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IS IT TIME TO RETHINK THE 60-DAY REQUIREMENT OF TRIAL RULE 41(E)?

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Is it Time to Rethink the 60-Day Requirement of Trial Rule 41(E)?
By Colin E. Flora
QUICK QUESTION

An article to answer requests for an answer to a "quick question".

By Amy Dudas
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THE IDES OF MAY: A Time for Rededication

By Michael E. Tolbert

In 1958, President Dwight D. Eisenhower established Law Day as a time of national dedication to the principles of government under law. In 1961, Congress officially recognized May 1 as the date Law Day would be celebrated annually. Since then, Law Day has not only been celebrated in our country, but also around the globe. It is a time to focus on how the law and the legal process impact various aspects of our daily lives. It can be celebrated on May 1 or throughout the entire month of May.

Over the years, Law Day has not been used as a tool to reenergize lawyers. Nor has the day been used as a time to reclaim burned-out lawyers who may have lost their passion for the law. On April 30, 2002, President George W. Bush issued a powerful proclamation about Law Day and the role lawyers play in our legal system. Part of the proclamation reads:

One of our Nation’s greatest strengths is its commitment to a just, fair legal system and the protection it affords to the rights and freedoms we cherish. On May 1, we observe Law Day to draw attention to the principles of justice and the practice of law. The theme of this year’s Law Day, “Celebrate Your Freedom: Assuring Equal Justice for All,” acknowledges the essential task of protecting the rights of every American. When disputes or conflicts arise, or when persons are charged with violating the law, resolution often occurs within the legal system. Consultation with an attorney is a common first step in this process. Attorneys advise clients of their rights and obligations, suggest possible courses of action, and help their clients to understand legal procedures. Attorneys are zealous advocates on behalf of their clients, helping to ensure that each one receives full and fair representation before the courts. Bar associations and other attorney groups play an important role in
maintaining the integrity of our legal system by overseeing admission to the bar and setting standards of discipline for those who practice law.

Former President Bush recognized the important role lawyers and bar associations play in maintaining the rule of law, albeit indirectly, while discussing the Law Day theme. However, much of the programming offered to the public on Law Day barely focuses on the direct role lawyers play in maintaining the rule of law. Sadly, the focus is rarely on reenergizing the gatekeepers who carry the enormous task of ensuring the preservation of the rule of law and delivering the Law Day message.

A review of the American Bar Association’s Law Day archives shows the most recent program themes at the national level. In 2020, the theme was Your Vote, Your Voice, Our Democracy: The 19th Amendment at 100. In 2019, the focus was Free Speech, Free Press, Free Society. In 2018, the Law Day subject was Separation of Powers: Framework for Freedom.

Law Day can be so much more than a day to celebrate the rule of law. It can serve the dual purpose of 1) dedicating a day to the principles of the rule of law, and 2) providing lawyers a specific day to affirmatively reconnect to the core tenets of our profession.

REDEDICATION TO OUR NOBLE PROFESSION

We must not forget that the rights secured for the public and discussed during Law Day programs can be traced back to lawyers—dedicated, energized lawyers. In the crowded world of reality television and social media alerts, it is easy for lawyers to forget their role in maintaining the rule of law. For lawyers, burn out is right around the corner. Expanding the scope of Law Day to include rededication services for lawyers would be a great benefit to the profession.

Part of the Law Day focus could be encouraging lawyers to recommit themselves to the noble standards and ideals of the legal profession. It can be used to stir up the same passion for the law we all had when we were sworn in as young lawyers. Lawyers must be engaged, dedicated, and focused to carry out the high demands of the legal profession. Law Day is a great time for lawyers to renew their minds and recommit to the legal profession.

THE LAWYER’S OATH

When was the last time you read the Indiana lawyer’s oath? I can remember being sworn in as a young lawyer on November 13, 2000. I was so proud to have the opportunity to practice law in the great State of Indiana. All my family members were present at the ceremony and I could not wait to publicly state the words of the oath to officially become a member of the Indiana bar. I remember thinking about all the great things I would do for...
people after I was sworn in. The oath Indiana lawyers take for admission to the bar reads as follows:

I, (lawyer’s name) do solemnly swear or affirm that: I will support the Constitution of the United States and the Constitution of the State of Indiana; I will maintain the respect due to courts of justice and judicial officers; I will not counsel or maintain any action, proceeding, or defense which shall appear to me to be unjust, but this obligation shall not prevent me from defending a person charged with crime in any case; I will employ for the purpose of maintaining the causes confided to me, such means only as are consistent with truth, and never seek to mislead the court or jury by any artifice or false statement of fact or law; I will maintain the confidence and preserve inviolate the secrets of my client at every peril to myself; I will abstain from offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged; I will not encourage either the commencement or the continuance of any action or proceeding from any motive of passion or interest; I will never reject, from any consideration personal to myself, the cause of the defenseless, the oppressed or those who cannot afford adequate legal assistance; so help me God.

I remember reading the Oath of Attorneys every day as a young lawyer. I could not believe I finally reached the goal of being a real, live lawyer! Unfortunately, the passage of time dampened my enthusiasm. I do not read the oath now nearly as often as I did when I first began my practice. The oath's words are rich and capture everything we should be as lawyers. I imagine there are some lawyers who have not read the oath fully since they were sworn in. This message is not an indictment. Life, clients, and the rigors of the practice can all be time consuming. That is why expanding Law Day to include rededication activities for lawyers makes sense.

A professional recalibration would be of great benefit not only to lawyers but also to the public we serve. A laser-focused lawyer dedicated to carrying out the objectives of the oath is one that will play a key role in maintaining the rule of law. CLE programming for lawyers on Law Day covering topics specifically outlined in the oath would be beneficial.

Something as simple as lawyers, every May 1, publicly reading together the Oath of Attorneys we took would go a long way in maintaining the hallmark of our great profession – the preservation of the rule of law. Let us reconnect and rededicate ourselves to the practice.

