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REFLECTIONS ON 2020

An Extraordinary Time to be an Employment Lawyer and Important Time to be a Pro Bono Lawyer
By Kayla Ernst

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CONTENTS

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

Heather George Myers
Attorney
hgeorgemyers@gmail.com

Maggie Smith
Member
Frost Brown Todd
msmith@fbtlaw.com

Kayla Ernst
Associate
Ice Miller LLP
kayla.ernst@icemiller.com

Ruth Johnson
Staff Attorney
Indiana Public Defender Council
ruthjohnson@pdc.in.gov

Curtis T. Jones
Partner
Bose McKinney & Evans LLP
cjones@boselaw.com

Hon. William L. Wilson
Magistrate
St. Joseph Circuit Court
wwilson@sjicindiana.com

Jack H. Kenney
Dir. Research & Publications
Indiana Public Defender Council
jkenney@pdc.in.gov

Bradley M. Dick
Partner
Bose McKinney & Evans LLP
bdick@boselaw.com

Anasuya Shekhar
Attorney
Law Offices of Robert S. Gitmeid, PLLC
aeshekhar@gmail.com

Margaret Christensen
Partner
Dentons Bingham Greenebaum LLP
margaret.christensen@dentons.com
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President's Perspective:
HOW TO GROW YOUR PRACTICE

By Michael E. Tolbert

It’s a New Year. Every year, lawyers start out on the quest to build the perfect law practice. Contrary to popular belief, the path to a successful law practice is not linked to a rigorous “12-step plan.” Nor is success linked to the billable hour. The secret to growing your practice or succeeding in any professional endeavor you may be engaged in can be found in one simple word: giving. Yes, giving is the key to unlocking the door to a successful law practice.

I bet you are wondering, “How can I give something away and expect to gain something in return?” Also, you are probably baffled how a tiny word can have such a profound impact on your business and a large industry like the legal profession. Well, the concept of giving is older than the legal profession – a profession that can be traced all the way back to 12th century Europe. Close to 3,000 proverbs are attributed to King Solomon, who is considered by many to be one of the wisest and most prosperous people to ever live because of the wisdom bestowed upon him by God. King Solomon believed there was a direct correlation between the concept of giving and prosperity. In Proverbs 11:24-25, King Solomon stated as follows:

One man gives freely, yet gains even more; another withholds unduly, but comes to poverty. A generous man will prosper; he who refreshes others will himself be refreshed.

What King Solomon describes is the great benefit we get as givers. As lawyers, the exercise of giving can take on many forms. It can come through pro bono work. It can come in the form of a monetary donation or the giving of our time to a local charity. Or, giving can manifest itself in our relationships with others. Attorney-to-attorney referrals (even when made to a competitor) are a
great way to give. I have personally reaped many benefits from this form of professional sacrifice through the creation of positive relationships with fellow lawyers, and the shocking return of other referral business that in most cases is greater in value than the work originally referred out!

The power of giving has been successfully applied in business. An article in the *Harvard Business Review* titled “The Competitive Advantage of Corporate Philanthropy,” also made the following observation:

> “Philanthropy can often be the most cost-effective way for a company to improve its competitive context, enabling companies to leverage the efforts and infrastructure of nonprofits and other institutions.”

Indiana lawyers are fortunate to have a state Supreme Court that leads by example in the giving arena. The Indiana Supreme Court created the Coalition for Court Access on May 17, 2016. Through the present, servant leadership of Justice Geoffrey G. Slaughter, the coalition provides a focused and comprehensive organizational structure for Indiana’s civil legal aid programs. The coalition also includes judges, law school representatives, civil legal aid and *pro bono* providers, the Indiana State Bar Association, and Indiana Bar Foundation members. All give their time to help Hoosiers who may be less fortunate gain equal access to our courts.

By now, I hope you have been persuaded that there are great benefits to giving. Besides the altruistic value one gets from being a giver, the art of giving can transform your business for the better. Where do you start? Well, below I have attempted to identify some great organizations where Indiana lawyers can start practicing the art of giving today. By no means are these all of the organizations in Indiana doing good work; these are just some of the organizations that could use your help.

1. **INDIANA BAR FOUNDATION**

The Indiana Bar Foundation is a charitable organization dedicated to strengthening access to justice and the appreciation for the rule of law in Indiana. The foundation directs resources toward three main areas: civic education to Hoosiers of all ages, assisting those who have difficulty accessing the justice system, and improving the legal profession.

The foundation also sponsors an Indiana High School Mock Trial program. In this program, high school students are provided the opportunity to experience a hypothetical trial with actual lawyers and judges presiding over the case. The mock trial program provides high school students with an opportunity to experience the innerworkings of our legal system. You can give to the foundation online at [inbf.org/donate](http://inbf.org/donate).
2. INDIANA LEGAL SERVICES, INC.

Indiana Legal Services, Inc. (ILS) is a not-for-profit law firm and the largest provider of free civil legal assistance to eligible low-income people throughout the state. ILS was established in 1966 and today offers legal services to clients in every county in Indiana. Their mission is to use the law to fight poverty, empower clients, and improve access to justice. In 2016, ILS served close to 11,000 low-income people. Many of the clients served by ILS face serious legal problems that could harm their ability to have such basics as food, shelter, income, medical care, or personal safety. Some client matters involve domestic violence, housing, consumer law, access to health care, and access to government benefits issues.

