INTRODUCING:
NEW ISBA PRESIDENT
AMY NOE DUDAS

PLUS:
Gaming in Indiana, Part Two: The Lottery
The Court of Appeals: Indiana's Unsung Leader in Promoting Better Civics
and More
Stuart & Branigin mourns the passing of our retired partner and former ISBA President Russell Hart.

Russell joined our firm in 1956 and served as a wise and inspiring leader of our lawyers for more than 40 years.

Russell was a national leader in the representation of railroad companies and in providing civil, environmental, and insurance counsel. He was active in numerous professional organizations, including serving as President of the Tippecanoe County Bar Association (1974-1975), President of the Indiana State Bar Association (1987-1988), President of the Indiana Defense Lawyers Association, and President of the National Association of Railroad Trial Counsel (1995-1996). He was a fellow of the Indiana Bar Foundation, the American Bar Foundation, and the International Academy of Trial Lawyers. Russell was honored by the Governor of Indiana as a Sagamore of the Wabash for his professional and community service activities, received the Legendary Lawyer Award from the Indiana Bar Foundation in 2007, and was inducted into the Indiana University School of Law Academy of Law Alumni Fellows in 1997.

We extend our deepest condolences to Russell’s family, friends, and colleagues.
GAMING IN INDIANA

Gaming in Indiana, Part Two: The Lottery
By Oliver M. Barie
PROMOTING BETTER CIVICS

The Court of Appeals: Indiana’s Unsung Leader in Promoting Better Civics through Appeals on Wheels

By Hon. Loretta H. Rush and Joshua C. Woodward
Indiana Work Injury Attorneys

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President's Perspective

A PROFESSION AT THE CROSSROADS

By Amy Noe Dudas

I never wanted to be a lawyer.

“‘I’ve always wanted to be a lawyer,’” attorneys frequently tell me. They often spent a part of their formative years being influenced in some meaningful way by a lawyer who was close to them. Many colleagues report being inspired, if not mysteriously called by a higher power, to make the law their profession and, for most of them, their primary identity.

But me? I fell into it.

When I graduated from Earlham College, the plan was to get a doctorate in comparative literature and spend the rest of my days observing the rest of the world from an ivory tower, making obscure yet incredibly profound connections between Molière and August Wilson. But I needed a break. Instead of immediately heading off to such lofty academic pursuits, I decided to get a job in Richmond and spend a year or two saving up for graduate school. I sent out dozens of resumes and got exactly one call. A solo practitioner (my now dear friend Jeff Arnold) needed a legal secretary. After about a year, I shrugged my shoulders and thought, “I could do that.” And off to law school I went.

What I discovered was a community of civic-minded professionals for whom being an attorney is central to their core identity. With that identity comes a set of treasured ideals we guard fiercely. Attorneys are super-citizens. Ours is often referred to as a learned profession, and our values as set forth in the Preamble to the Rules of Professional Conduct demonstrate the lawyer’s role in society as one that stretches far beyond the courtroom.

As a result, bad behavior, even that wholly outside the context of our practice, could cost us our license. We have committed to cultivating our knowledge of the law beyond what we need to know to represent our clients, improving the legal system and the quality of legal services, and bolstering the public’s confidence in the rule of law. The attorney-client privilege is so sacred that our Rules of Professional Conduct do not require us to breach that confidence...ever. What we do is so important it is actually a crime to practice law without having first been admitted to do so by the Indiana Supreme Court.

When lawyers are reckless, unscrupulous, or even slightly less than competent, the consequences to their clients and the legal system could be grave. For these reasons, it is difficult to get into law school, even
more difficult to get through law school, and even more difficult than that to pass the bar exam. In fact, graduating from law school doesn’t even guarantee us an opportunity to take the bar exam; first, we must pass a rigorous character and fitness investigation, which goes so far as to scrutinize even our traffic tickets.

With great power comes great responsibility.¹

Upon being admitted, every new attorney must take an oath, in which our commitments to the above ideals—and more—are explicitly and unambiguously declared. Lawyers occasionally get together and recite that oath again; I have pledged allegiance to these sacred principals dozens of times. We’re married to this profession, reciting our vows when we first commit our lives to it and renewing them periodically as a reminder of our lifelong devotion.

But we find ourselves at a crossroads. The generations are beginning to shift roles as baby boomers reluctantly retire despite their original plan to die at their desks. Generation Xers have redirected their permanent eyeroll from their boomer bosses to their millennial subordinates. Those millennials are coming into their own, insisting on reasonable business hours (“what are business hours?” perplexed boomers and Xers ask) while trying to pay off six-figure student loans. Now the Gen Zs have begun enthusiastically raising their right hands in holy matrimony to the law after having spent at least some of law school in crushing social isolation, desperately hoping their webcam doesn’t freeze during their turn with the Socratic method.

Each generation approaches the practice from a different perspective and with changing priorities. We owe it to ourselves, and to the public, to understand each other and, perhaps, to recognize areas where another generation (older or younger) may have better ideas.

In addition, our profession is at a turning point. The access to justice crisis is causing some to question whether attorneys really do need these core values and unique skills.
Utah is redefining who can perform tasks commonly restricted to those licensed to practice and, along with Arizona, is experimenting with allowing nonlawyers to have ownership interests in law firms (bye-bye, Rule 5.4). Other states are exploring these ideas as well.

These efforts at innovation and re-regulation, as proponents label them, are *freaking lawyers the heck out.* Myself included.

But in my pandemic-inspired quest for re-invention, self-examination, way to effectively tell the world why. After all, if we simply take our ball and go home, we’ll continue to see young lawyers running for the hills and new efforts at re-regulation, potentially eroding (but maybe, *just maybe*, enhancing) what we, as lawyers, hold dear.