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IS IT TIME TO RETHINK THE 60-DAY REQUIREMENT OF TRIAL RULE 41(E)?
FEATURE

By Colin E. Flora

In Summer 2006, the Indiana Supreme Court, at the behest of the Court of Appeals, authorized the posting of not-for-publication memoranda decisions to the court’s webpage. Though Indiana procedure has remained firm in limiting citation of such opinions to narrowly defined circumstances, that does not mean lessons found in those opinions should be overlooked. On rare occasion, unpublished dispositions have been a medium through which appellate judges have voiced interesting legal concerns.

One such instance was *Wicker v. McIntosh*, in which the panel questioned the continued viability of Trial Rule 41(E)’s 60-day trigger for involuntary dismissal. The rule permits either the court or a party to seek involuntary dismissal with prejudice “when no action has been taken in a civil case for a period of sixty [60] days[.]” It “assist[s] courts in the efficient control of their dockets [by] requir[ing] parties seeking relief to proceed with diligence or suffer the loss of their opportunity.”

The *Wicker* panel identified several perceived problems with the rule:

We would observe that Trial Rule 41(E) seems to be something of an anachronism, a holdover from the days when litigants were required to file all discovery documents with the trial court. Currently, such filings are prohibited, and parties are expected to engage in discovery with minimal intervention from the trial court. As such, many months of intense discovery activity might appear to be completely devoid of any movement at all, at least according to the CCS.

We would also like to point out the possible operation of Trial Rule 41(E) in a case where the plaintiff is fully prepared for trial many months in advance of the trial date. Because such a plaintiff has taken no action in the case, he could then be haled into court every sixty days to respond to the latest in a string of successive Trial Rule 41(E) motions. Not only would this be a tremendous waste of judicial resources (not...
to mention the client’s resources), the alternative is little better, i.e., that such plaintiffs would insulate themselves from Trial Rule 41(E) motions by filing periodic discovery notices with the trial court. 7

Drawing from those observations, this article considers the merits of the concerns raised by the panel and possible solutions. Not every issue flagged in Wicker seems to be the problem feared by the panel. But there are additional problems that may yet merit alteration of the rule.

**POTENTIAL PROBLEMS WITH TRIAL RULE 41(E)**

**Discovery Practice Has Changed**

Although engaging in discovery constitutes “action . . . taken in a civil case,” the panel began with reference to past practices because discovery typically does not show up on a court’s docket, making it possible for a Rule 41(E) hearing to be set by the court even though discovery is actively ongoing. While civil discovery “is designed to be self-executing with little, if any, supervision by the trial court[,]” courts were not always wholly absent from the process.

When the Indiana Trial Rules were enacted, they were modeled on the Federal Rules of Civil Procedure. 10 At that time, Federal Rule 5(d) required discovery to be filed with the court. 11 As a result, Indiana procedure also required the filing of discovery until an amendment to Trial Rule 5(D), in 1987. 12

While Trial Rule 5 has undergone numerous amendments, Trial Rule 41(E) remains unchanged since its 1970 enactment. 13 Further distinguishing its history from Rule 5, Trial Rule 41(E) was not directly modeled on a corresponding federal rule. 14 Instead, it sought “to incorporate the main features of former Indiana Supreme Court Rule 1-4C governing dismissals for failure to prosecute for six months, and the first sentence of Federal Rule 41(b) allowing dismissal for violation of these rules.” 15

Federal Rule 41(b) “provides no time periods suggesting what length of delay constitutes ‘want of prosecution.’” 16 That portion of Trial Rule 41(E) derives from incorporation of Indiana Supreme Court Rule 1-4C(1), which presumed want of prosecution following “six consecutive months” of inaction. 17 Notably, Rule 1-4C was not a long-established directive; it was effective only from July 1, 1965, until it was superseded by Rule 41(E), just four and a half years later. 18 Prior to Rule 1-4C, dismissal for failure to prosecute was controlled by statute and, like Federal Rule 41(b), contained no defined time period. 19

If no prior Indiana or federal procedure established a mere 60-day period to trigger dismissal, why then did Rule 41(E) reduce the period from six months to two? The Civil Code Study Commission Comment only answers, “The time limit for failure to prosecute has been fixed at 60 days rather than six months upon the theory that delay beyond that time upon objection is too great.” 20 Because the rule has never been amended, its perception of an appropriate period of time is still based in practices that necessitated parties filing discovery with courts. With such
practices abrogated, as the *Wicker* panel observed, there is reason to doubt the continued wisdom of the 60-day trigger, especially in light of the increased focus on discovery practices in litigation. 21

**Unavoidable Gaps in Litigation**

The second problem recognized in *Wicker* is that there are periods in which nothing can be done to prosecute a case, particularly when discovery is complete and all that awaits is trial. This perceived problem, however, may not be quite as severe as it appears on first blush. Prior to *Wicker*, the Indiana Court of Appeals, acting perhaps contrary to the plain language of Rule 41(E), concluded “that when a plaintiff has requested the trial court to set a trial date, and a trial date has been set, the trial court is without discretion to grant a T.R. 41(E) motion to dismiss which is based on a sixty day period of inaction which occurs between the date of the request for trial setting and the date set for trial.”22 Though a seemingly atextual conclusion, the rationale is consistent with the purpose of Rule 41(E), to ensure cases are not allowed to stagnate,23 since the setting of a trial date provides a date certain on which the case must be resolved.

Nevertheless, there are other instances in which nothing can be done to prosecute an action in court. The Indiana Medical Malpractice Act, for example, permits parties to file an anonymous complaint in court while a proposed complaint is processed through a medical review panel with the Indiana Department of Insurance (IDOI).24 The trial court, however, “is prohibited from taking any action except setting a date for trial,” adjudicating a motion to dismiss by the IDOI commissioner, and issuing a preliminary determination. As a result, there may be prolonged periods of time—certainly surpassing 60 days—without action on the plenary docket.

**Continued on page 30...**
All lawyers know when it comes to contracts, it’s always wise to put it in writing. As the old saying goes, an oral contract isn’t worth the paper it’s written on.

But a Louisiana Supreme Court opinion reminds us the principle may sometimes apply to criminal law, where it can mean the difference between freedom and prison.

Warren Demesme was questioned in connection with two sexual assault cases. According to police records, Warren voluntarily agreed to the two interviews, which
were recorded. He was read his Miranda rights, said he understood them, and waived them. He admitted one assault and denied the other.