Over half a million people in Indiana live below the poverty level and need legal help. Although ILS receives federal funding, as well as various other grants, monetary donations would help ILS continue to provide legal services to those in need. You can donate online by going to www.indianalegalservices.org/donate.

3. NEIGHBORHOOD CHRISTIAN LEGAL CLINIC

The Neighborhood Christian Legal Clinic believes everyone should have access to justice regardless of their income. The clinic provides free legal services to those who cannot afford it. It is a faith-based organization, and their mission is to promote justice through legal representation and legal education for low-income individuals as a way of demonstrating Christ’s love. You can donate securely online or by check, made payable to Neighborhood Christian Legal Clinic, 3333 N Meridian Street, Suite 201 Indianapolis, IN 46208.

4. INDIANAPOLIS LEGAL AID SOCIETY

The goal of Indy Legal Aid is to provide consultation, education, advice, and representation across a wide range of legal issues, most frequently in the areas of housing, guardianship, adoption, and family law to the least fortunate. Indy Legal Aid provides legal services that benefit the most vulnerable members of society: the elderly, disabled, children, their caretakers, and low-income individuals who otherwise would not receive legal services. If you wish to give to the Indy Legal Aid, contact Gina Woods, Development and Communications Director, at ginaw@indylas.org or call 317.217.5347.

If you cannot make a donation, do not feel bad. Give your time. Lawyers can volunteer their time with Free Legal Answers, which is a virtual legal advice clinic. Attorney volunteers, authorized to provide pro bono assistance in their state, can log onto a website, select questions to answer, and provide legal information and advice. It’s that simple. Lawyers who are interested should visit freelegalanswers.org.

Former President Theodore Roosevelt once said, “People don’t care how much you know until they know how much you care.” Giving is the tool used to show how much we care. Being a giver will transform your life and take your law practice to new levels.
REFLECTIONS ON 2020:

By Kayla Ernst
An Extraordinary Time to be an Employment Lawyer and Important Time to be a Pro Bono Lawyer
As in many other industries, 2020 proved to be both challenging and eye-opening for the legal profession. With COVID-19, we were faced with new laws, novel issues, and we learned the virtual parameters within which we can provide effective representation. This could not be truer than in my practice of employment law at Ice Miller. At the same time that our practice faced one of its busiest times, 2020 was also the year where the moral imperative of pro bono work was more apparent than ever.

COVID-19 touched on virtually every area of employment law. To name a few: discrimination concerns, leave entitlement, workplace safety, protected concerted activity, unemployment, reductions in force, and workers’ compensation. It also brought with it a slew of new laws, regulations, executive orders, and agency guidance on the national, state, and local levels. At times, regulations and/or guidance conflicted, did not provide answers for our clients, or raised even more questions or obligations for employers than before. More than once, even after spirited academic

“Above all, the hardest part of my job during this time was helping clients with one of the most difficult decisions they had to make (or were forced to make)”
debate among the talented and smart folks in our employment law group about a new issue, we had to tell our clients what no lawyer wants to tell their clients – there is no clear answer to this question (at least not yet).

Amidst the madness, we found it more important than ever to remember our role as counselors and think about issues outside of the law, both practical and human. Legal compliance was only one part of the picture—also at play was employee morale, employees feeling safe enough to come into the work in the first place, public perception, each employer’s economic circumstances, and, quite simply, doing the right thing. Employers faced hard decisions. Maybe a company wanted to afford its employees more leave than was required, but it could not keep its doors open if it did.

Above all, the hardest part of my job during this time was helping clients with one of the most difficult decisions they had to make (or were forced to make)—reductions in force (RIF). I assisted with more RIFs in just a few months than I had done in my entire legal career. The process is always very formalistic at first—determining the legal requirements for group reductions in force, making sure separation agreements contained required language, etc. But there always came the moment where it hit us. Wow, X number of people are losing their jobs tomorrow. Losing their livelihoods. It was never more real than when I was physically typing in the names of employees who would be losing their jobs into separation agreements, over and over. On the flip side, there were feelings of great accomplishment when we helped boost our clients up. We shared news about economic relief or tax credits that helped keep workers employed, and we worked with employers to implement creative solutions to make their workplaces as safe as possible for those who had to stay at work and for others when they returned.

Despite its challenges, I find my employment work to be incredibly fulfilling (in 2020 and prior years). I have no doubt that the work we do as employment counsel creates better workplaces for employees. Yet, at the same time, while we were helping clients work through these issues, the increased need for pro bono services could not be ignored. Every year, the need for pro bono work is vital, but especially in a year with a global pandemic, economic challenges, and where racial injustice has been brought to the forefront.

“**I feel lucky that this year I had opportunities to do more pro bono work than in prior years, and now more than ever, it felt imperative to respond to those opportunities in the affirmative.**”

---

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DEAR MS. SHEKHAR:

Thank you for your email to Res Gestae and pointing out that I was rather unfair in my references to certain practices. You are absolutely correct: mantras (like “om”) and holding hands in certain positions while meditating are definitely important components of many religions. I was completely wrong to refer to them the way I did. I committed a cardinal sin. I assumed that everyone reading my article would have similar backgrounds.
white, raised in a predominantly Christian tradition, and dismissive of non-Judeo-Christian practices. To be blunt, I am glad you called me out. While I like to think of myself as someone who rejects prejudice, I did a lousy job of keeping implicit biases out of my article. You have taught me a valuable lesson. Please accept my complete and unqualified apology for showing disrespect to other religious traditions and their practices. I am humbled by your willingness to bring it to my attention. I regret that my lapse in (or probably complete absence of) judgment is now in print and might be seen by some as an endorsement of their own prejudices. Again, I am thankful for your email to Res Gestae, and I will work to correct the message I conveyed.

