and text with Santwon, the plant closed for a thorough cleaning. It continued to pay the salaries of the employees who were required to quarantine. The cost exceeded $100,000.

In normal times, an employee caught falsely claiming paid sick leave faces, at most, firing a risk that Santwon was clearly willing to run. But, again, these are not normal times. Not content with firing Santwon, the company decided to make a federal case of it.

**THE DEPARTMENT OF JUSTICE STEPS IN**

It took the FBI no time at all to gather irrefutable evidence of Santwon’s fraud. It took even less time for the Department of Justice to file a criminal complaint. Santwon was indicted for committing fraud through interstate wire communications, i.e., his texts and email.

Caught red-handed, Santwon pleaded guilty, having learned too late the difference between speaking a lie and texting one.

The case is *United States v. Davis*, N.D. GA.
Unlike most years, many people ended 2020 exhausted, defeated and ready for change. Many of those individuals are ready to shift gears and recalibrate old ways. These New Year’s resolutions are not focused on recalibrating the physical body, but the mind. 2020 left many, particularly people of color, hurt, betrayed, unheard, and feeling others viewed their lives as dispensable. The list goes on. Although some individuals may feel unheard, there are many who are listening and have been all along. The Indiana State Bar Association with the support of the Indiana Supreme Court premiered Open Conversations: Racism and Racial Injustice. On January 29, 2021, we debuted the live programming part of Open Conversations hoping for an audience of at least 20 to 30 people. We were amazed
when the program drew more than 500 registrants with a waiting list. Members of our profession demonstrated they were eager to hear from our state bar and state court leadership and were hungry to learn more so they can do better. The premier program featured the leaders of the legal profession – Indiana Supreme Court Chief Justice Loretta Rush and Indiana State Bar Association President Michael Tolbert.

**INDIANAPOLIS ATTORNEY ANGKA HINSHAW KICKED OFF THE PROGRAM THIS WAY:**

The death of George Floyd has sparked a powerful social justice movement that hasn’t existed since the 1960s. We find ourselves again discussing the victimization and the inequities experienced by people of law. These struggles are real and still exist within the legal profession and resonate in other industries. The purpose of these conversations is to enlighten minds of the experiences of people of color within our profession and the laws that govern us as members of our communities. I hope you will leave this conversation with a new perspective that is empathetic of individuals whose experiences are different than your own and for others a renewed strength to continue to achieve.

The discussion began with a dive into Chief Justice Rush’s June 2020 “Statement on Race and Equity” and the thought process leading up to the statement. She said events surrounding that time and the demands for equity were too grave to ignore and required a response. Her statement was read by many. For marginalized individuals, it was a nod that conveyed “I see you, I hear you, and society must do better to extinguish racism.” After issuing the statement, she received negative and positive comments from lawyers and judges. Her response, in essence, was that we must continue the fight for justice for all and negative comments would not curtail the efforts of the Indiana Supreme Court.

Under the leadership of ISBA President Tolbert, the state bar created an Equity Task Force that is comprised of some of the best legal minds in the state to address inequities within our profession and the legal system. The task force will focus on four areas: civil legal aid, policing/prosecuting policies, legislation, and mentorship/diversity in the profession.
President Tolbert gave an abridged story of his pathway to the practice of law and shared some of the racial barriers he overcame and the stereotypes that were imposed upon him as Black man. He discussed his experiences with micro-aggression, a term some audience members were unfamiliar with while others had experienced it numerous times throughout their careers.

To attempt to capture every aspect of the program in this article would do it injustice – we encourage you to view it if you haven’t already seen it. The beauty of the Open Conversations program is the ability to be authentic, ask tough questions about racism, and provide a platform to share experiences. President Tolbert ended the formal program by sharing some of the lesser-known writings of Dr. Martin Luther King Jr. The book he read from is *Where Do We Go From Here: Chaos or Community*. After the formal program ended, the conversation continued with an informal session that was attended by more than 115 judges and lawyers.

Justice Steven David concluded the program with a quote from a fellow Columbus, Indiana, native, the industrialist and civil rights advocate J. Irwin Miller:

*"The most important service to others is service to those who are not like yourself."*

Justice David asked attendees to think about that concept as they left the program and went about their daily lives.

So, with that thought in mind, where do we go from here? It’s up to you. The feedback from the program has been astounding. Many practitioners told us they felt their struggles with inequities had been acknowledged and substantiated, others felt optimistic that a positive change in our profession is on the horizon, while others desired to be better equipped to understand the subtle tones of racism and how to combat it. The program hosts and organizers have read all the feedback and all the questions posed. For the rest of the year, we will give voices of the unheard a platform to share experiences and have authentic conversations about racism. The program series will also share the experiences of different races within people of color. Join us in an open conversation.
At this year’s Solo and Small Firm Conference, we celebrate resilient lawyers. The hurdlers. The pivoters. The prevailers. The solo and small firm attorneys.

The Solo and Small Firm Conference will help you master any challenge thrown your way. You’ll walk away with referrals, practice tips, and a renewed sense of passion for your practice.

This year’s conference will be a hybrid event—both an in-person (at French Lick Resort) and digital experience. The virtual experience gives attendees access to the highly-regarded learning opportunities that the conference has boasted for years, plus is designed to create opportunity for connections that many virtual CLE lack. The in-person experience is for those itching to connect in-person, but who are willing to strictly adhere to health and safety requirements.

**REGISTER EARLY FOR BONUS CLE**

Those who register early will receive access to additional CLE programs geared to expanding the solo and small firm practitioner’s skillsets.
If you have matters in California or referrals, we can help you. Please contact Guy Kornblum or his office for information.

