DECEMBER 2020

RES GESTÆ

THE INDIANA STATE BAR ASSOCIATION MEMBER JOURNAL

FEATURING:

INDIANA FALLS BEHIND IN REGULATION OF PRIVATE OWNERSHIP OF DANGEROUS WILD ANIMALS

PLUS

Racism and Racial Injustice - Moving from Mind Opening to Mind Changing to Action

& Celebrating Doug Church, Legendary Lawyer

VOL. 64 NO. 5

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President's Perspective:

RELAX, RELATE, RELEASE

By Michael E. Tolbert

PRESIDENT'S PERSPECTIVE

In the early 1990s, there was a popular television show called "A Different World." The sitcom was about the stress of being a college student. The show's main character, Whitley Gilbert, routinely experienced dating woes that added an extreme amount of stress to her life. Because of Whitley's inability to cope with her problems, she began seeing a therapist (played by famous dance choreographer Debbie Allen) who provided her with counseling. During the first counseling session, the therapist gave Whitley a mantra to help her conquer all her problems. Whitley was told to "relax, relate, release!" Throughout the show's successful run, anytime Whitley faced a stressful situation, she would loudly repeat the phrase: "RELAX, RELATE, RELEASE!" In an instant, all of Whitley's problems would vanish and she would find her happy place becoming a more effective college student.

Although this sitcom is currently in syndication and has been off of the air for many years, the "relax, relate, release!" mantra is one of the most recognizable sayings in pop culture. The mantra can have applicability to our own professional lives and the stressors that Whitley Gilbert faced are all too common in the legal profession. Lawyers experience many stressors that make it difficult to strike a perfect home- and work-life balance. Studies show that lawyers do not relax enough. We may also "relate" too much to our clients causing us to take on unnecessary stress and anxiety. In many law practices, to "release" a problem or client could mean the loss of professional standing. For this reason, lawyers are notorious workaholics. To work long hours is still a badge of honor in our profession. Over a career, lawyers develop negative habits that cost them the ability to be truly effective in the long run for their clients, family and community. When you factor

in the unique challenges presented by COVID-19, lawyers may be faced with an entirely new set of problems that could compromise lawyer wellness.

THE CASE FOR LAWYER WELLNESS

In 2014, CNN published a sad article titled, "Why are Lawyers Killing Themselves?" The story covered the lives of many successful lawyers who decided to end their lives. In 2012, Finis Price III, a successful Kentucky lawyer, jumped to his death. Shockingly, Kentucky had 15 known lawyer suicides in 2010. It was discovered that lawyer suicide was not merely isolated to Kentucky, but was a problem in many other parts of the country. Empirical studies show that lawyers experience depression and substance abuse at higher rates than the general population. Because of the stressors that come with the practice of law, lawyers have been found to be particularly vulnerable to depression and suicide. Contributing factors that lead to lawyer depression are high internal and external expectations, dissatisfaction with the profession, long hours, and stressful time constraints. Instant e-mails, cellphones, and text messages provide clients with 24-hour access, which does not help the problem.

> **"As early as 2014, the Centers for Disease Control and Prevention (CDC) ranked lawyers fourth for suicides."**

As early as 2014, the Centers for Disease Control and Prevention (CDC) ranked lawyers fourth for suicides. In 2016, the American Bar Association (ABA) Commission on Lawyer Assistance Programs and Hazelden Betty Ford Foundation published a study of nearly 13,000 currently practicing lawyers. Surprisingly, the study found that between 21% and 36%of the lawyers studied qualified as problem drinkers, and that approximately 28%, 19%, and 23% struggled with some level of depression, anxiety, and stress. Suicide, social alienation, work addiction, sleep deprivation, job dissatisfaction were all among some of the top complaints of the lawyers studied. A total of one in five attorneys studied met the criteria for mild or moderate depression. Almost 45% reported experiencing depression at some point in their career, while 11.5% reported suicidal thoughts during their career.

Shockingly, the most vulnerable group in our profession was not spared. Young lawyers in private law firms experienced the highest rates of drinking and depression. Also part of the study were15 law schools and over 3,300 law students, which found that 17% of the law students experienced some level of depression, 14% experienced severe anxiety, 23% had mild or moderate anxiety, and 6% reported serious suicidal thoughts. With over 18,000 lawyers practicing in Indiana and the barriers to social outlets presented by COVID-19, there is room for concern.

THERE IS HELP AVAILABLE TO INDIANA LAWYERS

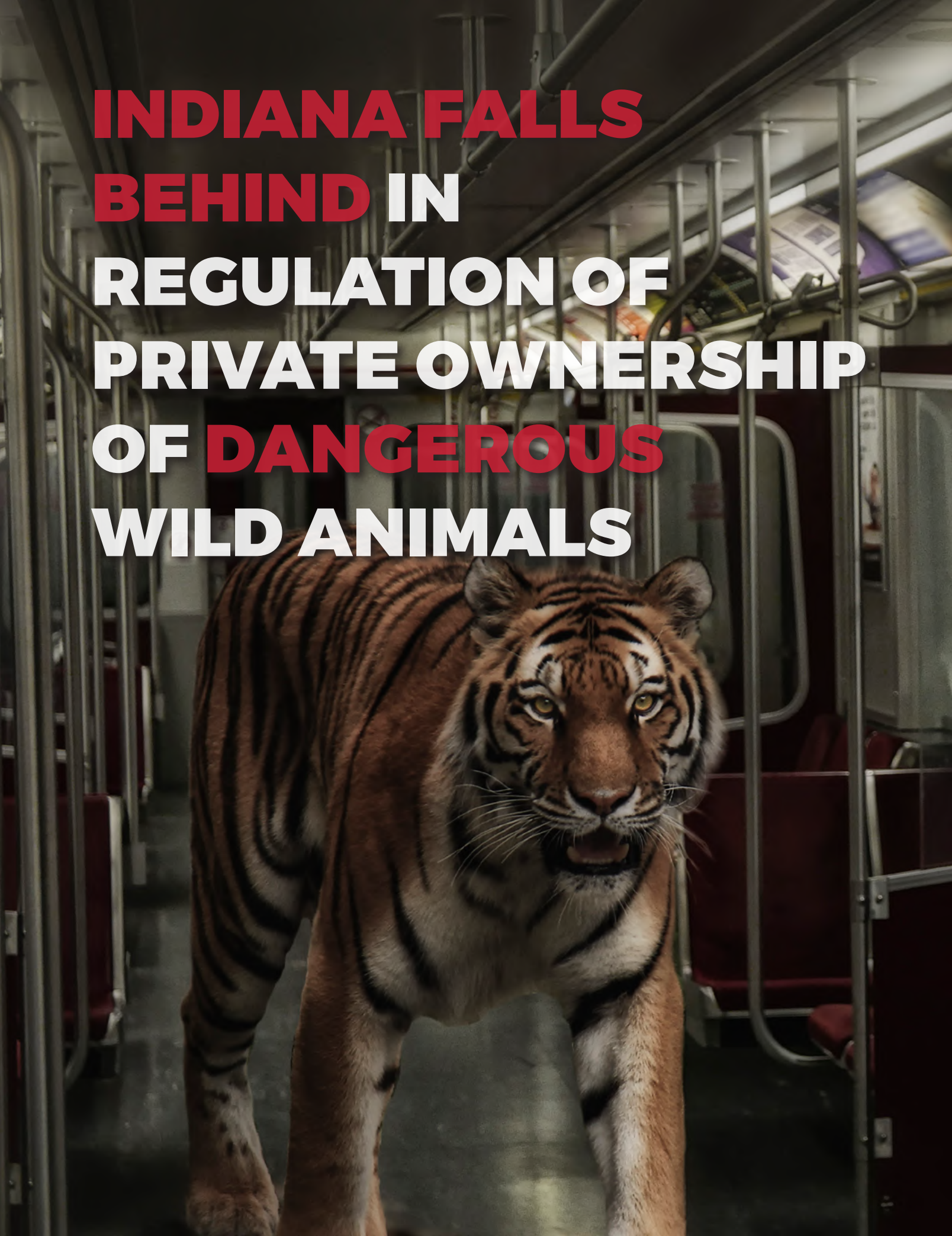
The CDC, due to the COVID-19 pandemic, released "social distancing" guidelines to help fight the deadly virus. Social distancing simply means keeping a safe space

between yourself and other people who are not from your household. This concept has caused problems for the legal profession – one that is built on social connectivity not only to key clients, but also colleagues. Many lawyers, particular young lawyers, are facing professional isolation and do not have the same outlets that were once available to them prior to the pandemic.