DEAR JUDGE WILSON:

I very much appreciate you taking the time to respond to my email. As soon as I read your article about meditation in Res Gestae, I knew it was light-hearted and not intended to hurt anyone. I want to assure you that I responded to start a dialog, not to attack or call your motives into question.

But, after I read your article, I felt weary and anxious. It was disappointing that you felt “burning incense, using gongs, chanting ‘ommmmmm’ repeatedly, and sitting with the tips of my middle fingers touching my thumbs” could somehow disqualify you as a judge. My family members in India who are Hindu do some of those things in prayer every day. “Om,” for instance, is a sacred syllable that begins many Hindu prayers and is supposed to encompass the entirety of the universe.
I felt weary because 2020 has been very difficult. Our country has been in dire straits dealing with a pandemic, a fraught general election, and unrest over mistreatment of Black Americans in our legal system, to name just a few issues. The opening lines of your article were very insightful: The judicial branch, as well as the legal profession at large, has a responsibility to promote fairness and instill trust in our work. I think conversations like the one we are having are a great way to do so. However, the reason I felt anxiety is that these conversations sometimes don’t go well.

We are all human and responding to disagreement with defensiveness is natural. I’m guilty of this as much as anyone. But there is an undeniable trend in our country’s history--minorities call attention to differential treatment, and the majority’s defensiveness leads to more severe differential treatment. So, calling attention to discrepancies can be daunting.

In my (admittedly short) legal career, I have sometimes tried to point out these discrepancies because I have the privilege and the platform to do so. The people most affected by prejudice often do not. And at times, when I have done so, I have been characterized as professionally unfit. My experience of this is insignificant compared to what others have gone through. As a result, I tend to weigh what I’m about to say against the potential consequences for myself. I’m ashamed to admit that I sometimes hesitate to speak up for others out of a desire to preserve myself.

So, when I sent a private email to the editors of Res Gestae expressing my concern over your article, I tried to do it in the most respectful way possible. I spent a long time finding the right words and the most palatable tone. I hoped my message, not how I delivered it, would define what I had to say. That was a tiring process. I didn’t expect to receive a response, I only hoped my email would reach somebody.

Continued on page 37...
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HOW TO PROTECT YOUR BOTTOM LINE WHEN ACCEPTING CREDIT CARD PAYMENTS

By Heather George Myers, Chair, GP, Solo & Small Firm Section

This column is provided by the ISBA GP, Solo & Small Firm Section

One part of running a law firm that law school may not have prepared you for is getting paid for your services. Providing easy options for your client to pay your bill will increase your bottom line. One of the easiest ways for clients to pay their invoices is via credit card but accepting them can create some pitfalls.

It is important to remember that funds received for a retainer must go directly into your trust account. A credit card processor must be able to deposit the full amount of the retainer into your trust account while withdrawing the associated fees from your expense account. If a credit card processor is unable to do...
this, you cannot ethically accept trust payments via credit card. Law Pay, an ISBA partner, is an example of a payment processor that can handle trust payments correctly. Square is an example of a service provider that cannot process trust payments correctly, although Square could be used to make payments on an existing invoice.

Once you have selected a payment processor that complies with IOLTA rules, you need to make sure your office policies cover any issues that may arise. A chargeback is where a dispute is made regarding a charge on a credit or debit card. Once a chargeback is initiated you will have a short period of time in which to respond to the dispute.

Here are some tips to help prevent a chargeback and how to respond if one does occur:

(1) Never begin work on a case until you have a signed fee agreement. Your fee agreement should outline your payment terms and any required retainer. If you require a retainer do not begin work on the case until it has been paid.

(2) Review your credit card processor’s policy on chargebacks. Some processors will pull the disputed amount from your bank account while the dispute is pending. Others will process the dispute before withdrawing any money.

(3) Include credit/debit card language in your fee agreement. Ask your credit card processor if they have recommended language for you to include. If not, here is some sample language: All charges paid via credit card or debit card are deemed valid if the receipt is signed or the client provides written, verbal, or electronic authorization. The client acknowledges that using the online payment portal is an electronic authorization for all charges so made. The client acknowledges that the chargeback process with the credit card company or banking institution is not the proper procedure to dispute attorney’s fees and client will not seek to dispute any charges made by the client through a chargeback. Should the client wish to contest the charges, the client shall follow the policy outlined in this fee agreement. The client further agrees that a copy of this fee agreement will serve as proof to the banking institution that the chargeback request should be and will be denied accordingly. The client waives the attorney/client privilege for any and all communications and documents necessary to respond to any chargeback.

(4) Obtain authorization from the client for all charges. Have your client initiate the credit card charge. You can provide the link on your invoices, via email, and on your website. Once the payment is processed, have the client sign the receipt. If authorization is given over the phone, email the receipt and have the client return a signed copy. Follow up until a signed copy is made. Provide instructions for your client to electronically sign documents or use a service such as DocuSign.

(5) If a third party is paying the client’s fees, obtain a separate fee agreement from the third party. Also have a third-party payor sign all receipts for any payments they make.

(6) Include a forum selection clause in your fee agreement if a chargeback dispute is resolved in favor of the client. A forum selection clause is beneficial if a dispute ultimately must be resolved through litigation. Here is a clause you may wish to use: The parties agree that should any suit, action, or proceeding arise out of this fee agreement, said suit, action, or proceeding shall be litigated in a state court in {insert county} County, Indiana.