Who better than attorneys in the trenches to guide the conversation? To keep those great powers reserved to those who demonstrate a commitment to great responsibility, we must identify and demonstrate how certain traits and skills make

"Each generation approaches the practice from a different perspective and with changing priorities. We owe it to ourselves, and to the public, to understand each other and, perhaps, to recognize areas where another generation (older or younger) may have better ideas."

and mind-body connection (ask me about the meditation room my best friend/husband/soulmate created for me), I’m trying to keep an open mind. Instead of rejecting these ideas and young lawyers’ concerns outright, I’m at least trying to understand why some are suggesting new approaches. This means identifying exactly which traits and skills are crucial to the practice of law and should therefore remain solely in the purview of lawyers. It also means considering whether the traditional approach to the practice is sustainable in light of these regulatory experiments and fresh attitudes. Finally, once we figure all that out, we must find a

only lawyers uniquely suited to provide certain services. We need to examine whether we’re successfully ensuring new generations of lawyers enter the practice suitably armed and with sufficient support. That means not only carefully guiding them through those early years but also *listening* to them for ways we can enhance not only their satisfaction with the profession but our own as well. In the coming year, I invite you to join me in engaging in this exercise of professional self-examination. 😊
This October during our Annual Summit, we will be welcoming the newest slate of our Board of Governors. Fourteen new members will be cycled onto the board this year, and leadership will pass from Clayton C. Miller to Amy Noe Dudas, the association’s 126th president.

The ISBA Board of Governors exercise all functions of administration, including determining ISBA policy between meetings of the House of Delegates, supervising financial affairs, and more. The board meets quarterly to handle these functions, as well as to look at the big picture – both the ISBA and Indiana’s legal field as a whole. Their hope is to both create progress for the bar association – and thereby benefit its members – as well as be a voice for the profession and a guide through
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Counsel to the President:
Jim Williams, Muncie

We’d like to give a huge thank you to the volunteers serving in governance positions. Much of what the association strives to do relies on their advice and expertise, and the time, effort, and commitment they put into their terms is what helps lead the association forward.

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GAMING IN INDIANA, PART TWO: THE LOTTERY
By Oliver M. Barie

This is the second part to a two-part article. The first part, published in the September 2022 issue of Res Gestae, discussed the pivotal State v. Nixon decision and the Indiana legislature’s passage of the 1989 State Lottery Act. In this issue, Barie will address the Indiana legislature’s passage of riverboat gambling in 1993 and subsequent court challenges that combined to shape Indiana’s gaming industry.

RIVERBOAT GAMBLING

At the start of the 1993 legislative session, Representative Charlie Brown, D-Gary, introduced House Bill 1107. The measure would legalize casino and riverboat gambling. Land-based casinos would be permitted on Gary’s Lake Michigan shore and in resorts at French Lick and West Baden. Additionally, and subject to local referendum, riverboat casinos would be permitted along the Ohio River and at the Hammond Marina in northwestern Indiana. The main motivation behind the bill was economic development. Representative William Cochran, D-New Albany, said, “one boat would hire more people than my largest employer in southern Indiana.”

Representative Jerry Denbo, D-French Lick, echoed Cochran’s statement when he said, “We’re in desperate need of something in Orange County.” At the time, the average unemployment rate in Orange County was 15%, compared to the state’s average of 6.1%.

Representative Brown’s HB 1107 made it out of the House in a 53-47 vote but failed to pass out of Senator Lawrence Borst’s finance committee. The riverboat gambling legislation was effectively dead. Although HB 1107 was a contentious bill during the 1993 legislative session, a larger battle loomed over the state budget. For months, the Democratic House and Republican Senate debated about an acceptable spending package. Adding to the legislature’s challenge was Governor Evan Bayh’s insistence on alleviating soaring Medicaid costs. Medicaid costs for the state had been increasing by 20% annually in recent years. Governor Bayh proposed a 1% tax increase on gross hospital revenues, but Republicans opposed any new taxes. The impasse resulted in the fourth consecutive budget session failing to conclude on time.

Governor Bayh called for a 1993 special legislative session to begin on June 9. The special session budget
battle between Senate Republicans and House Democrats ended up as a fight over the cigarette tax (replacing the hospital revenue tax) and riverboat gambling. Republicans viewed the increased tax on cigarettes as unacceptable “new taxes.” Democrats pushed the cigarette tax on behalf of Governor Bayh to alleviate rapidly increasing Medicaid costs. A majority of Republicans opposed riverboat gambling, while Democrats viewed it as an economic development tool with potentially positive fiscal impact.

It would be nearly two weeks before the stalemate began to break. Finally, on June 22, Senate Republicans amended HB 1001 by deleting the cigarette tax but keeping the riverboat language relatively intact. Due to its contentiousness, Senate Republican leadership insisted the riverboat language be a stand-alone amendment. The amendment passed with a surprisingly large margin, 29-20. The amendment would allow up to 11 riverboats: five on Lake Michigan (two in Gary, one in Hammond, one in East Chicago, and one at an undetermined site), five on the Ohio River (no specific sites), and one on Patoka Lake. All but the Gary riverboats would be subject to a local referendum. Gary was exempted because a referendum on the issue had already been passed.

In what could only seem like a game of hot-potato, Democrats now had a decision to make: accept HB 1001 as amended by Senate Republicans or further delay the budget process. Time was not on the side of Democrats because the state’s new fiscal year would begin on July 1. Failure to pass a budget by July 1 would result in the layoff of thousands of state workers and cause a state government shutdown. Pressure mounted at home as well. For the previous few weeks, legislators had endured television ads attacking them for failing to complete the “people’s work.”