But before making the admission, Warren said—emphasis on the word said—something about a lawyer. The argument over precisely what Warren meant made it all the way to the Louisiana Supreme Court.

According to the transcript, Warren said,

If y'all, this is how I feel, if y'all think I did it. I know that I didn't do it so why don't you just give me a lawyer dog cause this is not what's up.

In the view of the prosecution, Warren's statement—including the nine words why don't you just give me a lawyer dog—was nonsensical or ambiguous or both. After all, there is no such thing as a lawyer dog. Therefore, asking for a lawyer dog wasn't a request for an attorney and didn't require an end to the interview.

At trial and on appeal, Warren's public defender insisted the statement was a request for an attorney, requiring an end to the interview and rendering the confession inadmissible. He argued Warren had requested the interviewer, whom he addressed as dog (pronounced dawg), get him a lawyer.

In other words, Warren had not said get me a lawyer dog, which would make no sense. He said, get me a lawyer, dog, which makes perfect sense—at least to Warren.

In effect, therefore, the case turned on whether there was a comma between lawyer and dog. If there was, Warren had requested a lawyer, addressing his interviewer as dog. If not, he had spoken gibberish, asking for a lawyer dog—something that doesn't exist.

Warren and his lawyer were in a tough spot because you can't say a comma. You can write a comma, but you can't say it.

Because of the unspoken comma—you might say the unspeakable comma—the trial court denied the motion to suppress Warren's admission, the Court of Appeal affirmed, and the Louisiana Supreme Court voted six-to-one to deny certiorari.¹

Justice Crichton explained his vote in a concurring opinion: Warren's reference to a lawyer dog was “ambiguous or equivocal,” and decisions of both the Louisiana and United States Supreme Courts hold that an ambiguous or equivocal reference to an attorney does not constitute invocation of the constitutional right to counsel.

Warren's admission that he assaulted one of the victims was admissible at his trial—a trial on charges that could result in a life sentence.

All because of the unspeakable comma.

Footnotes:

I am always honored to hear from you seeking advice on legal and policy matters. It means you have confidence in me and my knowledge, and that means a lot. But please remember: with few exceptions, there are no "quick" questions. In order for me to give people answers, I am ethically required to do a number of things.

Most importantly, I have to make sure I don't have a conflict of interest. Since I’ve been practicing for over 20 years, I have to search a pretty comprehensive database. Then, for every one “quick” question you have, I will likely need to ask five questions to get context and clarification. Finally, I don't often like to do an analysis in my head. Memories are faulty, and every situation has nuance. Lawyers don’t have all the answers, but we usually know where to look to find them.

Here’s how it usually works. Before a lawyer can really answer even one question with substance, she must:

- run a conflicts of interest check;
- interview you and, perhaps, a few others who may have experienced this with you or are a part of your perspective;
- analyze your facts to spot applicable legal issues;
- determine what law might apply;
- refresh her understanding of that law and ensure it wasn’t changed by (a) the legislature, (b) the Indiana Court of Appeals or Supreme Court, or (c) the 7th Circuit or the U.S. Supreme Court;
- if the law falls into one of the many areas of law in which she

Amy Noe Dudas, ISBA vice president, wrote up this article to answer requests for an answer to a "quick question". This gives a little insight on how attorneys approach things that others may call "inefficient" and not cost-effective: dudaslaw.com/2020/11/12/quick-question/
has little to no experience, call a colleague to run the scenario past her or him;

- apply the applicable law to your issues; and

- tell you her initial opinion while explaining that with only your side of the story, her opinion is preliminary and the outcome depends on a lot of other factors that are impossible to be known from what little she knows so far.

I don't do this to be greedy or selfish, but lawyers spend a lot of time and intellectual energy developing the practical and analytical skills to do this kind of analysis. In addition, if I don't follow all of the steps above, I risk damaging your interests and potentially become liable for that as well, resulting in not only monetary loss but also potential disciplinary action.

Sometimes I am willing to do these things at no charge, often because we are friends, or because you need immediate help and don't know where else to go, or because your organization is an important part of the fabric of our community. But this is also my livelihood, and that of my staff, so more often I do need to charge for our service to you. And many times, my schedule is so full that asking me to squeeze in one more thing puts me in a real bind, because I really want to help you but I also only have so many hours in a day and some of them need to be reserved for rest and play.

All of this is why my Facebook "about" section says to please not ask me for legal advice via Facebook. And when you just want me to call you to answer a "quick" question or stop me at the grocery store to run something by me, especially when there's context or background in which I had no involvement, don't be offended when I tell you we need to schedule a later time to talk at more length or that I'll need some time to make sure I'm giving you the best answer I can based on what you've told me. Because before we dive deeper, I need to make sure (a) I'm even competent to discuss the issue, (b) I don't have a conflict, and (c) I have something to write on, even if it's a cocktail napkin.
This column focuses on Court of Appeals’ opinions addressing excessive bail, a life without parole (LWOP) sentence for a juvenile, single episode sentencing limitations, and an excessive penalty for a probation revocation.

EXCESSIVE BAIL REVERSED

In Yeager v. State, 148 N.E.3d 1025 (Ind. Ct. App. 2020), trans. pending, the Court of Appeals reversed a trial court’s order setting $250,000.00 cash bail and released the defendant to community corrections’ monitoring, in part, because the state presented no valid evidence that he posed a risk to the victim or the community. Building on Yeager, the court in DeWees v. State, No. 20A-CR-1146, 2021 WL 560307, at *1 (Ind. Ct. App. Feb. 15, 2021), reviewed a trial court’s refusal to reduce bail of $50,000 for an 18-year-old who drove three men to rob an elderly man. The appellate court focused on her “adjusted pre-trial IRAS-PAT score, the trial court’s inordinate reliance on [the victim’s] testimony, and the dearth of evidence indicating that DeWees posed a substantial risk to [his]
physical safety” in ordering her release to home detention with GPS monitoring. *Id.* at *8. Notably, the victim, who previously slept with one gun and now sleeps with two, “had no interaction whatsoever with” the defendant, and the Court of Appeals found his “testimony illustrates his understandable anger and desire for justice more than it reflects that [he] perceives a genuine threat to his physical safety” from the defendant. *Id.* at *7.