Indiana lawyers have available to them a very important organization that will help them battle the problems created by COVID-19. In October 1997, two volunteer organizations merged: the Indiana State Bar Association's Lawyers Assistance Committee and the Judicial Assistance Team, an Indiana Supreme Court Pilot Program. The partnership resulted in the formation of the Judges and Lawyers Assistance Program (JLAP). JLAP provides help to judges, attorneys, and law students who are experiencing life stressors, mental health, or substance abuse issues. These problems are all aggravated by the isolation brought on by COVID-19.

JLAP's services are not limited to mental health or substance abuse. JLAP can provide services to lawyers for any issue that may affect their quality of life or ability to practice law. The help offered by JLAP can vary depending upon the gravity of the situation. Depending on the issue, JLAP services can range from simply providing information and a referral to something more intense like an intervention that could involve one-on-one or group support. JLAP also provides training to the bench and bar on signs that may indicate when a lawyer is in trouble. The services provided by JLAP are confidential. The services are provided to lawyers by JLAP Admission and Discipline Rule 31 and Professional Conduct Rule 8.3. To further ensure confidentiality, JLAP is located in a separate, private building apart from the Indiana Supreme Court.

Indiana lawyers do not have to practice in "the bubble" facing their problems alone. If you or a colleague you know are having problems, do not hesitate to call JLAP at 866-428-5527. The call is strictly confidential and no fees are charged. The legal community needs you, but more importantly your family and friends need you more. Relax, relate, release. RG



INDIANA FALLS BEHIND IN REGULATION OF PRIVATE OWNERSHIP OF DANGEROUS WILD ANIMALS

FEATURE

By Erin Huang

Lions, tigers, and bears. Those are not the only dangerous wild animals that you could find in more Indiana back yards than you'd care to imagine. Hyenas, primates, crocodiles, and wolves are also popular choices for some who wish to have a more exotic pet, or make a little money exploiting these animals. Sadly, Indiana has very lax laws for the ownership of these dangerous species.

Indiana has an either/or licensing system, meaning you are required to have either a license from the Indiana Department of Natural Resources (DNR) for a wild animal under 312 IAC 9-11-1, or a Class C exhibitor license from the United States Department of Agriculture (USDA) under 9 CFR §2.1. Many exotic animal owners choose

to skirt state law, which often requires more rigorous housing and care requirements, by procuring a USDA license. What's shocking is how easily a USDA license can be obtained and that someone can get a Class C license for a rabbit they plan to exhibit, and once they have the license can then acquire a much more dangerous species, such as a tiger, primate, wolf or bear. The USDA often does not inspect again until it is time for license renewal, and even then, they don't usually make it to every facility. It will likely come as no surprise to most readers that the USDA is woefully understaffed and has thousands of facilities – from zoos to puppy mills to research laboratories - to inspect. The USDA intends to change its licensing to require 90-day notification if a licensee intends to obtain certain species not previously kept such as big cats, bears, and great apes. Additionally, the current administration has made it extremely difficult for individuals and organizations to gain access to inspection reports that are legally mandated under subsection (a)(2) of the Freedom of Information Act to be made available (see FOIA guidance).

If you thought that getting one of these animals was difficult, you are wrong. Not only are there several websites and social media groups with classifieds for animals such as tigers, primates, wolves, and bears, we have the Topeka exotic animal auction in northern Indiana where zebras, camels, kangaroos, and other exotic animals are sold.

Unfortunately, Netflix released the series Tiger King this year, and people have taken to binge watching the eccentric owner of one of America's most abusive roadside zoos. The zoo's former owner, Joe Exotic, is being celebrated and imitated despite the fact that for decades he caused anguish and suffering for hundreds of animals kept in his facility, he bred thousands of tiger cubs to profit from the public who paid to pet and play with them, and he ultimately hired someone to kill an outspoken animal welfare advocate and founder of one of the most amazing animal sanctuaries in the country. Sadly, the documentary did not fully document all of the abuse that occurred behind the scenes at this roadside zoo and that is so prevalent at similar facilities in our own state and across the U.S. Instead, it made a star out of a person who has profited for decades on the abuse and exploitation of animals.

The lack of strong laws prohibiting these animals from entering unqualified hands, and flimsy enforcement of the laws that do exist, put the safety of the public and law enforcement at risk. At some locations, people can pay money to have their picture taken with a tiger cub, wolf cub, monkey, or bear cub. Not only is this practice extremely cruel and unhealthy for the animals involved, there is the risk for spreading zoonotic diseases such as ringworm, or for members of the

" The USDA intends to change its licensing to require 90-day notification if a licensee intends to obtain certain species not previously kept such as big cats, bears, and great apes."

public to be scratched or bitten by one of these animals. The Humane Society of the United States notes, "Since 1990, at least 400 dangerous incidents involving captive big cats have occurred in 46 states and the District of Columbia. Five children and 19 adults have been killed and hundreds of others have lost limbs or suffered other often-traumatic injuries."

All too often, when one of these facilities folds or is shut down – as has happened numerous times in Indiana - the burden of re-homing the animals falls on sanctuaries and law enforcement. Appropriate, species-specific care for a big cat can cost around $20,000 per year, which is a huge burden on already overwhelmed sanctuaries and local governments. Consider the case in Zanesville, Ohio where a man who owned several dozen big cats set them free and then killed himself. The animals had to be hunted by local law enforcement and most were ultimately killed, after an expensive and time-consuming hunt for the animals, causing a major public safety issue and use of extensive manpower. More recently, Wildlife in Need in southern Indiana was stripped of its USDA license and non-profits and the government had to draw up and execute a plan to remove the animals to qualified sanctuaries and other facilities.

Ohio waited until a tragedy occurred before they passed strict laws banning private possession of most dangerous wild animals. Kentucky, Michigan, and Illinois also have laws banning private possession of these species. While there were bills to address this issue in the 2017 and 2020 Indiana legislative sessions, there has been little movement on the issue at the Statehouse. The bills, HB1332 and HB1200 respectively, which were nearly identical in substance, sought to prohibit the private ownership of dangerous wild animals – specifically, hyenas, wolves, bears, non-human primates, and big cats such as tigers and lions. The legislation created a grandfather clause for those who currently own such animals if they abide by certain safety protocol and insurance requirements. Additionally, the bill would have made exemptions for zoological parks, provided they also comply with certain safety

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"More recently, Wildlife in Need in southern Indiana was stripped of its USDA license and non-profits and the government had to draw up and execute a plan to remove the animals to qualified sanctuaries and other facilities."

PLIGHT OF THE UNCONSCIOUS PATIENT SUFFERING IATROGENIC INJURY IN INDIANA

By Morris L. Klapper

Several years ago, in a discussion had with a colleague, the 1997 Court of Appeals decision in *Slease v. Hughbanks*[1] was raised. The case concerned a new, unanticipated burn injury to a patient which occurred during surgery, but remote from the surgical site. The discussion led to a short, written commentary in 2003. Sufficient time has passed justifying an updated look at the status of Indiana law in respect to proving liability in a medical malpractice case, where the injured patient was unconscious at the time of the event.

In *Slease* the plaintiff broke his ankle, and surgery with general anesthesia was necessary. After he awakened from surgery, Mr. *Slease* noticed a fresh burn on his left thigh. A malpractice action was commenced against Porter Memorial Hospital and others. The plaintiff relied on two recognized exceptions to the general requirement for expert medical testimony to support a claim of medical negligence: the common knowledge exception and the doctrine of *res ipsa loquitur*. A medical review panel found that none of the defendants breached the appropriate standard of care. The hospital then moved for summary judgment.