Returning to session on June 28, House Democrats proposed a compromise with Senate Republicans: if Senate Republicans accepted House changes to SB 1, including Medicaid reform language favored by Governor Bayh, then the House would pass HB 1001 with riverboat gambling language and without new taxes. This meant that House Democrats would win on the issue of riverboat gambling, Senate Republicans would prevail on preventing new taxes, and Governor Bayh would secure his Medicaid reform language.

Governor Bayh was unwilling to accept the proposed compromise between Senate Republicans and House Democrats. “There is no reasonable defense that could be made of this proposal,” said Bayh. Governor Bayh was quick to note one of his major concerns with this proposal was that it would spend $453 million more than the state would take in over the biennium. Despite the governor’s opposition, the House passed SB 1 as amended, sending it to the Senate for final passage. Three things were becoming apparent: (1) House Democrats cared more about riverboat gambling than they did about supporting their party leader, Governor Bayh; (2) legislators from both sides of the aisle did not want to be responsible for a state shutdown; and (3) the compromise between House Democrats and Senate Republicans would effectively toss the “hot potato” to Governor Bayh with only seconds remaining on the clock.
Still convinced he had the upper hand, Governor Bayh issued a veto threat should House Democrats acquiesce to Senate amended HB 1001. “If my veto is overridden, it will be a sad day in this state,” said Bayh.8 Behind the scenes, House Democrats were finding it difficult to stand behind their governor. On June 29, Governor Bayh met with the 55 House Democrats to plead his case and secure their support in quashing HB 1001 as amended by the Senate. In a tense and emotional meeting, the governor’s plea fell upon deaf ears. Although House Democrats had supported the governor throughout the special session, a large majority were unwilling to jeopardize the opportunity for riverboat gambling. On June 30, the respective chambers followed through on their compromise, passing both SB 1 and HB 1001 as agreed to. Interestingly, Governor Bayh signed SB 1 into law that same day, even if begrudgingly, because it included the Medicaid reform language he had originally sought.9 However, in an attempt to call the speaker’s bluff, Governor Bayh refused to sign HB 1001 and instead vetoed the measure. The legislature quickly voted to override the veto, with the House voting 68-30, and the Senate voting 32-17. It is important to note that 68% of Senate Democrats supported the governor in voting to sustain, while roughly 73% of House Democrats rejected the governor in voting to override. This underscores just how critical the issue of riverboat gambling was to House Democrats.

A CONSTITUTIONAL CHALLENGE TO RIVERBOAT GAMBLING

It took just over a year from the conclusion of the 1993 special session for a constitutional challenge to riverboat gambling in Indiana. The 1993 riverboat legislation required LaPorte and Porter counties to first conduct countywide referenda on whether riverboat gambling should be allowed. However, in Lake County, a referendum was only required on a city-by-city basis. Of the two countywide referenda, Porter County failed to adopt riverboat gambling, despite its largest city, Portage, voting for the measure. Subsequently, the plaintiffs, who had a pecuniary interest in

"It took just over a year from the conclusion of the 1993 special session for a constitutional challenge to riverboat gambling in Indiana."

a riverboat gambling operation within Porter County, filed suit against the Indiana Gaming Commission.10

The plaintiffs contended the pertinent statute violated Indiana Constitution Article 1, Section 23, which guarantees equal privileges and immunities to all classes of citizens, and Article 4, Section 23, which requires the General Assembly to pass laws that are general and of uniform operation throughout the state. The Porter Superior Court held the statute did not violate Article 1, Section 23

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Public trust is the foundation on which government’s legitimacy rests. This is particularly true for the judicial branch—public trust is our currency. As Alexander Hamilton once famously recognized, we have “no influence over either the sword or the purse.” But we do have tremendous influence over Americans’ trust in government. And in Indiana, we take pride in striving to operate a justice system that bolsters this currency.

In recent years, however, our country has experienced an increasing breakdown of public trust in democratic institutions. As public confidence has eroded, polarization and incivility have risen. Though there are myriad reasons for this alarming trend, the important question is what can be done to heal the growing divide. In a recent survey, a majority of respondents, across political ideologies, identified a somewhat surprising solution—better civics.2

“Civics” is generally defined as the study of citizens’ rights and responsibilities and how government works. Recent studies have revealed startling statistics about Americans’ lack of basic civic knowledge: 67% could not pass the United States Citizenship test, 44% could not correctly name all three branches of government, and 39% could not correctly identify what it means when the U.S. Supreme Court rules 5-4 in a case.3 These concerning figures have resulted in nationwide efforts to instill

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**THE COURT OF APPEALS:**

**INDIANA’S UNSUNG LEADER IN PROMOTING BETTER CIVICS THROUGH APPEALS ON WHEELS**

*By Hon. Loretta H. Rush and Joshua C. Woodward*
This unique program takes a three-judge panel anywhere in Indiana to show Hoosiers the extraordinary role appellate courts play in the American system of justice. The case presented is real, the issues are important and onlookers get to see how appellate courts protect their rights and the rights of our society.”
— Judge Paul Mathias

In 2019, the Indiana Bar Foundation gathered state leaders from the government, business, education, and nonprofit sectors to create the Civic Education Task Force. Its job was to “shine a light on the importance of civic education” and provide Hoosiers with “the tools they need to ensure our communities and our democracy remain strong.” In late 2020, the task force issued a report with recommendations to boost civic engagement. The General Assembly heeded several of those recommendations by passing a bill requiring a civics course for middle school students and creating a permanent state commission on civic education.