In addition to litigation and dispute resolution services, Guy also serves as an expert witness in legal malpractice and cases relating to insurance claims.

Guy is a native Hoosier and alumnus of Indiana University. He is a member of the Indiana and California bars, and certified in Civil Trial & Pretrial Practice Advocacy by the National Board of Trial Advocacy.

Guy O. Kornblum A Professional Law Corporation
1388 Sutter St., Suite 805, San Francisco, CA 94109
Tel: 415.440.7800 | Fax: 415.440.7898
gkornblum@kornblumlaw.com

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Guy O. Kornblum A Professional Law Corporation
1388 Sutter St., Suite 805, San Francisco, CA 94109
Tel: 415.440.7800 | Fax: 415.440.7898
gkornblum@kornblumlaw.com

Inside the MindHunter: An Afternoon with John Douglas

Legendary FBI profiler and founder of the FBI’s Investigative Support Unit, John is the model for Jack Crawford in the film “Silence of the Lambs” and Holden Ford in Netflix’s “Mindhunter.” Over his 25-year career with the FBI’s Investigative Support Unit, Douglas interviewed hundreds of America’s most notorious killers, from Charles Manson and Ted Bundy to “Son of Sam” David Berkowitz and the “BTK Killer,” Dennis Rader. He has also served as a consultant on the JonBenet Ramsey case, “The West Memphis Three” case and the Amanda Knox case.

John’s longtime partner & co-writer, Mark Olshaker, will moderate the discussion on the evolution of criminal investigative analysis/criminal profiling within the FBI and the development of investigative tools from the crime scene to the court room.

Note: John & Mark will be joining us from the east coast and this presentation will be live-streamed to both in-person and virtual attendees.

VIRTUAL EXPERIENCE

The Solo & Small Firm Conference has been well-known for the quality of its programming for years. Each CLE topic is hand selected by the conference planning committee to ensure its relevance to solo and small firm practitioners. Speakers are reviewed and vetted to ensure they are engaging. Attendees walk away with practical knowledge that they can apply to their practice immediately.

• $125 for members.
• Includes 18 hours of on-demand CLE and a goodie kit mailed to your home (if registered by April 29).
• Thursday’s CLE sessions will be recorded and shared with attendees afterwards.
• All of Fridays sessions (including keynotes) will be live-streamed for virtual attendees to watch in real time, ask questions, and participate in the conversation.
FEATURED CLE

- **Building Client Rapport in a Virtual World** (1hr CLE); Deann Farthing, Robinson & Farthing, LLC
- **Tech Tips for a Remote Trial** (1hr CLE); Donna Bays, Bays Law Office
- **What to Do When the FBI Knocks on Your Door** (1hr Ethics); James Watson, Chief Division Counsel, FBI Indianapolis Office
- **Mindfulness with Layers: The Self Compassionate Solo** (1 hr CLE/Ethics); Jill Carnell, Indiana Department of Administration, Loretta Olesky, JLAP
- **Maximizing Your Success in Mediation: A Primer for Mediators, Lawyers and Parties** (1hr CME); Derrick Wilson, Mattox & Wilson, LLP
- **Litigating in a Divided Nation: Navigating Opinions and Presumptions While Seeking Justice** (1 hr CLE/Ethics); Claude Ducloux, Attorney at Law and Director of Education, Ethics and State Compliance, LawPay

IN-PERSON EXPERIENCE

We know how important the in-person Solo & Small Firm Conference is to many practitioners. It’s a time to reconnect with colleagues while developing new connections. We are happy to be able to offer an in-person component to this year’s conference, though with several changes to ensure health and safety. At the time of print, the in-person spaces available are nearing capacity.

- $225 for members.
- Includes 10 hours in-person CLE plus 8 hours of on-demand CLE; conference meals, and a personal care kit.
- Please visit inbar.org/SSFC to learn about the health and safety guidelines that will be strictly enforced.

VIP CELEBRATION

This year the SSFC will feature a VIP (very important practitioner): YOU! Attorneys are so busy that we tend to constantly look for what’s next. How often do you stop to acknowledge and celebrate your wins—even the small ones? The Solo & Small Firm Conference will take moments to celebrate your success and resilience. When you register, we’ll ask you to share a “win” from the past year. It could be something seemingly small such as finally remembering to unmute yourself on Zoom before talking, to something big such as launching your own firm. Throughout the conference we will learn about and celebrate resilience, including our own.
In January, the Indiana Supreme Court decided two criminal cases, one in which it rejected claims of fundamental error and affirmed a sentence of life without parole and another per curium decision clarifying that a represented defendant speaks to the court through counsel. The Court of Appeals continued to develop its double jeopardy jurisprudence following the Wadle and Powell cases, permitted a belated appeal despite language in the plea agreement, and found a guilty plea involuntary due to inadequate translation. The full text of all Indiana court decisions, including those issued not-for-publication, is available via Casemaker at inbar.org or the Indiana Courts website at in.gov/judiciary/opinions.