The trial court denied summary judgment, the hospital filed an interlocutory appeal, and the Court of Appeals remanded for an entry of summary judgment for defendants. It held that the plaintiff was required to show " . . . either that a specific instrument caused the injury and that the defendant had control over that instrument or that any reasonably probable causes for the injury were under the control of the defendant."[2]

> **"After he awakened from surgery, Mr. Slease noticed a fresh burn on his left thigh."**

The difficulty with the *Slease*

analysis is that it makes it virtually unachievable for one who suffers a new injury, while under anesthesia, to carry the required burden. The plaintiff would have to discover and delineate how, by whom, and with what he/she was harmed. The plaintiff would additionally need to pinpoint when the injury occurred during a period of time when he/she was comatose, paralyzed, and totally under the defendant's control.

THE EXPANDING PARAMETERS OF THE DOCTRINE OF RES IPSA LOQUITUR AFTER SLEASE

The *Slease* decision itself suggested the potential for a more expanded applicability of the *res ipsa loquitur* doctrine, in cases where the precise instrument and exact scenario culminating in the injury complained of is unknowable to the plaintiff. The Court of Appeals said that the focus of the application of the theory depends on the right of control and the opportunity to exercise control. The plaintiff's burden is simply " . . . to show either that a specific instrument caused the injury and that the defendant had control over that instrument, or that any reasonably probable causes for the injury were under the control of the defendant." (Emphasis supplied).[3] In essence, the patient must provide evidence or reasonable inference that the injury or condition was iatrogenic, meaning likely caused by the actions or omissions of a physician, nurse, or other healthcare provider.

Two years after the *Slease* decision, Judge Sharpnack, writing for the Court of Appeals in *Gold v. Ishak*,[4] said that the plaintiff need not present direct evidence of negligence under the *res ipsa loquitur* doctrine because the common knowledge exception applied. There was no need for expert testimony. He confirmed that when a defendant is responsible for all reasonably probable causes to which an injury could be attributed, it is not necessary to point to a single specific act or omission. The plaintiff is allowed to offer what evidence is available tending to suggest negligence and still utilize the inference of negligence permitted under *res ipsa loquitur*.[5] Once the doctrine is allowed in a case, the burden shifts to the defendant to explain why the accident did not involve the defendant's negligence.[6] The decision confirmed that use of the doctrine was not restricted to only those cases where there was, for example, a failure to remove an object at surgery. The *res ipsa loquitur* doctrine, as well as the common knowledge exception, may be used in other appropriate cases involving claims of medical negligence. Unexpected broken bones and paralyzed limbs arising from a surgery come to mind.

The Supreme Court of Indiana decided *Cox v. Paul*[7] in 2005. A maxillofacial surgeon failed to notify his patient that there was a 1991 recall by the FDA of the dental implant used on her. The FDA sent the defendant dentist notice that the implant was potentially defective and informed that the dentist's patients who had received the implant should be notified within 30 days. It is unexplained why the plaintiff was not notified by the dentist until 1996. By then, the implant had disintegrated, and the plaintiff had to undergo surgery to remove the remnants. Suit was filed under the Indiana Medical Malpractice Act. The plaintiff moved for partial summary judgment on liability. The motion was denied. On interlocutory appeal the Court of Appeals reversed, and the Indiana Supreme Court granted transfer.

"the implant was potentially defective and informed that the dentist's patients who had received the implant should be notified within 30 days. It is unexplained why the plaintiff was not notified by the dentist until 1996."

Justice Bohem authored the *Cox* decision, holding that although the defendant was not subject to strict liability because of the failure to warn, he/she was though, in the best position to know which patients had received the defective implants and to explain the efforts to notify his/her patients. Accordingly, the analysis of the case should be as in those where *res ipsa loquitur* applies, reasoning:

> in some situations the plaintiff is able to raise an inference that the defendant was negligent from the facts known to the plaintiff, but proof of the specific negligent act or omission may be difficult or impossible.[8]

The court then quoted from § 154 of Dan B. Dobbs, *The Law of Torts*

> The general rule of *res ipsa loquitur* merely permits the trier of fact to infer negligence as a cause of harm without proof of specific acts of negligence when the facts fairly analyzed show that, more likely than not, (a) the plaintiff's harm was caused by negligence, even though the specific act of negligence is not identified, and (b) the defendant was the author of the negligence.

Cox instructed that sometimes the circumstances will merely permit the jury to infer negligence, but *res ipsa loquitur* may also function, " as a rule of policy which goes beyond the probative effect of circumstantial evidence, and requires the defendant to explain the event of circumstantial evidence or be liable."[10] The court also recognized that in those cases where defendants must explain events causing harm, they often involve a special responsibility of the defendant to the plaintiff, such as between a physician who performed the surgery and his patient.[11]

CURRENT PATTERN RES IPSA LOQUITUR JURY INSTRUCTION FOR MEDICAL NEGLIGENCE

> *Indiana Pattern Civil Jury Instruction* 1543 (2017) adopted by the Indiana Judges Association, as applied to cases of medical negligence, provides:
> You may assume that an act of medical negligence took place if plaintiff proves the following by the greater weight of the evidence:
>
> (1) plaintiff was under defendant's care when the injury occurred;
> (2) defendant had exclusive control of plaintiff's actions or reactions when the injury occurred;
> (3) the injury was of a kind that would not have occurred unless an act of medical negligence took place: and
> (4) defendant had exclusive control of the instrument or (agency/means) which caused the injury.
>
> If you conclude that an act of medical negligence took place, you must then consider that fact with all other evidence in deciding whether defendant was liable.

As may be seen, Paragraph (4) of the Instruction does not restrict "control" to the physical instrumentation, apparatus and the like, but also encompasses the actions of the healthcare provider respecting the means and agency of the care suggested to have caused the subject injury.

ANALOGY TO BAILMENT LAW

Indiana recognizes the policy of allowing a fair opportunity for one sustaining a loss under circumstances that he/she is helpless to fully explain, to still have the chance to achieve recovery. Consider the policy similarity between Indiana bailment law and the doctrine of *res ipsa loquitur*. In property bailments, when the bailed property is returned in a damaged condition which did not previously exist, the bailor has the burden of proving negligence by the bailee. This is accomplished by proving by

a preponderance of the evidence that the damage occurred during the time the property was in possession of the bailee. Once that bailment is proven and that the bailed property was returned with fresh damage, these facts are sufficient to establish a prima facie case of negligence. The burden then shifts to the defendant to prove lack of negligence and that the defendant did not cause the damage. Numerous Indiana cases involving newly damaged, bailed vehicles explain the burden-shifting in bailments.[12]

It is manifestly fair for Indiana law to accept the inference of negligence when a car is newly damaged while in the possession of a bailee while the owner is absent. That same inference must be forthcoming where the new injury is to a patient's body, occurring during the defendant's control over that body, during an interval of planned, total patient unawareness. The same evidentiary equalizer should rightly be available to a patient, newly injured while unconscious during treatment, as is afforded to the owner of a damaged, bailed car.

CORPUS IPSA LOQUITUR

When a new injury is caused to a patient in the course of medical or surgical treatment, while the patient is unconscious, unaware and under the complete control of the defendant, it is not reasonable to insist upon an absolute requirement of identification of the precise physical implement or apparatus and a full explanation of the circumstances involved in the harm. The patient's body itself is the appropriate tableau upon which to base the inference of negligence. "*Corpus ipsa loquitur*," that is, "the body speaks for itself," in the context of claims of medical negligence causing new injuries, is the accurate and useful nomenclature. A jury instruction incorporating the elements of *corpus ipsa loquitur* could be as follows:

> When an unconscious patient undergoes a medical procedure or surgery during which:
> 1. his/her body is under the control of the defendant;
> 2. a new injury occurs which was neither expected nor intended; and,
> 3. any reasonably probable causes of the injury are under the control of the defendant, then; if the plaintiff proves the above by a preponderance of the evidence, you may infer that the defendant committed an act of negligence, however, this inference may be rebutted if the defendant proves by a preponderance of the evidence that the injury was not due to his/her negligence.

SUMMARY

During two plus decades since the *Slease* decision, there has been a growing recognition in Indiana that the law must afford a more equitable response to the dilemma of the patient who is injured while unconscious. Where the patient is unavoidably unaware, and where it is expected and planned that the patient will be unable to perceive what is occurring while others are manipulating, probing, and/or cutting his/her body, there is a plain need for a method under the evidence rules to provide essential fairness in assessing whether negligence is the likely cause. A pathway is required for potential recovery of damages when unexpected injury occurs to an otherwise healthy part of the body which is not the subject of the surgery or treatment.