**JUVENILE LWOP SENTENCE REMANDED**

The March 2021 column summarized *State v. Stidham*, 157 N.E.3d 1185, 1188 (Ind. 2020), which applied Appellate Rule 7(B) to reduce a 138-year sentence for a 17-year-old to 88 years, emphasizing “the basic notion that juveniles are different from adults when it comes to sentencing and are generally less deserving of the harshest punishments.” *Id.* at 1188. *Wilson v. State*, 157 N.E.3d 1163 (Ind. 2020), held appellate counsel was ineffective on direct appeal by failing to bring a 7(B) challenge on behalf of a 16-year-old, reducing his 181-year sentence to 100 years. In an appeal involving one of the few remaining LWOP sentences for a juvenile in Indiana, the Court of Appeals held a new sentencing hearing was required based on ineffective assistance of trial counsel in failing:

to adequately present mitigating evidence, especially with regard to Conley’s age; the application of *Roper* and *Graham*; and Indiana’s historical treatment of juveniles. Trial counsel also missed opportunities to present expert testimony on scientific evidence regarding the juvenile brain and diminished culpability of juveniles; and missed opportunities to zealously present evidence and challenge the state’s evidence regarding Conley’s mental health.


**SINGLE EPISODE**

Indiana Code section 35-50-1-2 limits consecutive sentences for non-violent offenses “rising out of an episode of criminal conduct.” That statute applied in *Gober v. State*, No. 20A-CR-1651, 2021 WL 405027 (Ind. Ct. App. Feb. 3, 2021), a case involving separate counts of neglect of a dependent against a mother who left her three young children alone in their locked apartment where they inadvertently started a fire that engulfed the apartment and took two of their lives. The court reasoned that the “convictions arose out of the same facts and circumstances occurring at the
same time and the same place. Her actions as they related to each victim occurred simultaneously and contemporaneously.” Id. at *6.

PROBATION REVOCATION PENALTY REVERSED

Reiterating “the selection of an appropriate sanction will depend upon the severity of the defendant’s probation violation,” in Brown v. State, No. 20A-CR-1550, 2021 WL 405022, at *1, 3 (Ind. Ct. App. Feb. 5, 2021), the Court of Appeals held a trial court abused its discretion when it revoked probation and ordered the defendant to “serve more than sixteen years of his previously suspended sentence when the evidence before the court showed only that Brown had missed an undetermined number of meetings with his probation officer.”

OTHER CASES

Coleman v. State, No. 20A-CR-817, 2021 WL 507966, at *5 (Ind. Ct. App. Feb. 11, 2021) (holding find “the requirement to attend anger management or conflict resolution classes as a condition of probation is an administrative or ministerial condition,” such that it could be imposed despite its absence in a plea agreement).

Demby v. State, No. 20A-CR-1012, 2021 WL 614938, at *7 (Ind. Ct. App. Feb. 16, 2021) (reiterating that some cases do not fall into the “Wadle bucket or the Powell bucket” before finding an aggravated battery conviction violated the lesser included offense statute).

The full text of all Indiana court decisions, including those issued not-for-publication, is available via Casemaker at inbar.org or the Indiana Courts website at in.gov/judiciary/opinions. 
PRESERVATION AND RECOGNITION OF ATTORNEY’S LIENS

You have successfully obtained a settlement in your client’s favor, much to his or her satisfaction. The only remaining issue is the client’s former attorney asserts a lien on the proceeds, and you are unsure of what, if anything, you must do to ensure the lien is satisfied. This article will hopefully provide best-practice guidance and tips for predecessor and successor attorneys to ensure attorney-fee liens are paid and both attorneys abide by their ethical responsibilities.

STATUTORY AND EQUITABLE ATTORNEY FEE LIENS

Indiana recognizes attorney-fee liens by statute and as a matter of equity. Statutory-fee liens are governed by Indiana Code § 33-43-4-1, which provides “[a]n attorney practicing law in a court of record in Indiana may hold a lien for the attorney’s fees on a judgment rendered in favor of a person employing the attorney to obtain judgment.” (emphasis added). Because statutory liens only apply to “judgments,” Indiana courts also have recognized equitable liens to protect attorney fees. An equitable lien can be in the form of a retaining lien or a charging lien. A retaining lien “is the right of the attorney to retain possession of a client’s documents, money, or other property which comes into the hands of the attorney professionally, until a general balance due him
for professional services is paid and exists as long as the attorney retains possession of the subject matter.” *State Farm Mut. Auto. Ins. Co. v. Kenn Nunn Law Office*, 977 N.E.2d 971, 976 (Ind. Ct. App. 2012). Commonly, equitable liens are in the form of a charging lien, which “is the equitable right of attorneys to have the fees and costs due them for services in a suit secured out of the judgment or recovery in that particular suit.” *State Farm*, 977 N.E.2d at 976.

**TIPS FOR THE PREDECESSOR ATTORNEY**

First, you should ensure your fee agreement with the client explicitly states the manner in which you will be paid if the client relationship is terminated prior to dissolution of the case, and you may place a charging lien on the eventual proceeds obtain in the disposition of the matter. This is supported by case law even if the matter settles before judgment. Indiana courts assume “that an agreement calling for a reasonable method of compensating a discharged lawyer may be enforceable according to its terms.” *Galanis v. Lyons & Truitt*, 715 N.E.2d 858, 861 (Ind. 1999). If the desired fee in the event of discharge is based on the attorney’s hourly rate, then be sure the fee agreement explicitly states such, especially in cases where your fee agreement contemplates a contingency fee. As our Indiana Supreme Court has explained, “The conventional rule is that an attorney who is employed under a contingent fee contract and discharged prior to the occurrence of the contingency is limited to quantum meruit recovery for the reasonable value of the services rendered to the client, and may not recover the full amount of the agreed contingent fee.” *Id.* (internal quotations omitted). In determining the reasonable value of services, the court has noted “[i]f a fee agreement provides for an hourly rate in the event of a pre-contingency termination, it is presumptively enforceable, subject to the ordinary requirement of reasonableness.” *Id.* at 862.