**SUPREME COURT CASES**

Defendant speaks to the court through counsel

In Underwood v. State, 722 N.E.2d 828, 832 (Ind. 2000), the Indiana Supreme Court articulated the point that a represented defendant speaks to the court through counsel. The court clarified that view in its per curium opinion in Anderson v. State, No. 21S-CR-28, 2021 Ind. LEXIS 60 (Jan. 28, 2021), noting that “once counsel has been appointed, even if counsel has not yet entered an appearance, a defendant speaks to the court through counsel.” *Id.* at 1. Because counsel had been appointed for the defendant, the trial court did not have to consider his pro se motion for an early trial under Indiana
Criminal Rule 4(B) and therefore acted within its discretion by disregarding it. *Id.*

**Fundamental error claims rejected in LWOP case**

Justice Slaughter wrote for the unanimous court in *Tate v. State*, No. 19S-LW-444, 2021 Ind. LEXIS 63 (Jan. 28, 2021), affirming the defendant’s sentence of life without parole, holding

The record contains substantial evidence of both the torture and child-molest aggravators on which the jury could reasonably rely. Excluding the torture and child-molest aggravators would not have altered the jury’s recommendation or the trial court’s decision. And the murder-of-a-child aggravator, proved beyond a reasonable doubt, outweighs Tate’s intoxication.

Detective Cole’s, Nurse Birge’s, or Dr. Short’s testimony.” Slip Op. at 6.

Nor did the court find fundamental error in allowing the medical providers to testify about the stages of the victim’s bruising and their opinions about the victim’s injuries and their source. Defendant waived his undeveloped argument that the witnesses were unqualified to give expert testimony and that their testimony did not rest on reliable scientific data under Evidence Rule 702(b). The court concluded that the defendant “has not shown that the jury could not be fair and impartial and that the trial judge needed to intervene to make a fair trial possible.” Slip Op. at 8.

The court also rejected the defendant’s argument that the state impermissibly referred to its medical witness as an “expert” during her direct examination. Distinguishing *Farmer v. State*, 908 N.E.2d 1192, 1199 (Ind. Ct. App. 2009), which prohibits only trial judges from calling witnesses “experts” in front of the jury, the court noted that no rule prohibits the state from asking a witness about her history testifying as an expert witness. *Id.*

**COURT OF APPEALS CASES**

**Guilty plea involuntary due to inadequate translation for Spanish-speaking defendant**

In *Bautista v. State*, No. 20A-PC-1542, 2021 Ind. App. LEXIS 23 (Jan. 29, 2021), the defendant’s guilty plea to child molesting was not knowingly, intelligently, and voluntarily entered

“he did not agree to be sentenced either to the full twenty-five-year executed term, or to an additional twelve years suspended, based on an improper aggravator.”

Slip op. at 14

A detective and medical provider testified regarding the underlying incident and investigation, but “[b]ecause Tate does not establish error under Rule 404(a)(1), and no such error is obvious on the face of the record, the trial court did not commit fundamental error in allowing
because the Spanish translation he received at his guilty plea hearing did not adequately advise him of one of the rights required by Boykin v. Alabama, 395 U.S. 238 (1969), namely, the right to confront the witnesses against him.

The Court of Appeals held Bautista carried his initial burden of demonstrating that he failed to receive an adequate advisement at the guilty plea hearing that he had the right to confront and cross-examine the witnesses against him, and the State failed to show that the record as a whole nonetheless demonstrated that Bautista understood this right and that he was waiving it by pleading guilty.

Bautista at 20. The court reversed the denial of post-conviction relief and remanded with instructions to vacate the guilty plea. Id.

Notwithstanding waiver of appeal provision in plea agreement, belated appeal permitted under PC Rule 2

In Crider v. State, 984 N.E.2d 618, 625 (Ind. 2013), the Indiana Supreme Court held that even when a waiver of appellate review appears to be unqualified, a defendant retains the right to appeal his sentence when it is imposed contrary to law and the defendant did not agree to the specific sentence. The plea agreement in Fields v. State, 20A-CR-1799, 2021 Ind. App. LEXIS 28 (Jan. 26, 2021), included a provision that waived “the right to appeal any sentence imposed by the Court so long as the Court sentences the defendant within the terms of this plea agreement” with sentencing “open to argument” but with “a cap of 25 years on any executed sentence.” Id. at 2. The Court of Appeals noted that while the defendant agreed to a maximum sentence of 25 years, “he did not agree to be sentenced either to the full twenty-five-year executed term, or to an additional twelve years suspended, based on an improper aggravator.” Id. at 8. The court concluded that the defendant is an “eligible defendant” pursuant to Post-Conviction Rule 2 because he would have had the right to challenge his purportedly unlawful sentence in a timely appeal notwithstanding the waiver provision in his plea agreement. Id. at 14.

The Court of Appeals vacated convictions in two cases after applying the post-Richardson substantive double jeopardy frameworks set forth in Wadle and Powell

The Indiana Supreme Court “expressly overrule[d] the Richardson constitutional tests in resolving claims of substantive double jeopardy,” adopting an analytical framework that applies the statutory rules of double jeopardy where a defendant’s “single criminal act or transaction violates multiple statutes with common elements and harms one or more victims.” Wadle v. State, 151 N.E.3d 227, 235, 247 (Ind. 2020). In a companion case, the court set out the framework for analyzing claims of multiplicity, or whether, when a single criminal act or transaction violates a single statute and results in multiple injuries, the same act may be punished twice as two counts of the same offense. Powell v. State, 151 N.E.3d 256, 263 (Ind. 2021).

The Court of Appeals applied the Wadle analysis in Hendricks v. State, 20A-CR-690, 2021 Ind. App. LEXIS 10 (Jan. 14, 2021). After first determining “the offense of conspiracy to commit robbery could be an included offense of the felony murder, as charged in this case” and then reviewing the evidence presented at trial, the court held

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WHAT CAN SOLO, SMALL FIRM PRACTITIONERS LEARN FROM PILOTS?