Continuing in situ a requirement that the injured patient must provide evidence identifying the exact physical instrument, device or circumstances which caused the new injury, hampers the law's quest to provide a level playing field for litigants.

When a surgery patient is necessarily rendered insensate, and when he/she awakens and learns that there has been a new injury to an otherwise healthy part of the body, those in charge of that body during surgery should bear the evidentiary burden of establishing there was no negligence.[13]

It is not the surgical instruments, the medical appliances or other paraphernalia involved in the surgery which do the "speaking" creating the inference of a medical mistake; it is the freshly injured body of the patient itself which is the messenger pointing to negligence, hence, corpus ipsa loquitur, the body speaks for itself. RG

Footnotes
1 Slease v. Hughbanks, 684 N.E.2d 2 496 (Ind. Ct. App. 1997).
3 Id. at 499.
4 Id.
5 Gold v. Ishak, 720 N.E.2d 1175 (Ind. Ct. App. 1999).
6 Id. at 1179.
7 Id. at 1181.
8 Id. at 1182.
9 Id. at 1184.
10 Cox v. Paul, 828 N.E.2d 907 (Ind. 2005).
11 Id. at 912.
12 Dan B. Dobbs, The Law of Torts § 154, at 371 (2001).
13 Restatement (Second) of Torts § 328D, cmt. b. Section 328D sets out the classic formulation of res ipsa loquitur.
14 Restatement (Third) of Torts: Liability for Physical Harm § 17 (2005) eliminates separate elements for the application of res ipsa loquitur and states the formulation as a single sentence: "The factfinder may infer that the defendant has been negligent when the accident causing the plaintiff's physical harm is a type of accident that ordinarily happens as a result of the negligence of a class of actors which defendant is the relevant member." The Indiana appellate courts have not yet adopted the Restatement (Third) definition.
15 See e.g., Kottlowski v. Bridgestone/ Firestone. Inc., 670 N.E.2d 78, 84 (Ind. Ct. App. 1996). See e.g., Ybarra v. Spangard, 154 P.2d 687 (Cal. 1944). Some recent Indiana appellate opinions continue to strictly require that the injured patient specifically identify the injuring instrumentality and prove the defendant's management and/or exclusive control over that instrument. Glon v. Memorial Hospital of South Bend, 111 N.E.3d 232, 237 (Ind. Ct. App. 2018); St. Mary's Ohio Valley Heart Care v. Smith, 112 N.E.2d 1144, 1150 (Ind. Ct. App. 2018).

OPEN CONVERSATIONS

By Justice Steven David & Angka Hinshaw

RACISM AND RACIAL INJUSTICE: Moving from Mind Opening to Mind Changing to Action

Welcome to the first in a series of discussions about racism and racial injustice. Indianapolis attorney Angka Hinshaw, a young woman of color, and Indiana Supreme Court Justice Steven David, a white man in his 60s, will begin a dialogue about racial inequality and inequities. We hope our readers and viewers learn, minds are opened and changed, and real changes are made in our profession and justice system.

This article launches our conversation. ISBA members can look forward to quarterly *Res Gestae* articles and monthly virtual programs tackling hard-to-discuss topics about race and culture with frank, vulnerable, and transparent conversations. Our guests will

share experiences, perspectives, journeys, and challenges as they navigate society where racism has touched their lives and what we can all do to make positive changes in our world.

You will be invited to listen to these upcoming programs and participate using the chat function and the question and answer option to ask Hinshaw and Justice David and the guests your questions. They will not be recorded or shared in order to allow guests to be open and vulnerable.

To kick off this series, we share the story of two attorneys, who are people of color. In the first instance, a potential client rejected the attorney's legal services and stated they preferred the legal help of a white attorney. Although the accomplished attorney enjoyed an excellent reputation and was diligent and well-prepared by explaining the strengths and weaknesses of the potential client's case, the person still preferred a white attorney. In addition, the potential client was also a person of color.

A second story that was shared by an attorney of color who asked their firm for additional assistance to accomplish work responsibilities, but instead of receiving help, the work product and the attorney's effort were questioned, and as a result the attorney felt unsupported and embarrassed.

These shared experiences are glimpses of some biases attorneys of color experience in their practice of law that others in the profession will never experience.

The stories are only two of the many. On the surface, the situation is a client who prefers a different attorney or an attorney who is supposedly *ill equipped* for the responsibilities but all too often, it is more than surface-level reasoning but smells of implicit bias or explicit bias – racism.

To gain a deeper perspective, the American Bar Association Commission on Women in the Profession published a report, *Left Out and Left Behind: The Hurdles, Hassles, and Heartaches of Achieving Long-Term Legal Careers for Women of Color*. That report studied the general practice experiences, barriers and reasons for leaving or staying the practice of law of Asian, Black, Hispanic/Latinx and multiracial or multiethnic women. All the women worked in Atlanta, Chicago, Los Angeles, or New York City. Many of the sentiments and experiences of the attorneys in the study can be mirrored in other states including Indiana and some instances can be experienced by men of color. The report is a must read for all practitioners, judges, partners, and supervisors.

> **"it is more than surface-level reasoning but smells of implicit bias or explicit bias – racisim.."**

In the drafting of this article, Hinshaw and Justice David had the following dialogue:
Steve: I am excited about our being able to do this upcoming webinar series Angka! Are you?

Angka: Yes, I'm excited but it can be uncomfortable to openly talk about these issues with others outside of my race.

Steve: I totally agree and must confess that I am more than uncomfortable about some of the

discussions we are likely to have. I am just plain nervous, anxious, and a bit scared.

Angka: I am too. We'll talk about some tough topics that will emotionally affect many people.

Steve: Very true, but it is critical that we do this and help move the conversations and action forward. How are you feeling about our commitment to this series?

Angka: I'm excited and committed. I'm glad we have a platform to host guests and discuss issues that affect all of us. May I ask you a question?

Steve: Certainly, I think our agreement is that no questions to each other are "off limits." Agreed?

Angka: Agreed. So, how come you haven't told me about your reaction to the intro to this article about the experiences of real Indiana lawyers?

Steve: Fair enough. Unfortunately, my immediate reaction is probably typical, of the reaction many would have, particularly white people, and that is they just weren't comfortable with the attorney and it had nothing to do with race or even gender. And maybe a year ago or five or certainly ten years ago, I may have stopped there. But being more open and being willing to listen and to believe and having read as much as I can get my hands on about racism and racial injusticemy reaction is that it upsets me and aggravates me. But on the other hand, we have two choices. We can complain about these stories and then do nothing, or we can talk about them, listen to them, collect them, share them, learn from them and do something about it. I prefer the second choice. It will be harder and take longer but it is the only right thing to do. And we all know doing what is right is not always easy.

Steve: May I ask you a question?

Steve: What do you hope comes from our conversations, these webinars that we are planning to host?

Angka: I want to elevate the voices of people of color. I want them to know they are valued and their experiences were heard. I want to do my part to change history and to help ensure that we all, regardless of race, work together, to combat racism and disparate treatment of people of color so our youth, our colleagues in the bench and bar, the next generation of lawyers, and our profession can be richly diverse with perspective and experience and our justice system more just and fair to all.

Steve: I could not have said it better myself. And we hope that other bar associations and other entities would like to "sign up" as supporters of the conversation.

Angka: Of course!

Steve and Angka: We look forward to you joining our conversation beginning next month. Stay tuned and look for subsequent announcements. RG

CELEBRATING DOUG CHURCH, Legendary Lawyer

By RG Staff

Douglas D. Church, Noblesville, was named the 2020 Legendary Lawyer by his peers in the Indiana Bar Foundation for his dedication to legal ethics, community involvement, and public service. Church served as the Indiana State Bar Association president from 2007 to 2008.

The annual Legendary Lawyer Award recognizes an Indiana Bar Foundation Fellow who demonstrates adherence to the highest principles and traditions of the legal profession throughout a legal career of 50 years or more. Church is an attorney at Church Church Hittle + Antrim in Noblesville where he served as managing partner for over 25 years. Church was honored in a virtual ceremony before friends, family and colleagues on Oct.15. Below, find praise for Church from his colleagues.