The benefit of accepting credit card payments may far outweigh the potential risks. Hopefully, implementation of the above strategies will further decrease any risks and help increase your bottom line. Check out the member discount page at www.inbar.org to find discounts on providers that may fit your needs.
UNCONSTITUTIONAL SIX-YEAR DELAY IN RETRYING HABITUAL OFFENDER CHARGE; APPLICATION OF NEW DOUBLE JEOPARDY ANALYSIS

In October, the Indiana Supreme Court issued one opinion in a criminal case finding a six- and one-half year delay in retrying a habitual offender charge was unconstitutional. In four opinions, the Court of Appeals applied the new double jeopardy analysis handed down in a pair of cases by the Indiana Supreme Court in September, which overruled long standing precedent.
INDIANA SUPREME COURT

Criminal Rule 4(C) does not apply to retrials of habitual offender enhancements, but 6-year delay in this case violated constitutional right to speedy trial

In 2001, Stanley Watson was convicted of Class A Felony dealing in cocaine and found to be a habitual offender. In 2012, Watson obtained post-conviction relief and his 30-year habitual offender enhancement was vacated. The state refiled the habitual offender charge in 2012 but a retrial was not held until November 2018.

In its decision, the Indiana Supreme Court granted Watson relief under the four-part test set forth in Barker v. Wingo, 407 U.S. 514 (1972), to determine Sixth Amendment speedy trial violations.

First, the 2,325-day delay in the retrial far exceeded the time frame for the delay to be considered presumptively prejudicial. Second, the 1,360 days attributed to the prosecution and trial court weighed heavily for Watson. Third, Watson asserted his right to a speedy trial, as evidenced by his letters to the trial court. Fourth, Watson was prejudiced by the delay because given Watson’s age, resolving the habitual offender charge would determine if he would leave prison before he died. The court found that all four Barker factors weighed in Watson’s favor and entitled him to speedy trial relief.

INDIANA COURT OF APPEALS CASES

In September, the Indiana Supreme Court decided Wadle v. State, 151 N.E.3d 227 (Ind. 2020) and Powell v. State, 151 N.E.3d 256 (Ind. 2020), which overruled Richardson v. State, 717 N.E.2d 32 (Ind. 1999) and long-standing double jeopardy analysis in Indiana. In October, the Indiana Court of Appeals applied the new double jeopardy standard in four cases.

Hill v. State, 19A-CR-2083, October 2, 2020 – Powell analysis

“The 2,325-day delay in the retrial far exceeded the time frame for the delay to be considered presumptively prejudicial.”

Reckless homicide convictions arising from two fatalities did not violate double jeopardy under either old law or recently-adopted test.

The Indiana Court of Appeals analyzed and rejected Hill’s argument under the new double jeopardy test announced in Powell v. State, 151 N.E.3d 256 (Ind. 2020). Under the Powell analysis, reckless homicide is a “result-based” statute that creates a separate “unit of prosecution” for each death caused by a defendant’s reckless act. Therefore, the court upheld two reckless homicide convictions for Hill’s single reckless act resulting in two fatalities.

Murder and robbery convictions did not violate double jeopardy under old law or Wadle analysis.

Diaz argued that his convictions for murder and the Level 5 felony robbery constituted double jeopardy because his acts occurred during a few very brief moments and were one action.

The Court of Appeals affirmed the convictions, finding no double jeopardy violation under either the old law, before the decision in Wadle v. State, 151 N.E.3d 227 (Ind. 2020), or the Wadle analysis, noting that murder and robbery are two distinct chargeable crimes and therefore the continuous-crime doctrine did not apply.


Pointing a firearm and criminal recklessness convictions vacated as lesser included offenses of attempted murder.

Thurman was found guilty of two counts of attempted murder, two counts of Level 6 felony pointing a firearm, and two counts of Level 6 felony criminal recklessness.

The Court of Appeals affirmed Thurman’s attempted murder convictions but vacated the pointing a firearm and criminal recklessness convictions, applying the included offense analysis under Wadle v. State, 151 N.E.3d 227 (Ind. 2020).


Two battery convictions upheld but kidnapping and confinement convictions vacated.

Jones was convicted of two counts of Level 3 felony aggravated battery, one count of Level 2 felony criminal confinement and two counts of kidnapping – one as a Level 2 felony and one as a Level 5.

The Court of Appeals held that under both the old continuous crime doctrine test and the new uniform substantive double jeopardy test found in Wadle, Jones’s battery convictions survive, but his Level 5 felony kidnapping and Level 2 felony criminal confinement convictions must fall.

“The Court of Appeals affirmed the convictions, finding no double jeopardy violation”
Long after a safe and effective vaccine for COVID-19 is available and we can get back to hugging old friends at holiday parties and high-fiving strangers at sporting events, we’ll be planning meetings, depositions, and even some hearings as virtual events. At this point, nearly a year into the pandemic’s disruption of legal practice as we knew it in Indiana, we’ve heard plenty of warnings about wearing pants during video calls, remembering to relieve oneself *and flush* before attending court hearings (not during), and the importance of maintaining confidentiality when participating in virtual client meetings. Back in the day, when lawyers did not regularly don a “Zoom jacket” as they dialed into professional events, it was not an option to “forget pants” or “forget to mute.” And much like the obligation to get dressed for court, the increasing use of new virtual communication modalities has not changed lawyers’ obligations in communicating with parties, opposing counsel, and the courts.