By David Frangos

Presented by the ISBA GP, Solo & Small Firm Section

Before each flight, a good (and smart) pilot will analyze the weather conditions at the departure airport, the en-route weather, and the destination’s forecasted weather. In conducting the analysis, the pilot will ask: Am I going to be taking off into a storm? Will it be a turbulent flight or a smooth ride? Is it going to be a bright and sunny trip, or will we be in the clouds for most of the flight? Can we make it to the destination, or do we need an alternate plan? Analyzing the weather is a fundamental step in preparing for a successful and safe flight.

Before taking on a new client, a legal practitioner can learn from the successful pilot by conducting a similar “weather check.” Regardless of the prospective client’s legal issue, a new client’s onboarding should begin with a thorough case analysis starting with the initial client interview and continuing throughout the case until final disposition.
In conducting the initial case analysis, the smart practitioner, like the pilot, will ask some of the following questions:

Does this client have a legitimate legal issue on the merits?

Are there any storm cells (deadlines) fast approaching?

Can the prospective client afford representation?

Is this going to be a turbulent ride or smooth flying?

Are you going to be in the clouds for most of the case, or will the visibility be clear?

And, at your destination airport, will the weather be good (available remedy), or is a safe approach and landing questionable or even possible?

The initial analysis of a new case is an essential but often neglected step. A practitioner’s failure to correctly recognize the issues early in the case can occur when the practitioner is anxious to take on a new client or excited to litigate a particular type of issue. In their haste, the practitioner may not correctly evaluate the “weather.”

Continuous weather checks throughout the case are an essential component of a successful outcome for your client. Like the pilot, the practitioner may find themselves navigating around a storm cloud or two or may need to climb or descend due to turbulence. The skilled and prepared practitioner will handle these issues with ease.

Keeping a keen eye on the destination weather, the practitioner, like the pilot, will ensure throughout the case that a safe and successful approach and landing can be made. If not, the practitioner will be ready to divert to an alternate airport or, if necessary will return to their home base to try another day.

David C. Frangos, Esq. is a retired military pilot and practices as a solo practitioner at Frangos Legal, LLC.
REFLECTIONS ON CHANGES TO LAWYER DISCIPLINE PROCESS

Like the U.S. Constitution, the Rules of Professional Conduct comprise a living document that expands and contracts over time through amendment and interpretation. After serving nearly 11 years as the Executive Director of the Disciplinary Commission, this writer retired in February 2021. Indiana’s Rules of Professional Conduct as well as the Rules of Admission and Discipline underwent noted growth and some retraction during that time.

TRUST ACCOUNT FOCUS

In 2013, the commission decided to dedicate one of its seven litigation lawyers to solely work trust account matters. Trust account investigation requires a knack for reviewing financial spreadsheets, crunching numbers, and reconstructing accounts. From May 1, 2014, through February 1, 2021, the trust account desk has generated 13 disbarments, 17 license resignations, 18 suspensions without automatic reinstatement, and 17 short or stayed suspensions with probation. This desk has accounted for the most case dispositions and the most severe sanctions within the agency since its inception.

By comparison, in the 10 years prior to 2014, there were only 8 disbarments for all areas of lawyer misconduct. Since May 1, 2014, there have been a total of 20 disbarments, 13 of which have been related to trust account and fiduciary responsibilities. A dedication of resources to a specific problem area has garnered results.

TRADE NAME AMENDMENTS

In 2006, Indiana absolutely prohibited law firm trade names. Three Indiana attorneys practicing under the trade name Attorneys of Aboite, LLC received public
reprimands for violating Rule 7.5.1 Aboite is a township in Allen County.

After 2009, Rule 7.5 was amended to allow lawyer and law firm trade names in a very limited fashion. A trade name had to contain a lawyer’s name and could only contain words that (1) identified a field of law concentration; or (2) described a geographic location of the firm’s office; or (3) indicated a language fluency. These restrictions were removed on January 1, 2021. A trade name is now permissible if it is truthful and not misleading. Today, Attorneys of Aboite would be a permissible trade name under Rule 7.5.

CAUTION LETTER

The first decade of this century saw the commission bringing formal discipline charges against 60 to 65 attorneys per year. Today, that number is in the 30 to 35 range annually. Implementation of an electronic case management system in 2012 and elimination of a glaring backlog are several actions that have impacted the reduction, but there are other developments that proved effective.

“A new frontier of lawyer social media and electronic messaging ethical traps has evolved.”

A private caution letter2 was not in the commission’s disposition toolbox until 2017. Observers have noted that the court is issuing fewer reprimands than in past years, and that it appears the court is more attracted to suspending a lawyer’s license. The reality is that the reprimand reduction correlates with the number of caution letters issued each year since 2017.

One area where caution letters are useful today is lawyer advertising. Twenty years ago, lawyer advertising was primarily in print media. Improper ads could not be retracted or recalled from the print distribution chain. Imagine trying to recall every single phone book that had an unethical lawyer ad. Violations of this nature were almost always the source of formal misconduct charges and a public reprimand.

As advertising moved into the internet age, enforcement of the Rules of Professional Conduct adjusted to the changing landscape. It is much easier to issue a caution letter to a lawyer to edit an online ad or webpage containing unethical messaging than it is to spend nine months or more to accomplish the same result through the filing of formal charges.