"He treats everyone, no matter their status, with civility and kindness. This is an attribute missing from many professionals today. He leads by example within our profession, community and at Church Church Hittle + Antrim. He volunteers his time to civic organizations, he spends time with young lawyers helping them hone their skills and he champions our community and our profession." **Liberty R. Roberts, Church Church Hittle + Antrim**

"Doug has stepped outside the confines of the legal professional to contribute to his community in countless ways. Doug has put into action the importance of achieving work life balance by helping others and taking great care of himself." **Donald. R. Lundberg, Lundberg Legal**

"Doug's special gift is that over the course of his long and distinguished career, he figured out how to reinforce the rule of law with kindness." **Hon. Sarah Evans Barker, United States District Court for the Southern District of Indiana**

"To me, however, Doug's life isn't measured in the number of awards he has received or the many boards he has chaired. Doug's true value lies in his humility and his knack for simply doing the right thing." **Justice Steven H. David, Indiana Supreme Court**

"Doug is a loyal and engaged alum at our school, and an individual who is a role model to students and faculty alike. I can think of no one who has earned the respect of his peers and served our bar over the years as much as Doug..." **Dean Andrew R. Klein, Robert H. McKinney School of Law**

"All lawyers and parties who work with Doug Church know his primary asset is courtesy and respect for others, including opposing parties, opposing counsel, and the courts. If all lawyers conducted themselves as Doug Church does, there would be no need for CLE on the subject of civility." **Sherrill Wm. Colvin, Haller & Colvin**

"He exemplified the fact that each and every person, no matter their status within the firm, the community, the case, or the court should be treated with kindness and sincerity. Most importantly, he taught me how to put aside personal opinions, stretch my thinking, build consensus and promote the greater good. Doug empowered me to be me; to build my practice and relate to others in an uplifting fashion, and to advocate fiercely while at the same time extending civility and understanding to my opponents." **Leslie Craig Henderzahs, Church Church Hittle + Antrim**

"Doug concentrates his practice on civil litigation, mediation and municipal law. If you ever have the opportunity to hear Doug present an argument in front of the Court, you don't want to miss it. He is very talented, and that talent is what resulted in his induction into the American Board of Trial Advocates." **Sarah J. Randall, Church Church Hittle + Antrim**

"Doug has been an active member of the state bar since he first became an attorney in 1970. He served in leadership roles in the Young Lawyers Section, the Indiana State Bar Association (ISBA) House of Delegates, and in 2007 was selected to be President of the ISBA. He has served on both the Indiana Bar Foundation and the Indiana Continuing Legal Education Boards. His work on all these boards (and countless others) had a singular purpose - to improve the profession of law in Indiana." **Thomas A. Pyrz, Indiana State Bar Association, retired**

"Those of us in the profession have known for years that Doug Church is a lawyer's lawyer. When there is a challenge to be met, you can have no better advocate. When there are problems to be solved and consensus to be reached, his experience and wisdom is precisely what you need." **J. Lee McNeely, Mcneely Stpehenson**

"That's who he is. A vessel for all of his great legal experiences. A mentor for both aspiring and seasoned attorneys. A legendary lawyer." **Seamus Boyce, Church Church Hittle + Antrim**

"From the time Doug arrived in Hamilton County, he immediately began to uphold and perpetuate the traditions and integrity of a fine law firm which has carried his name for decades. In addition to his vastly expanding law practice, Doug served as managing partner of his firm for more than two decades..." **Hon. V. Sue Shields, United States District Court for the Southern District of Indiana**

"...Doug always had time to meet, share and find solutions to tough problems not only in the law office but in the community and with all its citizens..." **Mary Sue Rowland, Mayor of Noblesville, 1988 to 1996**

CRIMINAL JUSTICE NOTES

By Joel Schumm

WADLE AFTERMATH, Language Limits Juvenile Prosecutions

This column offers a condensed review of the issues discussed in October appellate opinions in criminal cases. A longer version is available at the Indiana State Bar Association's website at inbar.org/rg-online

NO JUVENILE COURT JURISDICTION

In *D.P. v. State*, 151 N.E.3d 1210 (Ind. 2020), the State sought to waive a 21-year-old and a 23-year-old to adult criminal court for alleged offenses committed when they were juveniles. The plain language of Juvenile Code limits jurisdiction to respondents under the age of 21. Ind. Code § 31-30-1-1(1). The petitions therefore had to be dismissed because, as the court reiterated, "The age of the offender is determinative of subject matter jurisdiction in the juvenile court." *Id.* at 1211 (quoting *Twyman v. State,* 459 N.E.2d 705, 708 (Ind. 1984)).

SORTING THROUGH (STATUTORY RULES OF) DOUBLE JEOPARDY

As summarized in last month's column, *Wadle v. State*, 151 N.E.3d 227, 235 (Ind. 2020), overruled two decades of "constitutional tests in resolving claims of substantive double jeopardy," replacing it with "an analytical framework that applies the statutory rules of double jeopardy." *Wadle* is likely the most impactful criminal case of the year. Potential limitations on multiple punishments is a crucial issue for trial lawyers seeking to resolve cases and for judges at sentencing. Three published opinions from the Court of Appeals shed some light on the reach of *Wadle*.[1]

First, in *Rowland v. State,* No. 19A-CR-2761, 2020 WL 5361075, at *3 (Ind. Ct. App. Sept. 8, 2020), Senior Judge Rucker applied the new *Wadle* framework and found no violation because possession of marijuana and possession of paraphernalia were not included offenses

under the included offense statute or as charged. Notably, the opinion addressed another potential route for relief, finding that *Wadle* "appears to have left undisturbed the long adhered to series of rules of statutory construction and common law that are often described as double jeopardy but are not governed by the constitutional test set forth in *Richardson." Id.* (cleaned up). Rowland found no violation of one of those rules, "the very same act test," because the evidence at trial suggested "any marijuana found in the pipes was separate and distinct from the additional marijuana found in the car." *Id.* at *3-4.

Largely avoiding *Wadle* and also relying on "common law double jeopardy jurisprudence," the Court of Appeals accepted the state's concession that a defendant could not be convicted both of "Class A misdemeanor reckless driving for passing a school bus when its arm signal device was extended causing bodily injury and Level 6 felony criminal recklessness" arising from the same act with the same victim. *Shepherd v. State*, No. 20A-CR-134, 2020 WL 5509729, at *9-10 (Ind. Ct. App. Sept. 14, 2020).[2] The case signals that all five categories from the Sullivan concurring opinion in *Richardson* remain viable after Wadle. Id. (citing *Guyton v. State*, 771 N.E.2d 1141, 1143 (Ind. 2002)).

Returning to the *Wadle* test, *Barrozo v. State*, No. 19A-CR-2037, 2020 WL 5668940, at *3 (Ind. Ct. App. Sept. 24, 2020), found included offenses were not implicated because reckless driving requires operating a vehicle in a reckless manner, thereby endangering others and causing the bodily injury, but "leaving the scene of an accident merely requires that the defendant's vehicle was involved in an accident (he need not have caused the accident or the bodily injury) and that the defendant then left the scene of the accident without providing his identifying information, among other things." *Id.*

Two convictions for reckless driving, however, could not stand under the companion case to *Wadle*, which applies to multiplicity—charging a single offense in multiple counts. *Id.* at *5 (applying *Powell v. State*, 151 N.E.3d 256 (Ind. 2020)). Unlike some crimes that explicitly allow multiple convictions if there are multiple victims, reckless driving "occurs—and may be punished—only once, because the unit of prosecution is the act of reckless driving." *Id.* at *6. RG

Footnotes:
*1 A fourth opinion cited Wadle for the well-settled pre-Richardson principle, which still rings true under Wadle: "When faced with dual convictions that offend double jeopardy principles, our supreme court has remedied that violation by vacating the offense that carried the lesser criminal penalty." Shepherd v. State, No. 20A-CR-179, 2020 WL 5814178, at *8 (Ind. Ct. App. Sept. 30, 2020).*
*2 In discussing the concession, the court briefly noted "as a new rule of criminal procedure, Wadle was potentially applicable to this case." Id. at *10. Which rule(s) to apply, however, remains murky; an early October case addressed both Wadle and pre-Wadle law "because there are outstanding questions about whether Wadle should be applied retroactively." Diaz v. State, No. 20A-CR-203, 2020 WL 5858609, at *2 (Ind. Ct. App. Oct. 2, 2020).*

STATEWIDE SCOOP

By Erin Bauer

IN TIME OF CHANGE WE ADAPT

The year 2020 has posed challenges for the Evansville Bar Association ("EBA"), as it has for all bar associations nationwide. Despite the challenges, the EBA has adapted. During the quarantine, the EBA continued to hold committee and section meetings, as well as CLEs, virtually. As offices re-opened, we gradually began reintroducing in-person meetings and CLEs. However, we recognized the practical problems we faced with social distancing in limited meeting space, and also recognized that some members were simply not ready or comfortable attending meetings in-person. To accommodate those members and keep our members safe, the EBA purchased a new video conferencing system that made virtual meetings easier and more efficient. Currently, the EBA holds meetings and seminars in a hybrid capacity. Those members who are able and comfortable attending in person may do so until social distancing capacity is reached, but all others

have the opportunity to participate remotely via Zoom.