Whether a hearing is live or virtual, a lawyer’s duty of candor requires that the
Pursuant to Indiana Court Rule 1.15, an audited financial statement of the Indiana Bar Foundation’s IOLTA program for the prior year is published in this issue of Res Gestae.

Indiana Bar Foundation, Inc.

Schedule of IOLTA Activities

Year Ended June 30, 2020

REVENUE:

IOLTA revenue ........................................ 1,240,472
Total revenue ........................................ 1,240,472

EXPENSE:

Administrative expense:

Payroll, taxes, and employee benefits .......................... 154,998
Office supplies and leased equipment ....................... 20,858
Accounting fees ....................................... 18,937
Meetings ............................................... 447
Membership dues ................................... 3,811
Telephone ......................................... 2,833
Unreimbursed IOLTA expenses ........................... (69,884)

Total IOLTA administrative expense ..................... 132,000

Net IOLTA income ................................ $ 1,108,472

“lawyers must treat the ‘Zoom room’ with the same integrity afforded to a court room.”

Professional Conduct Rule 4.1, which prevents lawyers from making false statements of material fact or law to opposing parties, witnesses, counsel, or any other third person, applies in all contexts arising in the course of representing a client. Unsurprisingly, there is no exception for virtual communications. Likewise, the broad application of Rule 8.4 prohibits lawyers from engaging in “conduct involving dishonesty, fraud, deceit or misrepresentation,” or “conduct prejudicial to the administration of justice.”

Although the respondent’s conduct in Matter of Pizur went beyond a single false statement, the case aptly illustrates that false communications to the tribunal, opposing parties, and the media implicate Rules 3.3(a), 4.1, 8.4(c), and 8.4(d). There, the City of Indianapolis inspected and removed dogs from a private kennel. The following month approximately
14 puppies were born from dogs seized by the city and at least five of those puppies died. Pizur responded to a reporter’s request seeking information about the puppies and sent an email stating that the kennel owner had not notified the city that any of the dogs were pregnant. During a hearing a few months later, the kennel owner advised the court that Pizur’s statement to the reporter was false. Pizur falsely told the court that he had been misquoted by the reporter. Thereafter, Pizur knowingly altered his email to the reporter before it was produced to the kennel owner in response to a public records request.

The instructive value of Pizur is that the series of misrepresentations may have begun as a mistake and led to misrepresentations to the court and fraudulent alteration of documents. It is easy enough to imagine a similar escalation if an attorney defending a deposition attempts to refresh the recollection of the witness. Perhaps the witness gets distracted and forgets to mention a true and important fact. In a live deposition, the attorney would never pass a note across the table in the middle of the witness’s answer. But in a virtual setting, where the attorney is outside the observation of opposing counsel and the court reporter, the temptation to help the witness might lead the attorney astray. If the attorney is in the same room as the witness, the attorney might be tempted to whisper the information to the deponent. Or, if the attorney is participating remotely, the attorney might send a private message to the deponent referencing the omitted information. Perhaps opposing counsel notices an odd expression flash across the deponent’s face and asks if anyone is telling the witness how to answer. Embarrassed by the momentary lapse in judgment, the attorney quickly covers up the impermissible coaching and lies to opposing counsel. Our hypothetical attorney has likely violated Rules 4.1 and 8.4(c)-(d). If the situation were to occur in a virtual hearing instead of a deposition, we can add Rule 3.3 to the mix. The simple solution is to treat virtual proceedings the same as live proceedings: communicate with witnesses (as appropriate) during breaks, and not while the witness is testifying.

Virtual hearings also create pitfalls to the extent lawyers collaborate with attorneys who are not admitted to practice in Indiana and participate in hearings by sending private messages to counsel of record during public hearings. It is, of course, appropriate and common for counsel of record to sit together and pass notes with suggestions for response and reply during oral arguments in the trial and appellate setting. But the virtual setting makes it possible for colleagues who have not entered an appearance to watch hearings and “pass notes” without the need to appear or seek temporary admission. Such conduct would violate Rule 5.5, which governs the unauthorized practice of law. It may also implicate Rule 8.4(d), by allowing a lawyer who is not legally permitted to practice in Indiana to surreptitiously influence arguments during the course of a hearing. The simple rule for lawyers looking for guidance about whom they can consult during
a hearing is that they should restrict communications to their clients and anyone who would be entitled to sit at counsel’s table with them during an in-person hearing.

Given the opportunity for misconduct during virtual proceedings, prudent lawyers should consider a few protections as they start any proceedings. At the outset of any virtual proceeding ask all virtual participants to identify themselves and anyone else physically present in the room with them. In the hearing setting, the court typically handles this task to create a record. But lawyers can encourage candor by affirmatively introducing anyone who is present and off-camera (for instance, a paralegal or a permissible client representative). Or, if a lawyer is alone, he or she can affirmatively announce that fact, which might encourage other virtual attendees to announce whether they have any off-camera company.

Lawyers conducting virtual depositions should add an admonishment to their standard witness instructions to remind witnesses that they are under oath and should not accept guidance from counsel as to how to answer a question while the question is pending. Lawyers defending a witness during a deposition or hearing should prepare their witnesses for the virtual testimony just as they would for live testimony. The lawyer should discuss with the deponent whether anyone is permitted to be physically present with the witness during the testimony, and if so, should instruct the witness not to accept notes or suggestions from the off-camera participant. Finally, in building a virtual team for a hearing or deposition, lawyers should consider whether each participant would be permitted to appear and participate in an in-person hearing.