These endeavors are vital and should be applauded. But they join a prolific—and often unsung—civic outreach campaign: the Court of Appeals of Indiana’s Appeals on Wheels program. Through this exceptional traveling oral argument program, our dedicated intermediate appellate court has reached tens of thousands of Hoosiers by holding nearly 700 oral arguments across Indiana, including at least one in each of our 92 counties.

Like the early pioneer judges who traveled the circuit, three-judge panels regularly hit the road and take oral arguments for real cases directly to the people at various locales—from retirement homes, amphitheaters, conference centers, and fairgrounds to high schools, colleges, and law schools. By bringing this preeminent civic education program to thousands each year, the court fosters Hoosiers’ knowledge about and confidence in our judiciary. As Judge Margret Robb noted, Appeals on Wheels affords the public an opportunity to see the judges “up close and personal and to get to know who we really are.” And these events, as Judge Leanna Weissmann said, inspire civility by giving citizens “a front-row seat to how parties on opposite ends of the spectrum can politely vet their differences.” With Appeals on Wheels, the Court of Appeals has made civic engagement the cornerstone of its outreach. And it has been doing so for nearly four decades.

The impetus for Appeals on Wheels traces back to the 1980s when various institutions began requesting visits from appellate judges. As the requests increased over the years, the judges adopted an informal traveling oral argument program. Judges and community members alike quickly came to two realizations: (1) Hoosiers needed meaningful civic education opportunities; and (2) traveling oral arguments could address that need by bringing real-world, experiential learning directly to the people. The informal program naturally expanded, and in 2001, the Court of

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Appeals formalized it as Appeals on Wheels. Since then, the program has evolved into a vibrant educational experience that not only has produced greater interest in our governmental institutions but also has underscored the judiciary’s efforts to preserve a robust civic spirit.

Though the COVID-19 pandemic brought Appeals on Wheels to a halt in March 2020, it did not stay dormant for long. In October, the court exemplified its creativity and flexibility by holding a virtual “traveling” oral argument. A few months later, the court “masked up” and went back on the road upon request. Then, in November 2021, the program officially rebooted and the court held six traveling oral arguments before the end of the year. In the first half of 2022, judges hit the road 13 times, and several more events are scheduled for this fall and winter. The impact of Appeals on Wheels on Indiana’s communities cannot be overstated.

LASTING IMPACT ON INDIANA COMMUNITIES

Staying connected with Hoosiers has always been a priority of Indiana’s judiciary. By traveling across Indiana and building connections between the court and the people it serves, our Court of Appeals’ judges provide an avenue for citizens to learn firsthand about the judiciary’s vital role in government. Most of all, these visits put a face on our judiciary—leading to incalculable, lasting community connections. According to the 2021 Indiana Civic Health Index, our state’s “overall civic health is made better by positive interaction between schools and their communities.”

“I am proud of the Court’s commitment to educating the community about the judiciary’s important role in Indiana government. Our Traveling Oral Argument program shows the court at work for the people of this state and brings students, educators, law makers, government officials, and trial judges together at events that demonstrate the value of good relationships and good government.” — Chief Judge Cale Bradford
on Wheels program embodies this ideal and, crucially, has brought with it better civics to the next generation.

“There is something inherently magical about the moment the court is first called to order,” says the court’s communications director, Anne Fuchs, who attends each event. Indeed, as Judge student, from John Adams High School in South Bend, described his experience as “invaluable,” commenting that “in two years, I’ll be able to vote, so being able to understand the inside of how our government works, I think that is really important.”

Educators too have praised the Appeals on Wheels program’s unique ability to foster better civics. One teacher, Scott Gudorf from Pike Central High School, described it as “an indispensable tool” for classroom instruction, noting it “definitely lives up to the expectation of promoting the field of civics education relating to the judicial system.” Another teacher, Laura Duncan from Triton Central High School, characterized the program’s value to her students as “immeasurable,” remarking that it “provides a glimpse into the court system that most citizens, let alone high school students, do not get to experience.” And Professor David Bolk from Indiana State University described Appeals on Wheels as “the highlight of the year for the students.” Importantly, he noted “the appellate process is demystified,” allowing students to see “first-hand the professionalism of the judiciary and attorneys.”

What’s more, the Court of Appeals’ impact at these events extends far beyond the oral argument itself. After it is over, the judges regularly join students and community members in informal lunches and receptions nestled in libraries.

"Appeals on Wheels helps us build genuine connections with our community and give a face to the judiciary. I especially like getting to know the youth in my corner of the state and sharing life experiences that show them how alike we are. I think when they meet us and learn where we come from, they feel a sense of trust in the judiciary." — Judge Elaine Brown

Robert Altice observed, “Probably for a lot of these kids, it’s the first time they’ve ever seen any kind of court situation, so I think this is invaluable information.” In today’s technological age where kids’ attention is constantly being drawn in countless directions, students are required to put away their devices for a full hour. And they immediately feel the sense of import conveyed by the courtroom decorum and the well-articulated arguments before them. After an oral argument held at Jasper High School, a student summed up her experience by saying, “I thought it was cool how it was a legitimate court case. It wasn’t a mock trial or mock case. They were actually able to use a real situation, real lawyers, and everything like that.” Another
small classrooms, or community centers—each reflecting that community’s distinct culture and character. As area lawmakers regularly attend these gatherings, attendees witness members from different branches of government collaborating with one another in a civil and productive manner. Students and community members can speak directly with the judges and ask them questions about the legal profession, the appellate process, and the people behind the robes. These events humanize the judiciary, and the judges truly cherish that opportunity. Judge Elizabeth Tavitas noted how impressed she has been with “the enthusiasm students display during our time with them—either at lunch or after oral arguments. Their questions are thoughtful and demonstrate that they have paid attention to the briefs and oral arguments.” And Judge Nancy Vaidik expressed the “best part of traveling oral arguments is meeting the students. I love the questions about what is needed to be a lawyer or judge. You can see the kid’s wheels turning imagining themselves in our shoes. Priceless.”