ADVISORY OPINIONS AND GUIDANCE

Lawyers have quickly adapted to social media platforms like Facebook, Twitter, Instagram, and YouTube. Lawyers can reach a broader audience at a cheaper cost, and consumers can respond to, share, or re-publish lawyer messages, as well as review and rate lawyer services. A new frontier of lawyer social media and electronic messaging ethical traps has evolved.
Several key Indiana discipline cases in the past decade had a social media element in their facts.

In addition to enforcing the rules for social media-related misconduct, the commission turned to proactive misconduct prevention in 2018. It began issuing formal written advisory opinions for the benefit of the statewide bar. It also initiated an online informal one-on-one guidance service to lawyers who seek ethical analysis. Formal advisory opinion #1-2020 cautioned lawyers on vicarious liability for third-party comments on a lawyer’s social media account or for tagging the comments. Third-party comments can easily be ethically improper. The advisory opinion advised lawyers to patrol their own social media’s third-party comments and tagging. Failure to screen improper comments can be deemed a ratification or acquiescence by the lawyer.

**RULE 23 AMENDMENT**

Admission and Discipline Rule 23 defines the procedure for lawyer discipline operations. It was completely rewritten in 2017. The protracted rule has 30 sections. In addition to the creation of the previously mentioned caution letter process, it created a one-year limitation on the length of a discipline investigation. Extension of an investigation beyond one year requires court approval. The intent is to never return to last decade’s backlog. The rewrite also included aligning trust account provisions with 21st century banking practices and providing “how to” templates for trust account record keeping.

My scoutmaster taught his scouts to leave a campsite in better shape than when we arrived. I hope that these highlighted measures have accomplished the same. As for those phone book ads, when is the last time you picked up a phone book?

Footnotes:

1. Matter of Loomis, Grubbs and Wray, 905 N.E.2d 406 (Ind. 2009). Additionally, the lawyers falsely claimed to be an LLC when they were, in fact, individual attorneys working in an office sharing relationship and their purported LLC designation was not registered with the State Board of Law Examiners.

2. Admission and Discipline Rule 23, Section (10)(a)(2)

3. Matter of Usher, 987 N.E.2d 1080 (Ind. 2013) (lawyer created fake email address under another firm’s domain and sent mass email message attacking the virtue of a female victim who spurned the lawyer’s romantic advances); In re Anonymous, 6 N.E.3d 903 (Ind. 2014) (lawyer vicariously liable for improper testimonials linked by lawyer’s webpage to outside third party comments); Matter of Keaton, 29 N.E.3d 103 (Ind. 2015) (use of revenge porn tactics against former female acquaintance); Matter of Steele, 45 N.E.3d 777 (Ind. 2015) (lawyer disclosed client confidences in response to critical online review and manipulated positive online reviews);

4. Advisory Opinion #1-20: Third Party Comments or Tags on a Lawyer’s Social Media

**In re Fairchild, 130 N.E.3d 95 (Ind. 2019) (lawyer was identified by social media participants as the perpetrator of indecent exposure crimes); Matter of Hill, 144 N.E.3d 184 (Ind. 2020) (sanction aggravation weight given to lawyer’s advisory team’s use of social and mainstream media to disparage battery victims); Matter of Cooper, 19S-DI-418, 2021 WL 358627 (Ind. Feb. 3, 2021) (elected prosecutor battered his girlfriend and used her cell phone to impersonate the victim and send fictitious messages to her social media network claiming that she started the fight and excuses Cooper).**
In January 2021, the Indiana Supreme Court issued two civil opinions, and the Indiana Court of Appeals issued nine published civil opinions. The full texts of these opinions are available via Casemaker at inbar.org or the Indiana Courts website at in.gov/judiciary/opinions.

**INDIANA SUPREME COURT**

Unanimous Supreme Court holds independent contractor cannot enforce arbitration agreement to which it was a non-signatory

A resident’s guardian signed a residency contract at the Carmel Senior Living facility (facility) that included an arbitration agreement. A complaint was thereafter filed against the facility and its background screening company (contractor). Both facility and contractor argued the guardian was bound by the arbitration agreement, even though contractor was not a party to the facility contract.

A unanimous Supreme Court in *Doe v. Carmel Operator, LLC*, 160 N.E.3d 518 (Ind. 2021) (Rush, J.) held contractor could not enforce the arbitration agreement as a non-signatory against the guardian for three reasons. First, the court refused to find contractor was an agent of facility, instead determining it was an independent contractor. Second, contractor could not meet the requirements of equitable estoppel to enforce the arbitration agreement.

Lastly, the court explicitly refused to adopt any alternative theories of the estoppel doctrine. The Supreme Court overruled *German American Financial Advisors & Trust Co. v. Reed*, 969 N.E.2d 621 (Ind. Ct. App. 2012) on the grounds that traditional state law—not federal law—should determine the scope of who is bound in an arbitration agreement.

Unanimous Supreme Court holds minority and marketability discounts are applicable to valuation of minority shares.
A minority shareholder in a closely held corporation contractually agreed to have his shares bought back at the “appraised market value” as determined by a third-party valuation company in accordance with generally accepted accounting principles. The appraiser discounted the minority shares for their lack of marketability and lack of control.

The shareholder objected to these discounts because this was a compulsory, closed-market sale, but a unanimous Supreme Court in *Hartman v. BigInch Fabricators & Construction Holding Company, Inc.*, 2021 WL 325883, __ N.E.3d __ (Ind.Ct.App. 2021) (Rush, J.), disagreed, holding “the parties’ freedom to contract may permit these discounts, even for shares in a closed-market transaction. And under the plain language of this shareholder agreement—which calls for the ‘appraised market value’ of the shares—the discounts apply.”