Second, if you wish to avoid dealing with a fee lien altogether and receive payment for your work immediately upon discharge, include such a clause in the fee agreement. In *Four Winds, LLC v. Smith & DeBonis*, LLC, 854 N.E.2d 70, 71 (Ind. Ct. App. 2006), an attorney was hired on a contingency fee basis to represent Four Winds but was discharged before the resolution of the case. *Id.* Following termination, the attorney sought to recover fees earned from representing Four Winds even though the case had not yet resolved. *Id.* The fee agreement contained a clause stating, “if the Client discharges the Attorney, the Client agrees to compensate the Attorney for the reasonable value of the Attorney’s services rendered to the Client up to the time of the discharge based on the Attorney’s prevailing hourly charge in effect at the time of termination.” *Id.* The court held the termination clause in the fee agreement constituted a

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“Following termination, the attorney sought to recover fees earned from representing Four Winds even though the case had not yet resolved.”

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SUCCESSOR ATTORNEY’S ETHICAL RESPONSIBILITY

If the client’s former attorney has a valid charging lien, the successor attorney has an ethical obligation to ensure the lien is satisfied from the proceeds of the settlement. Indiana Rule of Professional Conduct 1.15(d) requires:

Upon receiving funds or other property in which the client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(Emphases added). Pursuant to Rule 1.15(d), a successor attorney is ethically obligated to ensure the predecessor attorney is compensated from the proceeds of the settlement for the work the predecessor attorney performed while representing the client in the matter, thus discharging the lien. The successor attorney should review the predecessor attorney and client’s fee agreement to determine whether it explicitly states how fees will be calculated upon discharge (i.e., an hourly rate) and the total amount of fees the former attorney earned. Moreover, Rule 1.15 requires that a lawyer safeguard disputed funds in trust until the dispute is resolved so

California Matters

If you have matters in California or referrals, we can help you. Please contact Guy Kornblum or his office for information.

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

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

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Continued on page 37...
This article highlights Indiana Supreme Court and Indiana Court of Appeals civil opinions issued in February 2021.

**INDIANA SUPREME COURT**

**Bloomington Ordinance Defining Fraternity Not Unconstitutional**

In *City of Bloomington Bd. of Zoning Appeals v. UJ-Eighty Corp.*, WL 717972, at *1 (Ind. Feb. 23, 2021), “UJ-Eighty Corporation own[ed] a fraternity house at Indiana University (IU) in Bloomington. The house sits within a district zoned by the City of Bloomington to permit limited residential uses.” At the time, under Bloomington ordinances, “fraternities and sororities in the district were required to be sanctioned or recognized by IU.” “Before the lease ended, IU revoked its recognition and
approval of the fraternity, meaning no one could reside there. But two residents remained, so Bloomington cited UJ-Eighty for a zoning violation.” “The City of Bloomington Board of Zoning Appeals (BZA) affirmed.”

The trial court and Court of Appeals held “Bloomington impermissibly delegated its zoning authority to IU by allowing it to unilaterally define fraternities and sororities.” The Indiana Supreme Court held the ordinance did not violate the Indiana Constitution because it “did not obligate IU to act or directly empower it to write zoning law. Rather, it helped define fraternities and sororities by ensuring their relationship with IU was the deciding factor, not the process that created the relationship.” Similarly, the court concluded the ordinance did not violate the United States Constitution because the ordinance “did nothing more than define fraternities and sororities based on their relationship with IU. It was not a delegation of power; rather, it was a legislative decision on how to define a certain land use.”

Appellant Failed to Timely File Notice of Appeal in Interlocutory Appeal

Indiana Appellate Rule 14(B)(3) provides that “appellant shall file a Notice of Appeal with the Clerk within fifteen (15) days of the Court of Appeals' order accepting jurisdiction over the interlocutory appeal.” In Cooper's Hawk Indianapolis, LLC v. Ray, 2021 WL 615174, (Ind. Feb. 9, 2021), the Court of Appeals accepted the interlocutory appeal of an order denying summary judgment on February 12, 2020, but “Cooper’s Hawk did not file a Notice of Appeal until March 3, 2020.” Ray moved to dismiss the appeal. “A divided Court of Appeals motions panel denied Ray’s motion to dismiss without explanation.” “In a split opinion, the Court of Appeals reversed the denial of the summary judgment motion,” without addressing the timeliness issue. When a party fails to timely file a notice of appeal, the right to appeal is forfeited. To reinstate the appeal, the party must show extraordinary compelling reasons. The Indiana Supreme Court held Cooper's Hawk failed to do so because it merely restated one of the Appellate Rule 14(B)(1)(c) grounds for interlocutory appeal (substantial question of law) and the court dismissed the appeal.

Transfer Dispositions

The Indiana Supreme Court granted transfer in two civil cases in February. In ShermansTravel Media, LLC v. Gen3Ventures, LLC, 152 N.E.3d 616, 618 (Ind. Ct. App. 2020), the trial court held “Shermans breached the settlement agreement.” The Court of Appeals reversed, “[f]inding the question of whether Shermans substantially performed its obligations under the parties’ settlement agreement is a disputed issue of material fact.” The Indiana Supreme Court granted transfer and vacated the Court of Appeals’ decision. ShermansTravel Media, LLC v. Gen3Ventures, LLC, 2021 WL 677933 (Ind. Feb. 11, 2021).


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Trial Court Cannot Take Judicial Notice of Appellate Attorney Fee Rate

In Wilder v. DeGood Dimensional Concepts, Inc., 2021 WL 615055, (Ind. Ct. App. Feb. 16, 2021), the trial court awarded $10,000 of appellate attorneys’ fees under a statute at a $300 per hour rate, but “there was no evidence presented to support a rate of $300 per hour for appellate attorney fees.” Based on the trial court’s statements, the Court of Appeals held that “the trial court could not take judicial notice of the prevailing rate for appellate services in the local area and there must be evidence on the record to support its decision,” when there was not a small amount of fees involved. The Court of Appeals found that evidence in the record supported “that the lowest current amount provided by the evidence was $400.00 per hour.”