Appeals on Wheels also provides a conduit for the media to highlight the work of our courts. Through television news programs, print journalism, and online platforms, members of the public are exposed to the judiciary’s indispensable role in government, inspiring Hoosiers and ensuring better civics is readily accessible to all.

**REPLICATING SUCCESS AND GOING FORWARD**

Recognizing the significant impact Appeals on Wheels has had in Indiana, our Court of Appeals is committed to helping other states replicate its success. A few years ago, the American Bar Association published a piece in which Judge Robb and Staff Attorney Joseph Merrick meticulously described what is required for a successful program—a best-practice guide for other courts.¹⁰ Notably, the article emphasizes the most important aspect of the program: it “has brought the appellate process to life for thousands of attendees and helped them to better understand the legal system.”¹¹ While other jurisdictions have similarly leveraged their judiciary’s collective voice to promote civics and civility, there is no appellate court in the country with a program as robust as Appeals on Wheels.

Despite having now reached every corner of Indiana, our diligent Court of Appeals’ judges have no intentions of slowing down. With long-standing traditions in communities and new invitations to accept, the court remains dedicated to hitting the road. And in today’s climate of growing polarization and incivility, the court’s dedication to Appeals on Wheels may be more important now than ever before. We encourage you to join us in extending our utmost gratitude to the Court of Appeals for its unparalleled efforts to promote better civics statewide. ¶

Loretta H. Rush has served on the Indiana Supreme Court since 2012 and has been chief justice since 2014. Prior to her appointment, she was a partner in a Lafayette law firm where she worked for 15 years before serving as a trial court judge.

Continued on page 37...
The Indiana Supreme Court issued no opinions in criminal cases in July, while the Court of Appeals addressed evidence of impairment, constitutional vagueness, the contours of preserving an issue by timely objection, admissibility of a diversion agreement at trial, double jeopardy, and appellate sentence review. A dissent from the denial of transfer addressed disruptive litigants.

INSUFFICIENT EVIDENCE OF IMPAIRMENT

Driving while “intoxicated” requires proof that a person was under the influence of an illegal substance “so that there is an impaired condition of thought and action and the loss of normal control of a person’s faculties.” Ind. Code § 9-13-2-86. Impairment, in turn, “can be established by evidence of the following: (1) the consumption of a significant amount of [an intoxicant]; (2) impaired attention and reflexes; (3) watery or bloodshot eyes; (4) the odor of [an intoxicant] on the breath; (5) unsteady balance; and (6) slurred speech.” Id. at *3 (citation omitted).

In Awbrey v. State, No. 21A-CR-2867, 2022 WL 2444758, at *3 (Ind. Ct. App. July 6, 2022), the State relied solely on the first factor, but “the sheer amount of the intoxicant...
consumed, standing alone, is insufficient to support a finding of impairment.” The general testimony of the toxicologist—that she would expect impairment, given the levels of methamphetamine in the Defendant’s blood—could not salvage the conviction: “testimony that someone would theoretically be impaired is not the same as testimony that somebody is impaired.” *Id.* at *4.

**UNCONSTITUTIONALLY VAGUE**

In *Armes v. State*, No. 21A-CR-2384, 2022 WL 2552760, at *1, *7 (Ind. Ct. App. July 8, 2022), the Court of Appeals reversed the denial of a motion to dismiss charges involving a Schedule I controlled substance identified as MDMB-4en-PINACA (MDMB). The Emergency Rule adopted by the Indiana Board of Pharmacy to add MDMB to Schedule I failed to provide the notice required by federal due process. Specifically, the Emergency Rule did not “explicitly identify the listed substances as synthetic drugs” and, even more troubling, did “not provide the chemical composition of MDMB. Thus, there is no official designation of what constitutes MDMB.” *Id.*

**PRETRIAL DIVERSION AGREEMENT ADMISSIBLE AT JURY TRIAL**

In *Barton v. State*, No. 21A-CR-2165, 2022 WL 2800852 (Ind. Ct. App. July 18, 2022), the Court of Appeals upheld the admissibility of a failed pretrial diversion agreement at a later trial. The agreement included the following terms: “Defendant acknowledges that failure to successfully complete the [Diversion Agreement] will result in (1) the [Diversion Agreement] being set aside and the prosecution resuming; (2) acknowledges this filed document may be used in Court against the Defendant . . .” *Id.* at *2 (court’s emphasis). The appellate court considered and rejected the Defendant’s “claim of ambiguity” grounded on the following:

1. He only acknowledged that the Diversion Agreement may be used against him in court, he did not agree to its admissibility;
2. That the Diversion Agreement only provided that it “may” be used against him, but did not foreclose the possibility that it would not be used against him; and
3. That the use of the term “Court” could be reasonably interpreted as some form of judicial proceeding other than a trial on guilt.