In October, the Access to Justice Committee and Evansville Bar Foundation conducted a virtual trivia night to benefit the Volunteer Lawyer Program and Legal Aid Society of Evansville. Prior to 2020, the EBA members raised thousands of dollars for these programs each year through an annual trivia night. The EBA did not allow the pandemic to stop the tradition. This year, teams conferred with each other virtually and privately to answer questions, then joined the entire group between rounds for scoring and socialization. The night was a great success!

During this challenging year, the impoverished members of the community have certainly struggled, and the EBA has continued helping serve those community members. The Volunteer Lawyer Program has operated a help desk staffed by members of the EBA each day for several hours near the temporary Vanderburgh County Superior Courtrooms. The attorneys staffing the help desk offer assistance and guidance to self-represented litigants facing evictions, collection matters, support modifications, and other pandemic-related issues.

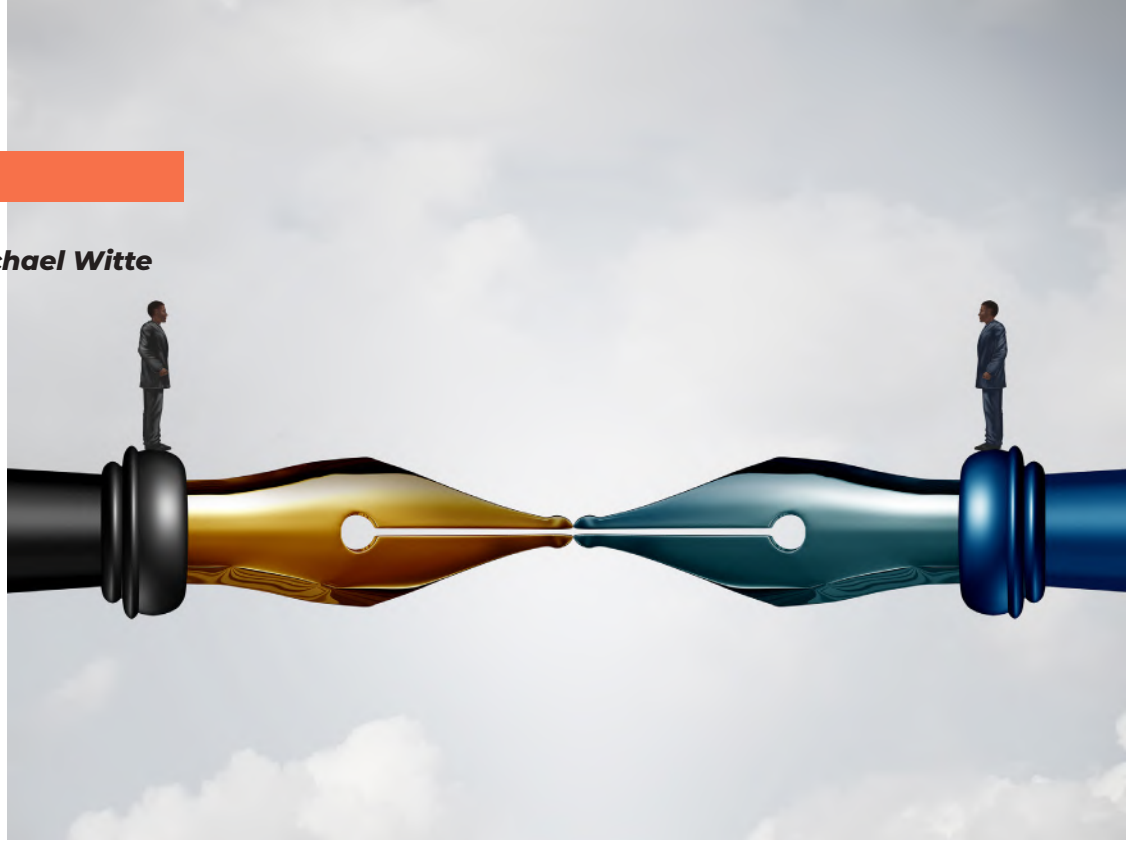
In addition, the EBA continues hosting "Talk to a Lawyer" twice per month. This service is a hotline staffed by EBA attorneys and paralegals accepting calls from members of the public who have legal questions. On average, "Talk to a Lawyer" receives more than forty calls per month.

Finally, the EBA has strived to address the social injustices and inequalities within our community. In June, the EBA Board of Directors asked the EBA's Diversity and Inclusion and Access to Justice Committees to develop action plans for the appropriate role of the Association to address the concerns of racial inequities within our community. Since then, those committees have worked diligently and implemented an action plan to promote change. As part of that plan, the committees have sent to EBA members a series of weekly emails that include links to articles, podcasts, or videos on the topics of equality, equity, and justice. The EBA has also offered and will continue offering CLE on those topics, as well as encourage each EBA section to offer seminars incorporating those topics into presentations related to their respective practice areas. On October 21, the EBA organized expungement training and education to provide its attorneys with the information and tools they need to assist clients with expungements. The EBA aims to offer a similar program in early 2021 in the area of public assistance. In 2021, through its Randall T. Shepard Lecture Series, the EBA will host renowned guest lecturers to discuss social inequities within the legal community and community at-large.

The year 2020 has certainly kept us on our toes, but our bar association and its members are resilient and will continue to adapt to whatever comes our way next. Surely, 2021 has to be brighter, right?

ETHICS

By G. Michael Witte



CONVENIENCE OVER ETHICAL ADHERENCE: False signatures and notaries

In the September 2020 edition of *Res Gestae*, this column focused on the frequency of e*x parte* communication reports despite its ease of avoidance. The theme of easily avoidable recurring misconduct continues in this writing. False signatures and notaries are this month's culprit.

The rise of e-signatures and e-approval might be marginalizing the importance of a legal signature as to authenticity and verification. DocuSign, Adobe Sign, and PandaDoc are just the tip of e-sign applications. Nevertheless, much of the legal system depends on the

legitimacy of signature bearing documents.

The most common violations of false signatures involve a lawyer signing a client's or witness' signature or notarizing a person's signature outside the signer's presence. Nefarious intent is usually absent. The false signature occurs for the sake of convenience or impatience. The violations are typically of Professional Conduct Rules 3.3(a), candor to the tribunal, 8.4(c), dishonest or fraudulent conduct, and 8.4(d), prejudice to the administration of justice.

The importance of enforcing false signature violations is eloquently stated in a sanction dissent by then-Chief Justice Brent Dickson:

> Much of our legal system is predicated on the authenticity and reliability of signatures. For a lawyer to affix a false signature is a deception that gravely undermines public trust, respect, and confidence in the legal profession. Such inexcusable misconduct is not justified or excused by considerations of client convenience, expediency, or lack of personal gain. Affixing a false signature is manifestly dishonest and an absolute ethical transgression. For this offense, I favor a substantial period of suspension.[3]

Robison involved a co-personal representative signing multiple estate documents in Robison's presence. One document was mistakenly unsigned, so Robison later signed it for the co-PR without her knowledge or consent. The narrow 3-2 decision (Justice Rush also dissenting) resulted in a public reprimand for the Rule 8.4(c) violation.