Suit in Court of General Jurisdiction Proper Procedure to Force Decision on Refund Claim

In Muir Woods Section One Association, Inc. v. Fuentes, 2021 WL 614937, (Ind. Ct. App. Feb. 2021), homeowners associations claimed that the Marion County treasurer, auditor, and assessor had a duty “to enter rulings or orders declaring approval or disapproval of their claims for refund but that, thus far, the Taxing Authorities have failed or refused to do so. The Homeowners Associations assert that, as it stands now, they lack effective recourse to address the alleged errors concerning their refunds and to pursue any administrative remedies because they have no ruling from which to appeal to the Board of Tax Review to obtain a final determination.” As a result, the

“Nuell claimed such an interest through a lease, but the lease was signed by David C. Holsclaw and Darlene Holsclaw, though the property had been transferred to a trust.”
homeowners associations brought suit in Marion County Superior Court seeking to mandate a decision on their refund claims. The Court of Appeals held this was the proper procedure: “although the Taxing Authorities’ duty to act arises under and is imposed by the tax laws of this state, any suit to enforce that duty must nonetheless be brought in a court of general jurisdiction because the ‘final determination’ jurisdictional requirement has not been met in order for the Tax Court to properly assume jurisdiction of the matter.”

Invalid Lease Meant no Insurance Coverage

In *Nuell, Inc. v. Marsillett*, 2021 WL 615057 (Ind. Ct. App. Feb. 16, 2021), “coverage under the [insurance] policy required that Nuell have a financial interest in the property.” Nuell claimed such an interest through a lease, but the lease was signed by David C. Holsclaw and Darlene Holsclaw, though the property had been transferred to a trust. The Court of Appeals held that a “lease is a contract, and a contract begins with the parties. The parties to a lease must be correctly identified and must have authority to make an agreement that defines their rights and responsibilities to assure accountability, enforceability, and liability in the event of a dispute. In that David and Darlene do not own the property, they do not have lawful authority to enter into a lease on the property. Because the owner of the property was not a party to the lease, the lease was invalid.” The Court of Appeals held that “Property-Owners had a legitimate reason for ultimately denying Nuell’s claim.”

Claim Barred by Law of the Case Doctrine


In a previous appeal, the Court of Appeals “affirm[ed] the trial court’s money judgment,” which included attorneys’ fees and costs. On remand, Gaeta argued the trial court should remove the attorneys’ fees and expenses. “Huntington argues that the final paragraphs of Gaeta I mandates the result reached by the trial court. Huntington argues that the law of the case doctrine precludes both the trial court and this Court from addressing the attorney fees set forth in the money judgment that was affirmed in Gaeta I.” The Court of Appeals agreed with Huntington and concluded “the law of the case doctrine” required “Huntington is entitled to the entirety of the money judgment.”

The full text of all Indiana appellate court decisions, including those issued not-for-publication, are available via Casemaker at www.inbar.org or the Indiana Courts website, www.in.gov/judiciary/opinions.

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But, as in the instance of awaiting trial, existing procedures theoretically prevent a Rule 41(E) dismissal while the medical review panel does its work. While the matter is pending before the panel, Rule 41(E) may not be invoked and dismissal for failure to prosecute may only be had upon motion of the IDOI commissioner after a two-year delay.25

Still, there are instances where delays not insulated from Rule 41(E) are inevitable. For example, personal injury matters can often run into periods of inactivity caused by the simple fact that the plaintiff may still be undergoing treatment for the underlying injuries, making further development of the case difficult until either the treatment has completed or the plaintiff’s condition has stabilized.

Unpredictable Application

There is a third problem, not articulated in Wicker, yet closer to the hearts of practitioners: unpredictable application. Predictability, Justice Oliver Wendall Holmes Jr. asserted, is the very property that defines “the law.”26 Yet, as any seasoned practitioner knows, courts and litigants rarely strictly adhere to Rule 41(E)’s 60-day trigger and what courts find to constitute impermissible delay runs the gamut from three months deemed too long27 to 11 years not.28

Arguably, Rule 41(E)’s text fails to accurately reflect its implementation. Instead of strictly following the text of the rule, Indiana courts consider numerous factors concerning the length, reason, culpability, and prejudice of the delay along with whether lesser sanctions will accomplish the goal of diligent prosecution.29 Notably, the factors are derived from federal caselaw interpreting Federal Rule 41(b), which has no 60-day limit.30 Balancing of the factors can prevent dismissal even if a delay of 60 or more days occurred.31 Nevertheless, the articulation of a 60-day threshold has consequences: it helps to justify dismissals that may not otherwise satisfy the factors.32

THE 60-DAY TRIGGER MAKES IT IMPORTANT HOW RULE 41(E) AROSE

Though not a problem per se, the operation of Rule 41(E) appears to
have the unintended consequence of making it important whether the rule was invoked by a party or the court. In addressing the rationale for the 60-day period, the Civil Code Study Commission Comment adopted “the theory that delay beyond that time upon objection is too great.” The comment appears to focus on the scenario of a defending party objecting to lack of prosecution, but the rule also empowers a court to act on its own accord without need for objection by a party. As a result, Rule 41(E) authorizes a court to set a hearing requiring the plaintiff to “show sufficient cause at or before such hearing.” Once a hearing is set, the plaintiff shoulders the burden to show why dismissal should not occur. Prior to that point, “[t]he burden is clearly on the defendant to timely file a motion to dismiss pursuant to TR. 41(E).”

If resumption of prosecution occurs prior to the filing of the motion then the motion is untimely and must be denied. That is true even if resumption occurs on the same day that the motion is filed. That dynamic creates a peculiar circumstance with the advent of electronic filing and service of documents. If a hearing is set sua sponte, then the plaintiff will not receive notice until the early morning hours the following day, thereby preventing an eleventh-hour resumption.

Another possible distinction between whether Rule 41(E) is invoked by the court or by a party may be the obligation to contact opposing counsel prior to filing the motion. In Smith v. Johnston, the Indiana Supreme Court determined that the expansive scope of professionalism embodied by the Rules of Professional Conduct necessitated at least placing a call to counsel known to represent a party in an action before seeking default judgment. Although few attorneys and no Indiana appellate courts have considered the impact of Smith beyond default judgments, it seems perfectly suited to cover Rule 41(E) motions. Counsel for the prosecuting party will generally be known at the case’s inception and the interests of resolving cases on the merits, avoiding a “gaming view of the legal system,” is equally served. Indeed, in deciding Smith, the Indiana Supreme Court looked to a Seventh Circuit decision applying Illinois’ professional rules to reverse dismissal for failure to prosecute. That rules applicable to default judgments would easily translate into the Rule 41(E) context comes as no major surprise since the intent of Rule 41(E) is to serve as a defense-based corollary to default judgments under Rule 55.