*Id.* at *5. The court found he had not “identified any true ambiguity[.]” The court addressed each argument, concluding (1) the term “acknowledges” must be read with an earlier line of the agreement that provided the State and Defendant “agree” to the terms that followed and (2) that dictionary definitions including that “the word ‘may’ means ‘[t]o be permitted’ or ‘[t]o be a possibility.’” *Id.* (quoting Black’s Law Dictionary (11th ed. 2019)). The court also rejected arguments about voluntariness or duress as well the weighing of probative value and unfair prejudice under Evidence Rule 403. *Id.* at *6-*7.
OBJECTION SUFFICIENT TO PRESERVE APPELLATE CLAIM

Although ultimately finding the Defendant “freely and voluntarily consented to the officers’ entry into his home,” Casillas v. State, 190 N.E.3d 1005, 1011, 1015 (Ind. Ct. App. 2022), is significant for two other reasons. First, the Court of Appeals rejected the State’s argument that defense counsel’s “objection was untimely because the evidence had already been admitted at trial.” It reasoned:

the trial court was aware of Casillas’s objection to the warrantless entry into his house, and the trial court gave no indication that its ruling on the constitutionality of the entry was unsettled. After referencing an unrecorded conversation that occurred in chambers, Casillas stated, “I would like at least the record to reflect that I disagree with the Court’s ruling and want to preserve that issue of the validity of his consent ... allowing law enforcement into the home voluntarily which led to a judicially issued warrant.” The trial court replied, “Okay ... I believe that the suppression issue is preserved for appeal[.]” Moreover, the State did not contest the timeliness of Casillas’s objection before the trial court. Therefore, the State may not challenge the objection’s timeliness for the first time on appeal. Id. at 1012 (internal citations omitted).

Second, in a lengthy footnote, the panel criticized as “particularly unwise” a “policy in effect at the time” that prohibited “DEA Task Force officers from utilizing body cameras.” Id. at 1013 & n.10. Noting that some “portions of the operation were recorded by a body-worn camera,” the court further observed that the “gap in footage is unfortunate because when critical portions of law enforcement interactions go unrecorded, public confidence in police action diminishes.” Id. at n.10.

DOUBLE JEOPARDY – TWO FIREARM OFFENSES

Wadle v. State, 151 N.E.3d 227, 248 (Ind. 2020), provided a new, non-constitutional framework that prohibits multiple convictions from the same act, focusing on whether one of those offenses “is an included offense of the other (either inherently or as charged).” Applied more than sixty times in less than two years, nearly every opinion has been unanimous.

A.W. v. State, No. 22A-JV-150, 2022 WL 3008525, at *3 (Ind. Ct. App. July 29, 2022), is an exception. There, the Respondent was adjudicated delinquent for possession of a machine gun and dangerous possession of a firearm. Offenses are “factually included’ when the charging instrument alleges that the means used to commit the crime charged include all of the elements of the alleged lesser included offense.” Id. at *3. That test was met because,“[a]s charged and as proven at A.W.’s hearing, unlawful possession of the same firearm was the means used to commit both offenses. Moreover, based on “one thirty-second episode of possession, the two offenses were obviously ‘so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction.”” Id. at *3 (quoting Wadle, 151 N.E.3d at 253).
Chief Judge Bradford dissented on that issue, opining that dangerous possession required proof that A.W. was a minor and did not satisfy any of the statutory exceptions, which “was not relevant to the machine-gun charge. Given that each charge requires proof of facts that the other does not,” he concluded that neither is factually included in the other. Id. at *4.

127-YEAR SENTENCE UPHELD

In *Angulo v. State*, No. 21A-CR-1465, 2022 WL 2721022, at *10 (Ind. Ct. App. July 14, 2022), the Court of Appeals rejected an Appellate Rule 7(B) challenge to maximum, consecutive sentences for the “extraordinarily heinous” murder, robbery, and confinement of two people. The nineteen-year-old defendant’s criminal history was relatively limited, but he had violated probation several times. Although he claimed he was in a “methamphetamine induced haze, . . . a defendant’s failure to address a known substance-abuse problem is not mitigating.” *Id.* at *11. Finally, although the Indiana and United States Supreme Courts have held that juveniles should be treated differently from adults. See, e.g., *Brown v. State*, 10 N.E.3d 1, 7 (Ind. 2014), the Defendant was not a juvenile, and the cited cases “do not stand for the principle that young adults are to be afforded the protections given to juveniles.” *Angulo*, 2022 WL 2721022, at *12.

FOOTNOTE:

1. Although the case was resolved on federal constitutional grounds, the panel suggested Article 4, Section 20 of the Indiana Constitution may provide even greater protection in vagueness challenges, quoting a delegate’s concern about the complexity of laws, which “ought to be so plain that every man can interpret them for himself, without the aid of a law dictionary.” *Id.* at *7.

DISRUPTIVE DEFENDANTS

In *Partee v. State*, 189 N.E.3d 163, 164 (Ind. 2022), Justice David joined by Chief Justice Rush dissented from the denial of transfer to “provide needed guidance to our trial courts, which all too often must navigate proceedings involving disruptive, vexatious, and outright abusive litigants.” Courts have interpreted the requirements of *Illinois v. Allen*, 397 U.S. 337 (1970), differently. Here, under the dissenting justices view, although the trial court was justified in removing the disruptive defendant from the courtroom, “its failure to ensure that [he] was informed how he could reclaim the right to be present—or even that he could reclaim this right—renders the process constitutionally inadequate and constitutes fundamental error.” *Partee*, 189 N.E.3d at 164-65. ☑
When the Sideshow Takes Center Stage, or the Ethical Implications of Producing Privileged Information

Although the actual provenance isn’t clear, P.T. Barnum is often given credit for the phrase “There’s a sucker born every minute.” The lure created by Barnum’s circuses seems to have been supplanted by YouTube clips of trial footage from celebrity lawsuits. Like moths to a flame, we all get drawn in to watch the latest soap opera play out in wood-paneled rooms across the country. The latest “Greatest Show on Earth” featured Alex Jones as the ringleader.

For those readers who are blissfully unaware, radio host Alex Jones was sued in Texas state court for defamation. The crux of the plaintiff’s claims centered on Jones’ statements on his show that the awful events at Sandy Hook were staged by the United States government as a
“false flag” effort to pave the way for more gun control. The trial produced evidence that Jones’ acolytes took heed and set out to harass and intimidate families of the children who died at their elementary school. In the end, a jury returned a multi-million-dollar verdict against Jones, a result that will surely continue to be litigated in the months and years to come.