As with all technological growth, virtual proceedings offer efficiencies and cost savings that lawyers and clients appreciate. These benefits will most assuredly result in virtual proceedings continuing well past the pandemic. Prudent lawyers will treat these proceedings as they do any in-person proceeding and will not get caught with their pants down.

KEY TAKEAWAYS:

• Wear pants (or skirts, or dresses, you get the idea)
• Prepare witnesses to testify before they take the stand, and share comments and notes during breaks, not during testimony.
• Request that participants identify everyone in the room with them, including anyone who may be off-camera during depositions and hearings.
• During oral arguments, resist the temptation to chat or otherwise communicate with lawyers who would not be qualified to sit at counsel’s table with you in a live hearing.

Footnotes
1 “Supreme embarrassment: The flush heard around the country” www.cnn.com/2020/05/06/politics/toilet-flush-supreme-court-oral-arguments/index.html
2 Ind. R. Prof. Cond. 3.3(a)(1).
3 Ind. R. Prof. Cond. 3.3, Cmt. [3].
4 Ind. R. Prof. Cond. 3.3, Cmt. [12]; Ind. R. Prof. Cond. 3.4(b) (prohibiting a lawyer from assisting a witness to testify falsely).
5 Ind. R. Prof. Cond. 8.4(c).
6 Ind. R. Prof. Cond. 8.4(d).
7 84 N.E.3d 627, 628 (Ind. 2017).
INDIANA SUPREME COURT

Unanimous Supreme Court holds state need only attempt notice in a way desirous of actually informing property owners of impending tax sales

In Indiana Land Trust Co. v. XL Inv. Prop.’s, LLC, 155 N.E.3d 1177 (Ind. 2020) (David, J.), the Indiana Supreme Court considered whether the LaPorte County Auditor gave adequate notice to the owner of a vacant property that the property would be sold at an impending tax sale. Indiana Land Trust (ILT), the property owner, had accrued $230,000 of outstanding tax liability.

Although the LaPorte County Auditor sent notice of the impending tax sale to ILT by way of certified and first-class mail and later by publishing notice in a newspaper, ILT was not ultimately notified of the sale until
the subsequent purchaser filed a quiet title action.

ILT then moved to set aside the tax deed, arguing that it had not received sufficient notice of the sale and that the auditor should have searched its internal records for a better address when its other notice attempts were unsuccessful.

In affirming the trial court’s denial of ILT’s motion to set aside the purchaser’s tax deed, the court held that “[b]efore the State sells a delinquent property, the Due Process Clause of the Fourteenth Amendment requires that the owner of the property be given adequate notice reasonably calculated to inform him or her of the impending tax sale.”

While the government need not achieve actual notice, it must at least “attempt notice in a way desirous of actually informing the property owner that a tax sale is looming.” If the state “becomes aware that its notice attempt was unsuccessful—such as through the return of certified mail—it must take additional reasonable steps to notify the owner of the property if practical to do so.”

Even though, as the court noted, the auditor certainly could have taken additional steps to ensure ILT received notice of the tax sale, the auditor’s attempts were enough to satisfy the Fourteenth Amendment’s requirements.

Indiana Supreme Court parses policy language entitling estate to additional underinsured-motorist recovery

The Indiana Supreme Court held in Glover v. Allstate Prop. & Cas. Ins., 153 N.E.3d 1114 (Ind. 2020) (Slaughter, J.), that the estate of Shelina Glover was entitled to summary judgment on its request for $25,000 in additional underinsured-motorist (UIM) coverage.

The insurers for the two drivers responsible for the crash paid Glover’s estate per-person liability policy limits totaling $75,000. The estate also received $25,000 UIM coverage payments from both Glover’s own insurer and her
estranged husband’s insurer, totaling $50,000.

At issue before the court was whether the estate was entitled to additional UIM coverage under a separate Allstate policy held by Glover’s parents. Allstate argued the estate was not so entitled because Glover’s parents did not notify Allstate that Glover had moved in with them. Glover was therefore not a “resident relative” and not an eligible insured under the policy. And, even if Glover were an eligible insured, the policy’s offset and anti-stacking provisions barred the estate from additional coverage.

The trial court granted Allstate’s motion with respect to the policy’s offset provision. The Court of Appeals affirmed, concluding that the estate was not entitled to further recovery under the parents’ Allstate policy.

The Indiana Supreme Court disagreed. The policy’s plain language required that “whenever an operator becomes a resident of [the parents’] household,” the operator will not be an eligible insured unless Allstate receives notification of the operator’s new residency. The court explained that Glover was not an “operator” because she never drove or planned to drive any of the vehicles owned by her parents. Thus, because the notification requirement only applied to operators, Glover’s parents were not obligated to notify Allstate that Glover resided in their home before the policy’s coverage extended to Glover.

Nor was the court persuaded that the payments the estate received from other insurers exceeded the Allstate policy’s limits. The Allstate policy’s anti-stacking provision only prevented the aggregation of UIM policy limits, not multiple UIM recoveries. Further, while the per-person liability limits paid to the estate by other insurers did offset the estate’s UIM recovery under the Allstate policy, the $50,000 worth of initial UIM payments the estate received did not offset the Allstate policy’s limits. Because the Allstate policy’s UIM limit was capped at $100,000, the estate was entitled to $25,000 of additional coverage.