**SELECT COURT OF APPEALS DECISIONS**

*Residences of Ivy Quad Unit Owners Association, Inc. v. Ivy Quad Development, LLC*, 2021 WL 325672, __ N.E.3d __ (Ind.Ct.App. 2021) (Crone, J.) (ruling that the economic loss doctrine was insufficient to bar a negligence claim in the residential construction industry where both parties are unsophisticated and the work involves “smaller construction projects.” The use of the doctrine should be “limited” to a “major construction project” where parties are without contract privity.)

*Staat v. Indiana Department of Transportation*, 2021 WL 325670, __ N.E.3d __ (Ind.Ct.App. 2021) (Bailey, J.) (reversing trial court’s grant of summary judgment in INDOT’s favor appeal where the trial court’s order dismissing three defendants failed to “include the magic language required to meet the bright line rule under Indiana Trial Rule 54(B)”)

*Lowrey v. SCI Funeral Services, Inc.*, 2021 WL 97226, __ N.E.3d __ (Ind. Ct.App. 2021) (Crone, J.) (affirming summary judgment dismissal of negligence claim where the allegedly dangerous condition was “known and obvious,” the condition was “in plain sight,” and the injuries were caused by the plaintiff’s “own act of taking a shortcut”)

*Chapo v. Jefferson County Plan Commission*, 2021 WL 220968, __ N.E.3d __ (Ind.Ct.App. 2021) (Vaidik, J.) (holding the commission’s members were de facto officers whose authority cannot be “collaterally attacked” by a “technical defect” that the officers had not filed the proper oath before commencing suit.)

*Haggard v. State*, 2021 WL 209208, __ N.E.3d __ (Ind.Ct.App. 2021) (Kirsch, J.) (holding easement interest in the property “alone is not ownership of the real estate entitled to an offer as a condition precedent to the State’s condemnation suit.”)


“authority cannot be ‘collaterally attacked’ by a ‘technical defect’”
administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige [the government] to control itself.”

In Federalist No. 47 Madison wrote that, “the preservation of liberty requires that the three great departments of power should be separate and distinct.” Thus, as everyone knows, the core structural feature of our Constitution is the separation of powers and checks and balances between three co-equal branches of the federal government. Of equal importance is the system of federalism which divides political power between the national government and the states.

In Federalist No. 51, Madison described the principles and structure of the proposed government of the United States:

In the compound republic of America, the power surrendered by the people is first divided between two distinct governments . . . . Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

Thus, the United States Constitution was designed for majority rule but was also designed to protect against the threat of both majority factions and minority factions.

**Factions as a Threat to the Rule of Law**

The Founders were also students of human nature. Political institutions are human institutions, and all political theory going back to the ancient Greeks—Socrates, Plato, and Aristotle—begins with human nature.

In Federalist No. 51, Madison asked, “what is government itself, but the greatest of all reflections on human nature?” And he observed that “If men were angels, no government would be necessary.”

In Federalist No. 10, considered the most famous of the Federalist Papers, Madison addressed factions as a threat to the rule of law. He defined a faction as follows:

By a faction, I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse or passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.

Madison wrote that, “[t]he latent causes of faction are . . . sown in the nature of man.” He noted that, “[a] zeal for different opinions . . . as well . . . as . . . an attachment to different leaders ambitiously contending for pre-eminence and power . . . have . . . divided mankind into parties” and “inflamed them with mutual animosity” which can “kindle... unfriendly passions” and excite “violent conflicts.”

Factions advocate for narrow interests against the public interest and the rights of others. The most virulent factions will not merely promote a political agenda but will tear at the social fabric. Thus, factions must be circumscribed, moderated, and contained by institutions designed for that very purpose and by the rule of law.

In Federalist No. 51, Madison warned against a society in which “the stronger faction can readily unite and oppress the weaker,” and he explained that “[i]t is of great importance in a republic not only to guard the society against the oppression of its rulers, but to
guard one part of the society against the injustice of the other part.” Madison concludes that if left unchecked factions are a threat to the rule of law.

But Madison did not contemplate the rise of political parties. He did not anticipate that political parties would institutionalize factions and that parties would act as a force multiplier that would aggregate, magnify, and sustain factions as permanent political actors. And of course, Madison did not contemplate the power that a minority faction could exert from within a political party.

No matter how well the infrastructure of American federalism is designed to contain the influence of factions and to preserve the rule of law, the most basic fact is—in Madison's words—that the “government [is] administered by men over men.” Thus, our constitutional system cannot—by itself—provide an absolute safeguard against factions, which are derived from human nature.

REPRESENTATIVE GOVERNMENT, GEOGRAPHIC SIZE, AND POPULATION

In Federalist No. 10 Madison asserted that two characteristics of the proposed union would moderate and contain the influence of factions. The first was representative government itself. Madison believed that the election of representatives would tend to minimize the effects of factions, that the people would choose “citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice [the country] to temporary or partial considerations.” He actually said that under a republic, as distinct from a direct or pure democracy, it will prove more difficult for unworthy candidates to rise to power. Although that may generally be true, Madison appears to have underestimated the ability of unworthy candidates to insinuate themselves and rise to power in a republic. In American history since 1789, many unworthy candidates have sought or risen to power at every level.

Second, Madison asserted that the sheer geographic size and population of the union would dilute factions and make it more difficult for them to organize. He argued that the larger the geographic sphere, “you make it less probable that a majority of the whole will . . . invade the rights of other citizens . . . and more difficult for all who feel it to discover their own strength, and to act in unison with each other.”