Salacious as it is, the actual subject matter of that suit wasn’t the most pertinent topic for readers of Res Gestae. That honor goes to a discovery issue! While cross examining Jones at trial, lawyers for the plaintiffs sought to impeach Jones with his own text messages. While this effort is standard in courtrooms across the nation, in Jones’ case, the distinguishing variable here was that the plaintiff’s lawyers received the texts inadvertently from Jones’ counsel. Boldly informing Jones that “12 days ago, your attorneys messed up and sent me a digital copy of every text!” (emphasis added), plaintiff’s counsel proceeded to show Jones a text he had sent previously that was counter to his testimony at trial.

Perhaps a little late, Jones’ lawyer then sought an “Emergency Motion for Protection” to prohibit further use of the unintentionally produced material. During a hearing on that request, it became clear the buildup to that dustup is something that keeps all litigators reading this article awake at night: a misdirected filesharing link to opposing counsel in an attempt to produce discovery. In sum, the link sent by Jones’ counsel contained materials that contained privileged information. Upon receipt, the plaintiff’s lawyers did what we’ve been trained to do: notified Jones’ lawyers they believe the material was sent in error. Jones’ lawyers quickly confirmed the same and asked them to “please disregard” the link. The end, right? Wrong.

Per the local rules of the jurisdiction, once Jones’ lawyers were notified of the error, they had 10 days (remember the “12 days ago...” part?) to specifically assert privilege and seek protective relief from the court to prevent usage, or else they waived it. Jones’ lawyers didn’t seek a protective order, so the plaintiffs’ lawyers took it and ran. And here we are. While this circus played out on a national YouTube stage, it is certain that it’s been repeated, and will be repeated throughout our state.

SO, WE ASK: WHAT DO YOU DO AS LITIGATOR IF YOU FIND YOURSELF IN THIS CIRCUS TO AVOID BECOMING THE CLOWN? LUCKILY, WE ARE HERE TO HELP.

The facts of the Jones’ discovery debacle present ethical quandaries for both the producing lawyer and the receiving lawyer. The conduct of the producing lawyer could implicate competence and diligence. Lawyers must provide competent representation to a client. Ind. R. Prof. Cond. 1.1. This requires the “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Id. Of relevance for Jones’ lawyer, Comment [6] to Rule 1.1 explains “a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with the technology relevant to the lawyer’s practice.” Digital document production is standard operating procedure, and no one can reasonably fault Jones’ lawyer for attempting to respond to discovery with a filesharing link (assuming the lawyer has properly vetted the filesharing software and is satisfied with its security).

Readers of Res Gestae know fileshare productions are cheaper, faster,
and generally more efficient for the producing and the receiving party. Jones’ lawyers surely should have slowed down and double checked the filesharing link before transmitting it, but a single instance of a mis-sent link does not amount to ethical incompetence. After all, Rule 1.1 imposes a standard of reasonable thoroughness. Of greater concern to Jones’ lawyer would be Rule 1.3, which requires lawyers to act with diligence and promptness in representing a client. Comment [2] clarifies that lawyers should control their workload to ensure competent representation and Comment [3] warns against the dangers of procrastination.

In this instance, those local rules are crucial. Jones’ lawyer was practicing in a jurisdiction with a 10-day time limit to obtain safe harbor for inadvertently produced information. Jones’ lawyer either failed to know the rules or failed to act within a timely fashion. Had Jones’ lawyer sought a protective order, perhaps the damaging text messages could have been suppressed.1

But what about the receiving lawyer? If an Indiana lawyer receives privileged information, the Rules of Professional Conduct give only limited guidance:

> A lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

Ind. R. Prof. Cond. 4.4(b).

Here, the plaintiff’s lawyer did exactly that: prompt notification. What next? Rule 4.4 does not address what happens after the receiving lawyer gives notice. Indeed, Comment [2] disclaims such instruction as “beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived.” As a matter of professional judgment, some lawyers may decide to return the inadvertently sent document to the sender unread, but Comment [3] refers lawyers to Rules 1.2 and 1.4, which require lawyers to follow their clients’ goals for the representation and communicate information impacting the representation to their clients.

"In this instance, those local rules are crucial."
Here, Jones’ lawyers’ inaction creates a conundrum. In Indiana, had they simply taken the additional step to notify the Plaintiff’s lawyer of the production of privileged material, Indiana’s Trial Rules kick in:

Information produced. If information is produced in discovery that is subject to a claim of privilege or protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

Ind. Tr. R. 26(B)(5)(b) (emphasis added); see also Fed. R. Civ. Proc. (b)(5)(B) (imposing nearly identical obligations).

Thus, a lawyer receiving potentially privileged information in an Indiana state or federal proceeding must not only advise the producing party pursuant to Professional Conduct Rule 4.4(b), he or she must also refrain from using that information unless and until a court resolves the question of privilege (and waiver). The impact of failure to adhere to Trial Rule 26(b)(5)(B) can be significant: the receiving party may be barred from using the information and the receiving counsel who failed to follow the rules may be disqualified. See, e.g., McDermott Will & Emery LLP v. Hausman, 10 Cal. App. 5th 1083 (Cal. Ct. App. 2017) (disqualifying counsel that failed to follow the requirements of California’s corollary to Trial Rule 26(B)(5)(b) and insisted on using an inadvertently produced email despite the producing party’s objection); Arnold v. Cargill Inc., 2004 WL 2203410, at *10 (D. Minn. Sept. 24, 2004) (disqualifying counsel that received potentially privileged documents and failed to cease review of the documents, notify the privilege holder, and return the documents); Harris Davis Rebar, LLC v. Structural Iron Workers Local Union No. 1, Pension Tr. Fund, 2019 WL 447622, at *5 (N.D. Ill. Feb. 5, 2019) (restricting litigant’s use of improperly obtained documents and limiting the scope of testimony the litigant could obtain regarding those documents). Given the potential for sanctions, there can be no dispute that it puts clients at peril when their lawyers ignore the obligations imposed by Professional Conduct Rule 4.4(b) and Trial Rule 26(B)(5)(b).