Procuram opinion from Supreme Court vacates ruling that the law-of-the-case doctrine only applies when an appellate court—rather than a trial court—determines an issue

In Brown v. Ind. Dep’t of Envtl. Mgmt., 154 N.E.3d 822 (Ind. 2020) (per curiam), the Indiana Supreme Court vacated part of an Indiana Court of Appeals decision which held the law-of-the-case doctrine “is applicable only when an appellate court determines a legal issue,” rather than a trial court.

Plaintiff Timothy Brown had pursued an administrative appeal of his termination from the Indiana Department of Environmental Management (IDEM). When his administrative appeal was unsuccessful, Brown petitioned the Marion Superior Court for judicial
The trial court reversed Brown’s termination, and the State Employees’ Appeals Commission (SEAC) affirmed its original decision, granting summary judgment in favor of IDEM on remand.

Brown then petitioned for judicial review a second time. Brown insisted that IDEM’s arguments in opposition to his second petition for judicial review were barred by the law-of-the-case doctrine, but the trial court disagreed. The trial court concluded the law-of-the-case doctrine did not apply because SEAC’s decision on remand addressed different legal issues and different evidence.

On transfer, the Indiana Supreme Court stated that in concluding only appellate court decisions constitute law of the case, the Court of Appeals went too far. The Court of Appeals “need not have reached so broad a conclusion to resolve the issue.”

Accordingly, the Indiana Supreme Court affirmed the trial court’s conclusion that the law-of-the-case doctrine did not apply under the specific circumstances of this case.

**Per curiam opinion from Supreme Court holds default properly vacated when “even slight” evidence of excusable neglect exists**

In *Riddle v. Cress*, 153 N.E.3d 1112 (Ind. 2020) (per curiam), the Indiana Supreme Court affirmed a trial court’s decision to set aside a default judgment.

The trial court had set the default judgment aside after a hearing on defendants’ motion for relief under Trial Rule 60(B)(1). At the hearing, defendants presented evidence demonstrating that various personal complications prevented them from responding to plaintiffs’ complaint and that plaintiffs sent several harassing letters and purported legal documents to defendants and other family members. Although the trial court was not convinced defendants’ personal complications constituted “mistake, surprise, or excusable neglect” under Trial Rules 55(C) and 60(B)(1), the court was convinced that defendants were sincerely confused as to whether they were obligated to respond to plaintiff’s complaint.

The Indiana Court of Appeals reversed, concluding that the trial court abused its discretion in setting aside the default judgment. The Indiana Supreme Court disagreed, noting in its per curiam opinion that a “trial court will not be found to have abused its discretion so long as there exists even slight evidence of excusable neglect” and concluded that a “trial court’s assessments of the parties’ credibility and demeanor are the type of fact-sensitive judgments that may not be second-guessed under the deferential standard of appellate review.” Because the evidence was sufficient to establish at least slight evidence of excusable neglect, the trial court did not abuse its discretion in setting aside plaintiffs’ default judgment.

**SUPREME COURT TRANSFER GRANTS**

A dispute arose between Conroad and the Association over which party bore the risk of the sewer lift station’s failure. Conroad filed a complaint alleging, among other things, that the Association breached its agreement with Conroad by failing to maintain the sewer. After a three-day bench trial, Conroad was awarded damages for breach of contract, lost rent, and other costs.

Unpacking the plain language of the parties’ agreement, the Court of Appeals agreed with the trial court that Conroad did not bear the risk of the sewer lift station’s failure. The plain language of the parties’ agreement required the Association to pay “all of the costs necessary” to maintain the facilities at Castleton Corner, as well as “any other expense reasonably necessary or prudent for continuous operation of such facilities.” The Court of Appeals was not convinced by the Association’s argument that the phrase “continuous operation” did not require the Association to keep the sewer lift station operating at all times.

Affirming the trial court’s judgment that the Association breached its agreement with Conroad, the Court of Appeals also held that the trial court did not abuse its discretion in admitting a report prepared by Conroad’s expert over the Association’s objection that the report was inadmissible hearsay.

SELECT COURT OF APPEALS DECISIONS

Association bore the risk of sewer lift station’s failure


The failure of the sewer lift station—a machine that collects toilet and sink runoff from all the buildings located in Castleton Corner—led Pier 1 Imports to terminate its lease with the owner of the flooded building, Conroad Associates, L.P. (Conroad).

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• **G&G Oil Co. of Indiana v. Continental Western Insurance Company,** 145 N.E.3d 842 (Ind. Ct.App. 2020) (Mathias, J.), transfer granted October 26, 2020 (dealing with coverage of ransomware attack under fraud provision of multi-peril commercial common insurance policy).


INDIANA SUPREME COURT

Applicability of the Medical Malpractice Act

Indiana appellate courts have consistently stated that the Medical Malpractice Act (MMA) should be narrowly construed. The MMA is not all-inclusive for claims against health care providers, nor is it intended to be extended to cases of ordinary negligence. In Community Health Network, Inc. v. McKenzie,
150 N.E.3d 1026 (Ind. Ct. App. 2020), the Indiana Court of Appeals, on an interlocutory appeal, reviewed a trial court's denials of a motion to dismiss and motion for summary judgment. The complaint arose following a health care employee's access to private health information without authorization. The defendant health care provider argued that the matter should be dismissed because the claims were within the purview of the MMA and plaintiff failed to comply with the MMA's procedural prerequisites.