Alternatives

Identifying the potential problems with Rule 41(E) necessarily prompts the question, what, if any, changes should be made to the rule or its implementation? One option is to leave Rule 41(E) alone. As most practitioners can attest, courts and litigants rarely, if ever, adhere to a rigid 60-day requirement. Another possibility is to enact mechanisms that strike a balance between burdening courts with discovery filings and keeping...
discovery wholly off the continuing case summary. Two counties, Bartholomew and Jackson, have enacted local rules that do just that, requiring notices of promulgation of discovery be filed. That method was, however, specifically addressed in Wicker and rejected as “little better” than the possibility of being “haled into court every sixty days to respond to the latest in a string of successive Trial Rule 41(E) motions.”

If the rule is to be amended, two possibilities readily arise. One is to enlarge the 60-day period to more closely track actual practices. A starting point for defining such a period may well be the six-month period set forth by Trial Rule 41(E)’s predecessor, Supreme Court Rule 1-4C. That would also appear in line with the sensibilities of the Court of Appeals, which has observed “that a six-month delay is not among the most egregious periods of inactivity that th[e] court has seen[.]”

The other possibility is to simply drop the time period altogether, thereby mirroring Federal Rule 41(b). Indiana caselaw already undermines rigid adherence to the 60-day trigger in favor of a factor analysis that mirrors federal practice. While the language of Federal Rule 41(b) appears to contemplate dismissal only by motion of a defendant, federal courts, just like Indiana courts, have the authority to dismiss actions *sua sponte* for failure to prosecute.

A third, perhaps less obvious, option would be to remove the portion of Rule 41(E) allowing courts to *sua sponte* set hearings. Such an approach, however, appears ill-calculated to permit the rule to achieve its primary purpose. As the Indiana Court of Appeals observed, “Courts cannot be asked to carry cases on their dockets indefinitely and the rights of the adverse party should also be considered. He should not be left with a lawsuit hanging over his head indefinitely.”

In its present embodiment, the rule allows courts invaluable flexibility to protect both their dockets and litigants. Two examples of a court’s judicious use are: (i) using the rule to prevent a shotgun approach to initiating collection actions with no attempt to pursue litigation beyond a bounced-back summons; and (ii) using the rule terminate pending dissolution actions between temporarily reconciled parties who, but for the timely dismissal, may have otherwise accrued substantial support arrearage upon subsequent separation. Perhaps more
importantly, even were Rule 41(E) amended to remove the express authority for sua sponte action, the power of a court to dismiss for want of prosecution would remain “both by virtue of the common law and under [the court’s] inherent powers[.]”

**Conclusion**

As seen in *Wicker* and through further analysis Trial Rule 41(E) may not be perfect. Nevertheless, not all perceived problems with the rule play out in actuality and others have been curtailed by caselaw. Still, there are possible fixes that can and maybe ought to be made to bring the text of Rule 41(E) into alignment with modern litigation practices.

**Footnotes:**

1. In re: Request from Indiana Court of Appeals to Post Unpublished Opinions on Judiciary Website, No. 94S00-0608-MS-299 (Ind. Aug. 21, 2006).
5. ND. TRIAL RULE 41(E). Rule 41(E) also allows dismissal for failure to comply with the orders or procedural rules. See, e.g., Benton v. Moore, 622 N.E.2d 1002, 1006–07 (Ind. Ct. App. 1993). This article, like *Wicker*, focuses exclusively on the temporal basis for dismissal.
8. Cf. Bonecutter v. Discover Bank, 953 N.E.2d 1165, 1170 (Ind. Ct. App. 2011) (“While the CCS does not indicate activity in the case during the sixty-day period prior to Bonecutter’s motion, the record indicates that Discover filed motions to permit discovery in November 2007 and again on March 3, 2008, both of which the court granted.”), *trans. denied*; see also *Wicker*, 2008 Ind. App. Unpub. LEXIS 719, at *8 (“To be sure, the CCS reflects no activity on Wicker’s part for almost one year, but the record indicates that Wicker did address some discovery matters in April and May of 2007, making the actual period of inactivity something more like three or four months.”).
11. Bond v. Utreras, 585 F.3d 1061, 1076 (7th Cir. 2009). For text of FED. R. CIV. P. 5(d) as adopted in 1938, see Frierson v. McIntyre, 151 F. Supp. 5, 6 (W.D. Va. 1953) (“All papers after the complaint required to be served upon a party shall be filed with the [**2] court either before service or within a reasonable time thereafter.”). In 1980, Federal Rule 5(d) was amended to allow federal courts “the authority not to require the filing of discovery requests and responses[,]” Anderson v. Cryovac, Inc., 805 F.2d 1, 12 (1st Cir. 1986); see also FED. R. CIV. P. 5(d) advisory committee’s note, 1980 amendment. In 2000, Rule 5(d) was again amended, making mandatory and uniform the general prohibition on filing discovery materials. FED. R. CIV. P. 5(d) advisory committee’s note, 2000 amendment; STEVEN A. WEISS ET AL., A TRIAL LAWYER’S GUIDE TO DISCOVERY IN FEDERAL AND STATE COURTS IN ILLINOIS 2 (2d ed. 2003); CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS § 83 n.30 (7th ed. 2011). Remnants of the interim period between the 1980 and 2000 amendments can be seen in the local rules for both the Northern and Southern Districts of Indiana. N.D. IND. L.R. 26-2; S.D. IND. L.R. 26-2.
DISCOVERY PROBLEMS AND THEIR SOLUTIONS, at xi (3d ed. 2013) (“Putting aside all other issues raised by the vanishing trial phenomenon, it clearly accentuates the critical importance of discovery.”).