Even when the client consents to the lawyer signing as a proxy, an 8.4(c) violation occurs when the lawyer notarizes the document and attests that the client signed before the notary in-person. The attestation is false. If the document is filed with a court, then Rules 3.3(a) and 8.4(d) come into play due to lack of candor and prejudice to the administration of justice.[4]

"a brazen non-lawyer office assistant was convicted of fraud, identity deception, and theft. She created fake court orders, forged judicial signatures, and stole from her employer's trust account."

Another instance of convenience over ethical adherence involved a deputy prosecutor signing the name of an investigator to an affidavit to support amending criminal charges. She also affixed the investigator's signature to the charging information and filed it with the court. The actions were done to expedite a pre-trial diversion disposition without the investigator's consent or knowledge.[5]

Browning's fact pattern shows a false signature's slippery slope. An unknowing affiant has his signature proxied twice resulting in a filing before a court which leads to an amended criminal charge filing against a defendant and provides false reliance for a court to publicly dispose the matter. She received a 30-days license suspension.

A legitimate notarization is where a notary attests a person representing themself as the signer executes the signature in the notary's presence. Falsely notarizing a person's signature is another frequent Rule 8.4(c) fact pattern.

Matter of Fraley[6] involved a lawyer using a notary's seal and signature to falsely attest an affiant's signature without the notary's knowledge or permission. Both the affidavit and the notarization were forgeries. To compound the harm, the affidavit was prepared and submitted as evidence in the Fraley's discipline case. These facts supported additional violations of Rule 8.1(a), making false statements of material fact in a discipline investigation, and Rule 8.4(b), commission of a dishonest criminal act. The fraud was part of a pattern of deception and other misconduct leading to her disbarment.

Matter of Szilagyi[7] is another false notary scenario combined with the excuse of convenience. However, the convenience was for Szilagyi's benefit. Szilagyi falsely used his secretary's notary seal on a quit claim deed transferring the marital residence from his ex-wife to himself. Variations on this fact pattern of falsely using another's notary seal without their knowledge or consent can be found

at Matter of *Drook*[8], and *Matter of Darling*.[9] Sanction aggravators unique to each case led to 60-days license suspensions for all three respondents.

The dual role of lawyer and notary is another opportunity for false signature temptation. It occurs when a lawyer/notary, attests a signature outside the presence of the signer. The signer is an active participant to the misconduct and usually benefits from the act without harm. That might minimize the mischief, but it does not negate the misconduct or its erosion of authenticity, honesty and trustworthiness.

One scenario is a lawyer pre-notarizing a blank signature line and forwarding the document to the signer for an after-the-fact signature such as in the case of *Matter of Giannetto*.[10] The reverse of this scenario is where the client or third person forwards to the lawyer notary an already signed document. The lawyer notary then falsely attests to the signatures being affixed in the lawyer's presence such as in *Matter of Beeson*.[11] Both respondents in these cases received public reprimands.

Criminal forgery convictions, thankfully, are the least likely false signature setting. In a twist on the rule violation, a brazen non-lawyer office assistant was convicted of fraud, identity deception, and theft. She created fake court orders, forged judicial signatures, and stole from her employer's trust account. The lawyer was not complicit in the employee's acts. Nevertheless, he failed to supervise a non-lawyer employee which harmed clients and the integrity of the courts. Rule 5.3(b) served as the basis for misconduct.[12]

In 2013, my predecessor wrote about this same topic expressing amazement at lawyers continuing to commit notary abuse misconduct despite the Disciplinary Commission's frequent prosecutions.

It is clear that the Indiana Supreme Court takes lawyer abuse of the office of notary very seriously. What is, perhaps, puzzling is the very fact that lawyers continue to engage in similar misconduct.[13]

Seven years have passed since that observation. False signature situations remain easily avoidable. Nevertheless, they continue to visit the Commission. RG

Footnotes:
1 Matter of Robison, 985 N.E.2d 336 (Ind. 2013)
2 Matter of Bridenhager, 735 N.E.2d 1177 (Ind. 2000).
3 Matter of Browning, 39 N.E.3d 685 (Ind. 2015)
4 138 N.E.3d 262 (Ind. 2020)
5 969 N.E.2d 44 (Ind. 2012)
6 855 N.E.2d 989 (Ind. 2006)
7 685 N.E.2d 1066 (1997)
8 781 N.E.2d 1138 (Ind. 2003)
9 (997 N.E.2d 336 (Ind. 2013)
10 Matter of Lisher, 137 N.E.3d 254 (Ind. 2020)
11 Lundberg, Donald R., "I Swear or Affirm: Lawyers and Notaries Public," 57 Res Gestae 34, 36 (November, 2013).

By Norm Tabler

DEATH BY SPELLCHECK!

We don't usually think of spellcheck as a matter of life and death, but for one New York State man, spellcheck was the difference between dead and being alive.

Robert Berger, age 25, of Huntington, New York, was facing a bleak future. He had pleaded guilty in Nassau County to possession of a stolen Lexus and attempted grand larceny of another vehicle and was awaiting sentencing for both crimes. He faced yet another criminal charge in nearby Suffolk County.

In Robert's mind there was only one way out: *death.* After all, he couldn't be sent to prison if he was dead.

The Certificate of Death, bearing the signature of the New Jersey State Registrar Vincent T. Arrisi, certified that Robert William Berger had died on September 21, 2019, in Mercer County, New Jersey. The manner of death was listed as *Suicide;* cause of death, *Suffocation*. The document bore the familiar blue border of official New Jersey certificates and, as expected, a unique bar code in the lower left corner and filing number in the upper right.

Robert's fiancée delivered the certificate to his attorney, Meir Moza, who later recalled that his heart went out to Robert's family upon receiving the document. Meir performed the sad duty of forwarding it to the office of Madeline Singas, District Attorney for Nassau County, where Robert was to be sentenced.

The initial reaction of that office upon receiving the certificate was expectable: If ever a case was moot, this was it; dead defendant, dead issue.

But wait! There was something puzzling about the title of the department that issued the certificate. Was the department really titled Office of Vital Statistics & *Regsitry?* What is a *Regsitry?*

That question prompted a Google search for an example of a New Jersey death certificate. A comparison of that example with Robert's document confirmed the D.A.'s suspicion that *Regsitry* on Robert's document was a typographical error: a misspelling of *Registry.*

Alerted by that typo, the D.A. scanned Robert's document further and spotted more discrepancies, including variations in font size and absence of the official New Jersey watermark.

Meantime, Robert was alive and well in Pennsylvania well enough to be arrested on charges that included stealing from a Catholic college and providing a false identity to law enforcement.

Forcibly returned to Nassau County, Robert was charged with the additional crime of offering a false instrument for filing, which carries a sentence of up to four years in prison. He pleaded not guilty.

Meir Moza, who is now Robert's *former* attorney, declared himself flabbergasted to learn that the document he sent to the Nassau County D.A. was doctored. Robert's new lawyer declined comment.

All of which brings us back to the value of spellcheck. What if Robert had used spellcheck when he created his death certificate? It's distinctly possible that in the eyes of Nassau and Suffolk County authorities, he would be legally dead.

But he didn't, with the result that he faces sentencing on the two original Nassau County charges, as well as trial on the new charge of filing a false instrument, along with trial on the Suffolk County charge.

For Robert, spellcheck was the difference between life and death.

CLIENT SERVICE: a sole practitioner's suggestion for changing public perception – one client at a time

By Thomas E. Scifres
Presented by the ISBA GP, Solo & Small Firm Section

Although I feel (and act) pretty young, I recently completed my 54th trip around that big yellow ball of gas, and as Mellencamp warned me, there are probably "less days in front of the horse than riding in the back of this cart." With those as my only credentials, I sit, taxing the capacity of my expandable waistline pants, leaning intently toward my laptop so I can actually see the words appearing on-screen, and think about how the public perception of our profession has changed over my life.

It was in third grade that I first wanted to be a lawyer. Back then, I knew nothing but good things about lawyers. It was a noble profession of members seeking justice for their clients. As far as I know, that was everyone's impression. At least back then. Over the years, that has changed. Modern opinion seems to rank us to just above the tax collector of biblical times. I've read numerous opinions on why this might be and what might change it. But perhaps the one area where we can make the biggest

difference is in our relationships with our own clients.