In support of its argument, the health care provider relied on Howard Regional Health System v. Gordon, 952 N.E.2d 182 (Ind. 2011), for the proposition that maintenance and preservation of medical records is so closely entwined with health care that the present claims were governed by the MMA. The Court of Appeals did not find Gordon’s holding to be applicable and held that the MMA did not apply to plaintiff’s claims because the conduct at issue was “demonstrably unrelated to the promotion of the plaintiff’s health or an exercise of the provider’s professional expertise, skill or judgement.” With regard to the motion for summary judgment, the appellate court held that a question of material fact regarding whether the employee’s actions were within the scope of her employment with the health care provider existed. The Indiana Supreme Court has granted transfer vacating the Indiana Court of Appeal’s opinion.

INDIANA COURT OF APPEALS

Emergency medical treatment and Active Labor Act preempts Indiana trial rule 15(C)


“maintenance and preservation of medical records 'is so closely entwined with health care' that the present claims were governed by the MMA.”
Emergency Medical Treatment and Active Labor Act. Judge Pyle authored a dissenting opinion, reaching a different result than the majority and in Williams, particularly since, here, the plaintiff sought to add a new claim.

Retail store enjoined from leaving mall


Enforcement of Home Improvements Contracts Act


Liability despite Statute of Frauds


County ordinance permits waste transfer station

- *Monster Trash, Inc. v. Owen County Council*, -- N.E.3d --, 2020 WL 6479601 (Ind. Ct. App. Nov. 4, 2020) (rehearing granted to clarify that an applicable county ordinance permitted a proposed waste transfer station to be constructed within an area designated by the county as a heavy industrial zone).

Curtis Jones is a partner at Bose McKinney & Evans LLP in the Litigation, Insurance and Appellate Groups. While at Valparaiso University School of Law, Mr. Jones served as Executive Symposium Editor for the Valparaiso University Law Review, earned an honors program scholarship, and served for a year in an externship with the Honorable Kenneth F. Ripple, United States Court of Appeals, Seventh Circuit. Upon graduating and prior to joining Bose McKinney & Evans LLP, Mr. Jones served as a judicial law clerk to Justice Theodore R. Boehm on the Indiana Supreme Court. His email is CJones@boselaw.com.

Bradley M. Dick is a partner at Bose McKinney & Evans LLP in the Litigation and Utilities Groups. His email is BDick@boselaw.com.
In choosing to be an associate at a large law firm, it is one thing to say that you will use your position to help the community and will do pro bono work (something I always told myself). It is quite another thing to do it in reality, particularly when billable hour requirements are looming and there are seemingly endless other expectations you need to meet before you hit partner. I feel lucky that this year I had opportunities to do more pro bono work than in prior years, and now more than ever, it felt imperative to respond to those opportunities in the affirmative.

Ice Miller values pro bono work, and that goes a long way in feeling comfortable accepting pro bono work that will take attention away from client billable work. In January 2020, Ice Miller hired Diane Menashe as a partner in its Litigation Practice and as the Director of Litigation Training and Pro Bono Activities. From the get-go, Diane has been aggressively advocating within the firm the importance of pro bono work. After the COVID-19 pandemic hit, at Diane’s request, our managing partner Steve Humke readily endorsed an increase in the amount of pro bono hours that could count toward our billable hour requirement.

Needless to say, in 2020, I found my inbox full of pro bono opportunities, to the end (including a memorable December 2020 email from Diane to all associates and of counsel - “You could even say ‘Diane I would like 5 hours of PB work’ and we’ll make it happen.”). One such opportunity was participating in one of the Second Chance Driving Workshops, for which Ice Miller is collaborating

“It took me over four years to delve into pro bono work like I have this year (four years too long), and I do not plan on going back now.”
with Eli Lilly, the Indianapolis Legal Aid Society, and the Marion County Prosecutor’s Office, assisting indigent individuals in the reinstatement of their driving licenses. (This is just one part of the crucial work being facilitated by the Firm’s Racial Justice Task Force – see icemiller.com/racial-justice-task-force/.

In participating in the workshop, I did one simple task—helped people get their driver’s license back—but it felt very important. A means of transportation could literally mean life-changing progress for these individuals. The other opportunity I accepted was providing legal counsel to an indigent prisoner who had filed a pro se civil rights lawsuit. Without providing details, suffice it to say that I’ve never had a more grateful client or felt more like a favorable result could really change a person’s life.

It took me over four years to delve into pro bono work like I have this year (four years too long), and I do not plan on going back now. I suspect in both the employment and pro bono realms, 2021 will look a lot like 2020 (at least at the macro level). Bring it on. ☺

Kayla Ernst is an associate in Ice Miller’s Labor and Employment Group.
Continued from page 16

Then I received your message. You kindly and humbly listened to my concerns and addressed them. You owned your words and thanked me for bringing their implications to your attention. It was an enormous relief. I am very grateful to you for showing that people in positions of authority in the law do care and do want to have these conversations. And, crucially, I thank you for wanting to model these conversations for others by publishing this exchange.

Dear Ms. Shekhar: Thank you for your thoughtful email. Once again, you have taught me a valuable lesson. While I am “aware” that many are hesitant to speak up when it comes to blunders like mine, I often don’t understand why.

Too many of us get defensive and retort that the critic is being over sensitive or too politically correct. Those reactions may be instinctive, but that does not make them right. It must be mentally exhausting to have to constantly worry about how someone will react to your take on their error. Again, I am glad you had the courage to speak up. I also hope that all of us in Indiana will show similar courage and be willing to doubt our own infallibility when confronted by a mistake like mine. I hope our paths cross again soon.

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