Contrary to Madison's theory, neither geographic size nor population has acted to moderate or contain the influence of factions. Madison could not foresee that political parties and the information age would shrink the nation and bring Americans closer together. And Madison could not have anticipated the impact that technology would have on every sphere of American life, including politics, or that technology would enable factions to form and coalesce across the nation unlimited by population size or geography.

AN ENGAGED CITIZENRY

So what means are available to contain factions and preserve the rule of law?

The first counterweight to factions are citizens who take their citizenship seriously. Former Congressman Lee Hamilton has spoken and written often about citizenship. His consistent theme is that representative government ultimately depends upon a well-informed and engaged citizenry. The architecture of our federal system is sound, but our freedom ultimately depends upon well-informed citizens exercising their civic responsibility.

So in the grand bargain that is the social contract between the citizen and the state, the people agree to surrender their absolute freedom in exchange for the rule of law. And, as previously noted, the rule of law
requires the consent of the governed. But consent of the governed does not mean surrender or acquiescence. Passive citizenship is a dangerous option. Active and well-informed citizen participation remains a civic duty.

Thus, civic education and engagement are of paramount importance. We are fortunate in Indiana to have an active “We the People: The Citizen and the Constitution” program, administered by the Indiana Bar Foundation and funded by private contributions and the General Assembly. The online portal for the “We the People” program can be found under the Educational Programs feature on the Indiana Bar Foundation’s website at www.inbf.org. The purpose of this program is “to promote civic competence and responsibility among Indiana’s elementary, middle and high school students.” My colleague Judge Paul D. Mathias has been a mainstay and leader of this program for some 30 years. And recently Barnes & Thornburg retired partner Bill Moreau and his wife, Ann, have created “The Indiana Citizen,” a “non-partisan, non-profit platform dedicated to increasing the number of informed, engaged Hoosier voters.” The online portal can be found at www.indianacitizen.org. The goal of this resource is to provide readily accessible information on candidates for public office and to increase voter registration and participation in our elections.

Representative government requires that citizens be well informed and exercise their First Amendment rights to speak, assemble, and petition their government. Representative government does not work well—and the rule of law will not endure—without a well-informed and engaged citizenry.

**A TRADITIONAL FREE PRESS**

The second essential means to contain factions and preserve the rule of law is a traditional free press. The Fourth Estate is a surrogate for the public and serves the public in ways that the public cannot serve itself.

In a commentary published in August 2016 titled, “The Media’s Responsibility to Our Democracy,” Congressman Hamilton said: “The independence of our press was hard to win, and it’s vital that we sustain it. People must have sources they can rely on in order to make our system work. Our democracy needs well-informed citizens making decisions based on fact about policies and politicians.”

The First Amendment, which guarantees freedom of the press, is the first amendment for a reason. In 1912, in *Abrams v. United States*, Justice Oliver Wendell Holmes wrote the most famous dissent in the history of the U.S. Supreme Court. In *Abrams*, Holmes wrote that “the theory of our constitution” is “that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market.”

Over time this principle articulated by Holmes—and known as “the marketplace of ideas”—became the primary theoretical justification and explanation for freedom of expression under the First Amendment. But the marketplace of ideas cannot function as intended unless an independent press is vigorous in the pursuit of facts and truth.

In Madison’s time political news was disseminated through newspapers and pamphlets. Today political news is transmitted instantly across many platforms. The flood of contemporary media is stress-testing the First Amendment and the marketplace of ideas. We are inundated 24 hours a day by media that is not mediated. Unfiltered information is dumped into the news stream, information that may or may not be accurate or reliable, that is often not well sourced, delivered unedited and unfiltered directly to the public without any accountability or reputational risk. Some so-called news media are not news media at all but agenda-driven advocates who disseminate misinformation or disinformation with no concern for the traditional ethics and standards of the journalism profession.

The line between the traditional press and social media has become almost indistinguishable. A tweet or a Facebook post will sometimes carry as much or more weight as a well-sourced network news report or an article in a reputable newspaper. Information sharing is a positive and essential democratic attribute. But there is a lot of “information” in the public square that is unreliable or simply false. Idle chatter and fact-free, unfiltered, unsubstantiated reports and allegations are not journalism. A robust, traditional
free press, exemplified by coherent, fact-based, well-sourced, and ethical journalism, is an essential antidote to the noise in the public square that often passes for information today.

AN INDEPENDENT JUDICIARY

Finally, an independent judiciary plays an essential role in maintaining the rule of law. The law is, of course, the business of the judiciary. As Chief Justice John Marshall wrote in *Marbury v. Madison*, “It is emphatically the province and duty of the judicial department to say what the law is.”

But the term “independent judiciary” is sometimes misunderstood. It does not mean that the judiciary is free to do whatever it wants. It means that the judiciary must be allowed to follow the facts and the law wherever they lead without outside influence. And, as Justice Holmes wrote in *The Common Law*, “[T]he standards of the law are standards of general application.” Thus, in applying the law to particular facts, our courts are not unfettered but are bound by neutral legal principles.

The judiciary is not merely a third political branch. The standards of the law are not grounded in politics, ideology, or the roar of the crowd. Thoughtful deliberation and well-reasoned judgment are the currency of the judiciary. In my more than 28 years on the Court of Appeals I have served with more than 30 other judges, and I can say with confidence that the decisions from our court have been rendered without fear or favor by judges who are not controlled by, or accountable to, any political party or interest group but only to the rule of law.