I started my career in various-sized firms in Indianapolis. But some of my most valuable education has come after going solo in my hometown in 2006, the year I first attended the ISBA Solo & Small Firm Conference. It was there that I was introduced to a concept known as "fixed" or "value pricing." Although it is a new approach to pricing your services, which I won't dwell on here – other than to tell you that "fixed pricing" and flat-fee billing are not the same thing – it also emphasizes a paradigm shift in how we approach client representation. Authors like Ron Baker have challenged me to change my approach.

An underlying premise behind the value pricing philosophy is that hourly billing itself – and our hourly contracts – seek first to protect the attorney, then the client. This caused me to review my own contract. In setting my hourly rate, I calculated annual overhead, annual billable hours, and needed personal income. The focus was on what it cost me to provide my services rather than what value my services had to any individual client. My hourly contract terms were equally self-protecting. The scope of representation section read like the exclusions in my CGL policy, and there were no estimates of monthly fees – only an insistence on prompt payment. There were also multiple client actions that could lead to my withdrawal. Everything about it – my own little contract of adhesion – seemed to insert some self-centered protection in every clause. Though certainly not unethical, I began to see how I was contributing to the problem with the people I should be impressing otherwise.

The nature of my practice and clientele don't readily lend to "value pricing" in every representation. Even for hourly clients, the paradigm shift required to explore value pricing methodology still lends to more client-centered practices. For instance, I quit having short initial consultations geared toward filling out initial forms to accomplish the client's stated purpose. I now have lengthy consultations to get the "story behind the story" and really figure out why the client wants to pursue the representation. We explore and write down the client's stated goals. Truly understanding the client's motives and interests behind the actions lends to better representation throughout.

We also explore the monetary value of the representation, along with the client's income and resource limitations. We discuss payment methods up front – including fixed monthly payments that fit the client's budget. That way, the client doesn't have to worry about how returning our calls might increase the monthly legal bill beyond available means.

Frequent communication, real empathy, and regular client input are intentional pursuits. None of these are quick fixes or gimmicks that can be quickly implemented to improve client satisfaction surveys. If they are, that won't be the result. Rather, they are the result of a continuously practiced paradigm shift. If you try it, you are likely to come up with your own practice changes. It isn't the changes themselves that matter – it's the client-focused reflection process that leads to the changes.

I can't predict when I will shut out the lights for the last time, or what they'll say when I do. But I can say unequivocally that re-thinking how I approach every aspect of client representation has increased my desire to suit up and keep playing. I can't help but believe my "teammates" feel the same. RG

"some of my most valuable education has come after going solo in my hometown in 2006, the year I first attended the ISBA Solo & Small Firm Conference. "

Footnotes
1 "The Real Life," The Lonesome Jubilee; Mercury Records 1987.
2 To fully appreciate the concept, you should read Ron Baker's book, Professional's Guide to Value Pricing, Baker, Ronald J., Harcourt Trade Publishers 2000.

RECENT DECISIONS

By Brian Paul & Bianca Eddy

Appellate civil case law update

In September, the Indiana Supreme Court issued one civil opinion and the Indiana Court of Appeals issued 21 published civil opinions. Select opinions are summarized below. The full text of all the Indiana appellate court decisions, including those issued not-for-publication, are available via Casemaker at inbar.org or the Indiana Courts website at in.gov/judiciary/opinions. A more in-depth version of this article is available at the Indiana State Bar Association's website at inbar.org

In reviewing the amount of evidence necessary for a court to instruct a jury on a mitigation-of-damages defense, the Indiana Supreme Court determined that only a "scintilla" of evidence was required to meet this burden, meaning that defendants need only point to "some" evidence in the record that would suffice for a reasonable jury to decide the issue in the party's favor. *Humphrey v. Tuck*, 151 N.E.3d 1203 (Ind. 2020). In *Humphrey*, defendants were able to provide evidence that plaintiff had not mitigated damages to his head injury suffered in a collision where he did not do the necessary follow-up on medications and therapy to help his condition.

In two different cases, the Indiana Court of Appeals discussed the doctrine of vicarious liability. In *Penske Truck Leasing Co., L.P. v. Dalton-McGrath,* -- N.E.3d ---, No. 20A-CT-94, 2020 WL 5415822 (Ind. Ct. App. Sept. 10, 2020), the Indiana Court of Appeals focused on the third-party truck leasing company's relationship to the *wrongdoer* as opposed to the plaintiff in finding that there was a principal-agent relationship between the trucking company and the auto sales location that rented defendant's trucks. As a result, there was a genuine issue of material fact as to whether the trucking company was vicariously liable for the damages caused by a dog bite to plaintiff when plaintiff picked up the trucking company's vehicle at the auto sales rental shop. In *Jernagan v. Indiana Univ. Health*, -- N.E. 3d --, No. 20A-PL-41, 2020 WL 5755460 (Ind. Ct. App. Sept. 28, 2020), the Court of Appeals concluded that a genuine issue of material fact existed when considering whether the delivery of a business card during surgical registration was sufficient to satisfy the meaningful notice requirement informing the patient that the doctor performing the medical procedure was an independent contractor. Specifically, the court looked at the totality of the circumstances and noted that, without more, the mere handing over of a business card was not enough to alter a patient's belief that the anesthesiologist was an employee of the hospital as opposed to an independent contractor.

In another Court of Appeals case, the court found that a place of worship might be liable to a person who was harmed on the premises if the harm was foreseeable. The plaintiff in *Singh v. Singh*, -- N.E. 3d, No. 20A-CT-959, 2020 WL 5361027 (Ind. Ct. App. Sept. 8, 2020), was stabbed while visiting a Sikh place of worship. The court determined that there was evidence in the record to show that defendant operator had notice of present and specific circumstances that would cause a reasonable person to recognize the risk of an imminent criminal act and the likelihood of looming harm that day.

Finally, the issues of standing and ripeness were before the Indiana Court of Appeals in *Indiana Family Inst. Inc. v. City of Carmel*, -- N.E. 3d --, No. 19A-MI-2991, 2020 WL 5415837 (Ind. Ct. App. Sept. 10, 2020). There, the plaintiff companies filed a lawsuit against various Indiana cities claiming that specific ordinances would "chill" their rights of free speech and free exercise of religion should they exclude same-sex couples from their events. However, since there had been no evidence of such violations nor had the companies discriminated against anyone thus far, the court determined that the companies lacked standing to bring their claims. RG

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procedures, filing, inspection compliance, and insurance requirements. Finally, and most importantly, this legislation sought to end all public encounters with dangerous wild animals. Neither bill was given a vote by the House Natural Resources Committee, where it was assigned. Hopefully, Indiana does not wait until a major tragedy and public safety emergency occurs before taking action.

Federally, the Big Cat Public Safety Act (H.R. 1350/S.R. 2561) was introduced in February of 2019. This bill would limit who may own big cats and would also prohibit public interactions with these animals. This would go a long way in protecting big cats since the current patchwork of state laws allows individuals to simply change jurisdictions when states crack down on pet tiger owners. The ban on public contact would reduce the number of surplus big cats discarded by the cub petting industry that find their way into people's backyards, garages, and basements.

As a society, we can and should do better. We have recently found out, in the most devastating way, the effect that our abuse of nature and wild animals has on the human population. Voting with our dollars is the simplest avenue for effecting change. When we refuse to patronize establishments that profit from animal abuse, we are letting businesses and legislators know what will or will not be tolerated in our communities. It is time for us to take a stand and instead of "getting back to normal," changing the status quo. RG

Footnotes

1 https://www.justice.gov/oip/foia-guide-2004-edition-foia-reading-rooms

2 http://www.topekalivestock.com/alt.-animal.html

3 https://www.humanesociety.org/news/what-tiger-king-didnt-reveal-animal-abuse-and-extensive-network-breeding-and-selling-tigers

4 https://www.humanesociety.org/sites/default/files/docs/cdc-petting-zoo-recommendations.pdf

5 https://www.humanesociety.org/news/what-tiger-king-didnt-reveal-animal-abuse-and-extensive-network-breeding-and-selling-tigers

6 https://www.humanesociety.org/news/what-tiger-king-didnt-reveal-animal-abuse-and-extensive-network-breeding-and-selling-tigers

7 https://www.congress.gov/bill/116th-congress/house-bill/1380

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