25. IND. CODE § 34–18–8–8 (if no action has been taken for two years in IDOI proceedings, commissioner may seek dismissal under T.R. 41(E)); Mooney v. Anonymous, 991 N.E.2d 565, 579–80 (Ind. Ct. App. 2013) (trial court lacked jurisdiction to dismiss under T.R. 41(E) because motion was not filed by commissioner), trans. denied; cf. Ind. Code § 34–18–10–14; Adams v. Chavez, 874 N.E.2d 1038, 1042 (“This court repeatedly has characterized Indiana Code section 34-18-10-14 as the ‘administrative parallel’ to Trial Rule 41(E) because it permits relief when a party or panel member is ‘dilatory or fails to comply’ with the Act.”), clarified on reheg, 877 N.E.2d 1246 (Ind. Ct. App. 2007).

26. Oliver Wendell Holmes, Jr., The Path of the Law, 10 HARV. L. REV. 457, 460–61 (1897) (“The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”); see also Allen v. State, 50 So. 279, 280 (Ala. 1909) (Mayfield, J.) (“[I]t is important that the law be certain as well as that it be right.”); EDWARD COKE, A READABLE EDITION OF COKE UPON LITTLETON 212a (Thomas Coventry ed., London, Saunders & Benning Law Booksellers 1830) (“[C]ertainty is the mother of quietness and repose, and uncertainty the cause of variance and contentions.”); id. at 395a (“[T] he known certainty of the law is the safety of all.”); Alan M. Dershowitz, Visibility, Accountability and Discourse as Essential to Democracy: The Underlying Theme of Alan Dershowitz’s Writing and Teaching, 71 ALB. L. REV. 731, 765 (2008) (“Law must be predictable if it is to be credible. . . . Predictability is the essence of judicial legitimacy and accountability.”); W. Lawrence Church, History and the Constitutional Role of Courts, 1990 WIS. L. REV. 1071, 1076 (“[U] ncertainty compromises the chief policy function of the law in the first place: to guide behavior.”).

38. Id.
39. William I. Babchuk, M.D., P.C. v. Ind. Univ. Health Tipton Hosp., Inc., 30 N.E.3d 1252, 1255 (Ind. Ct. App. 2015) (resolution of prosecution on same day motion was filed defeats dismissal). The panel noted that “[i]t is important to note that the instant matter was time-stamped.” Id. at 1255 n.9. Though the footnote suggests a possibly different outcome under e-filing, which affixes time-stamps, the court of appeals recently reminded “that [it] do[es] not decide issues in footnotes.” Sw. Allen Cnty. Fire Prot. Dist. v. City of Fort Wayne, 142 N.E.3d 946, 956 (Ind. Ct. App. 2020), trans. denied.
40. See generally IND. TRIAL RULE 86 (rule governing e-filing and service).
42. IND. TRIAL RULE 3.1(A). An important aspect to the Smith rule is that counsel was actually known to represent the party in the matter. See Allstate Ins. Co. v. Love, 944 N.E.2d 47, 51–52 (Ind. Ct. App. 2011); Menard, Inc. v. Lane, 68 N.E.3d 1106, 1113 (Ind. Ct. App. 2017), trans. denied.
43. Smith, 711 N.E.2d at 1264.
44. Id. at 1264 n.7 (discussing Grun v. Pneumo Abex Corp., 163 F.3d 411, 422 n.9 (7th Cir. 1998)).
52. Blickenstaff, 58 Ind. App. at 379, 106 N.E. at 376; see also Link v. Wabash R. Co., 370 U.S. 626, 631 (1962); FEC v. Salvi, 205 F.3d 1015, 1018 (7th Cir. 2000).
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the lawyer can effectuate accurate disbursement. Ind. R. Prof. Cond. 1.15(e); In re Cassady, 814 N.E.2d 247, 248 (Ind. 2004) (commenting that it is implicit in Rule 1.15 that an attorney must hold disputed funds in trust). Comment 4 to Rule 1.15 explains,

Paragraph (e) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer’s custody, such as a client’s creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

Accordingly, if the client disputes the predecessor attorney’s charging lien, the successor attorney must refuse to surrender the proceeds to the client until the dispute is resolved.

TIPS FOR THE SUCCESSOR ATTORNEY

First, discuss with the client the ramifications of any lien asserted by a predecessor attorney, including the amount of fees being sought and your ethical duty under Rule 1.15 to satisfy the charging lien from any proceeds obtained in the resolution of the case and to hold disputed funds in trust pending resolution.

Second, it is likely prudent of you to include in the fee agreement the manner in which the predecessor attorney’s charging lien will be paid, especially in contingency fee agreements. Generally, in contingency-fee situations, the successor attorney will be required to satisfy the predecessor attorney’s charging lien from the contingency fee he or she earns; however, the successor attorney and the client may reach an alternate arrangement proceeds to your client without regard to third-party liens (attorney liens) might result in you paying the predecessor attorney’s lien out-of-pocket and getting involved in a disciplinary action. There is no reason the pursuit of an attorney’s earned fee should subject the attorney, or a successor attorney, to disciplinary problems. Following these simple rules will enable all involved the compensation they deserve while avoiding the need to contact the undersigned counsel.

Footnotes:

1. Despite recognition of the concept of a retaining lien, attorneys should proceed with caution any time they seek to withhold case files or client materials that could prejudice the client. Attorneys have been sanctioned for refusal to surrender materials to clients pursuant to 1.16(d). See, e.g., Matter of Corbin, 716 N.E.2d 429 (Ind. 1999); Matter of McCausland, 605 N.E.2d 185 (Ind. 1993).

2. It is important, however, that you do not threaten to report the successor attorney for ethical violations for failure to satisfy the charging lien, but rather, simply remind him or her of the ethical responsibility. In re Dimick, 969 N.E.2d 17 (Ind. 2012)

“Always keep in mind your ethical responsibilities, especially Rule 1.15.”

when negotiating the fee. Our Supreme Court has explained, “[I]t is incumbent upon the lawyer who enters a contingent fee contract with knowledge of a previous lawyer’s work to explain fully any obligation of the client to pay a previous lawyer and explicitly contract away liability for those fees. If this is not done the successor assumes the obligation to pay the first lawyer’s fee out of his or her contingent fee.” Galanis, 715 N.E.2d at 863.

Finally, regardless of the unique facts and circumstances of the situation and various fee agreements, always keep in mind your ethical responsibilities, especially Rule 1.15. Disbursing settlement or judgment

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