Two well-known examples of judicial independence immediately come to mind. First, in *United States v. Nixon*, the United States Supreme Court considered whether executive privilege would shield the Watergate tapes from discovery in a criminal prosecution. The Supreme Court held unanimously that President Nixon must deliver the subpoenaed tape recordings and other materials to a federal district court. Five of the eight justices who participated in the case had been appointed by Republican presidents Eisenhower and Nixon, including the Chief Justice Warren Burger who wrote the opinion of the court. Closer to home, in *State Election Board v. Bayh*, our Supreme Court considered whether Democrat Evan Bayh met the constitutional residency requirement for the office of Governor. Again, in a unanimous opinion written by Chief Justice Randall Shepard affirming the trial court, the court held that Bayh was an Indiana resident. Four of the five justices, Shepard, Givan, Pivarnik, and Dickson, had been affiliated with the Republican Party. And the trial judge, Shelby Circuit Court Judge Charles D. O’Connor, was also a Republican. These cases exemplify an independent judiciary deciding cases on the merits.

And, recently, there have been numerous cases decided by state and federal courts concerning challenges to the November 2020 election in which both trial and appellate judges have acted entirely without regard to their current or prior political affiliations. This is as it should be.

CONCLUSION

My first point has been that the architecture of American federalism is designed to prevent the concentration of political power, to restrain the excesses of human nature, and to preserve the rule of law.
law. My second point is that for the rule of law to be sustained, it must be protected and nurtured.

At the end of the day, an informed and engaged citizenry, a vigorous and authentic traditional free press, and an independent judiciary are required to sustain the rule of law. When we vote, we must make good choices. In the perpetual contest between factions, philosophies, and policies, it is imperative that those who hold positions of public trust respect and adhere to the rule of law.

The rule of law has provided an environment in which personal, political, and economic freedom have flourished. While the great American experiment remains unfinished, within our system of ordered liberty, where we balance “the liberty of the individual” and “the demands of an organized society,” Americans have built the greatest nation on earth. From the beginning of the Republic to the present day, lawyers have been indispensable partners in this enterprise. And respect for the truth, a core value of the legal profession, has been essential to preserve our democratic self-governance.

The rule of law is transcendental and endures from one generation to another. It does not belong to any one party or faction. It does not belong to a person. It belongs to everyone. It is woven into the fabric of our national, state, and local lives.

James Madison wrote that, “Justice is the end of government. It is the end of civil society.”


25. We the People: The Citizen and the Constitution, INDIANA BAR FOUNDATION (Jan. 24, 2020), inbf.org/Portals/0/Uploads/We%20the%20People%20Program%20Summary.pdf?ver=2017-09-19-143821-147

26. We the People Program, INDIANA BAR FOUNDATION (Jan. 24, 2020), inbf.org/Educational-Programs/We-The-People.


31. Id. at 630.

32. 5 U.S. 137, 177 (1803).


35. Id. at 700-02.


37. Id. at 1318.


39. THE FEDERALIST No. 51 (James Madison).
Continued from page 24

“under these facts” the defendant’s criminal acts were a single transaction not subject to multiple punishments and remanded with instructions to vacate the robbery conviction. *Id.* at 31, 34.

In *Madden v. State*, 20A-CR-196, 2021 Ind. App. LEXIS 7 (Jan. 12, 2021), the court also engaged in the *Wadle* analysis and found that “because criminal confinement is included in kidnapping” and the defendant’s actions were so “compressed in time, place, singleness of purpose, and continuity of action that his convictions for both crimes violate double jeopardy.” *Id.* at 22, 23.

Employing the test in *Powell*, the court also held, as the state conceded, that only the Level 2 felony kidnapping may stand but his Level 5 felony kidnapping conviction must be vacated. *Id.* at 19. However, the defendant’s two convictions for aggravated battery were affirmed. Noting that “[b]ecause the gravamen of this offense is the injury of another person, it is a result-based statute” the court continued to the second step in *Powell* and held that since “the two batteries were separated by time, place, and purpose, they were not part of a single transaction.” *Id.* at 17, 18.

The court remanded the case with instructions to vacate the Level 5 felony kidnapping and criminal confinement convictions. *Id.* at 31. Noting split in the Court of Appeals, panel holds common law principles of substantive double jeopardy no longer exist independently post-*Wadle*.

In *Woodcock v. State*, 20A-CR-432, 2021 Ind. App. LEXIS 31 (Jan. 28, 2021), the Court of Appeals considered an appeal that was being briefed when the Indiana Supreme Court issued its opinion in *Wadle v. State*, 151 N.E.3d 227, 235, 247 (Ind. 2020). Addressing whether the five Richardson common law rules, including the “very same act” rule, survived *Wadle* and may continue to be independently applied, the Court of Appeals noted a conflict among different panels of the court, but ultimately concluded that “the common law rules are incorporated into the *Wadle* analysis and no longer exist independently.” *Woodcock* at 9. The court declined to definitively decide whether the *Wadle* analysis is to be applied retroactively since it concluded that under either the common law formulation or the *Wadle* analysis, there is no violation of principles of substantive double jeopardy. *Id.* at 10. #

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Telephone: 317.439.5648

1905 S. New Market St., Suite 200, Carmel, IN 46032

Email: curtis@shirleylaw.net | URL: www.shirley.net
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Notice of Grant Funds Available for Calendar Year 2022.

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

Please visit https://www.lsc.gov/grants-grantee-resources/our-grant-programs/basic-field-grant for filing dates, applicant eligibility, submission requirements, and updates regarding the LSC grants process. Please email inquiries pertaining to the LSC grants process to LSCGrants@lsc.gov.

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