No matter the result, this situation is dramatic for all involved. Hence, the YouTube views, and articles (present company excluded) dissecting the same. As litigators, whether we like it or not, we will get drawn into the “big top.” Take P.T. Barnum at his word: don’t be a sucker. This isn’t your minute. 😎

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FOOTNOTE:
1. Of course, the question of whether it was discovery misconduct to withhold the non-privileged text messages in the first place remains. In any jurisdiction, when a lawyer learns of the existence of a responsive document that his or her client has claimed does not exist, the lawyer must supplement the discovery production. Or, if the client refuses to allow such action, the lawyer may face a conflict requiring withdrawal. However, this digression goes well beyond the scope of this article.
This article highlights two Indiana Supreme Court civil opinions, including one where the court granted transfer, and six Indiana Court of Appeals opinions issued in July 2022. 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.

**INDIANA SUPREME COURT**

**FRAMEWORK FOR SEEKING DEPOSITION OF HIGH-RANKING EXECUTIVES**

In *National Collegiate Athletic Association v. Finnerty*, 2022 WL 2815848, at *7 (Ind. July 19, 2022), the Indiana Supreme Court issued an opinion setting forth the legal framework for determining whether a deposition of a high-ranking corporate executive should be suppressed, narrowed, or allowed. Before getting to the discovery analysis, the Court first held the National Collegiate Athletic Association (NCAA) was able to obtain discretionary interlocutory review under Indiana Appellate Rule 14(B) after being denied a protective order by the trial court for a second time. Though the Court acknowledged the appeal may have been from a repetitive motion or motion to reconsider, it was deemed...
to be an "other interlocutory order" under the appellate rules.

In Finnerty, the plaintiffs sought to depose three high-ranking NCAA executives. The NCAA responded by filing a motion for protective order to quash the depositions, relying in part on the apex doctrine. This doctrine generally shields high-level executives from depositions unless the requesting party shows (1) the executive possesses unique or personal knowledge relevant to the issues being litigated and (2) the information cannot be obtained through a less intrusive discovery method. At its core, the apex doctrine is intended "to balance the competing goals of limiting potential discovery abuse and ensuring litigants' access to necessary information." The Indiana Supreme Court chose to not adopt the apex doctrine, but instead establish a legal framework that "harmonizes its underlying principles with our existing discovery rules."

First, "the party seeking a protective order must show [by affidavit and specific factual support] that the deponent qualifies as an apex official." The "trial court must then determine whether there is 'good cause' to protect the official from annoyance, embarrassment, oppression, undue burden, or expense" pursuant to Indiana Trial Rule 26(C). "If the trial court finds good cause and the party seeking the deposition did not file a responsive motion, the court should issue a protective order." If, however, the requesting party files a responsive motion, the trial court must then "determine whether either the executive's apex status or the good cause showing has been negated or rebutted." If the responsive motion attempts to rebut the request for protection, "the court must use its discretionary authority to balance the parties' needs and impose a protective order that (1) restricts the topical scope of the deposition or (2) requires the exhaustion of less intrusive discovery methods."

**IF NO INJURY, THEN NO STANDING**

On July 21, 2022, the Indiana Supreme Court simultaneously granted transfer and issued its decision in City of Gary v. Nicholson, 190 N.E.3d 349 (Ind. 2022). In 2017, the city of Gary adopted a so-called "welcoming ordinance" that established a commitment to protect the rights of immigrants, such as limiting the city's ability to investigate a person's immigration status or assist the United States in enforcing federal immigration laws. Plaintiffs claimed standing to sue under principles of public standing and a statutory right under Indiana Code section 5-2-18.2-5, and challenged the ordinance as violating state law. The Court declined to find public standing and held the plaintiffs, who acknowledged they had alleged no injury, lacked standing to sue. The matter was remanded to the trial court with instructions to dismiss the action.

**INDIANA COURT OF APPEALS BUYER BEWARE**

In Sri Shirdi Sai Baba Sangsth an of Tri State, Inc. v. Farmers State Bank of Alto Pass, Ill., 2022 WL 3008502, at *1 (Ind. Ct. App. July 29, 2022), plaintiff purchased real estate "as is" that was being used as a church with the intention of converting the property to a Hindu temple. The purchaser did not review the zoning regulations or fire code applicable to the real estate prior to purchasing the building, but instead relied on the current use of the building and listing as a religious facility. After the purchase was completed, plaintiff learned the building was zoned for use as a banquet hall and limited to small gatherings making its use as a Hindu temple difficult, if not impossible. The Indiana Court of Appeals affirmed the trial court's finding that the seller made no fraudulent representations with respect to the zoning of the building that induced the plaintiff to enter into the purchase agreement. *Id.* at *5.

"The purchaser did not review the zoning regulations or fire code applicable to the real estate prior to purchasing the building, but instead relied on the current use of the building and listing as a religious facility."
SCOPE OF ARBITRATION PROVISION

In Haddad v. Properplates, Inc., 2022 WL 2977362, at *2 (Ind. Ct. App. July 28, 2022), the Court of Appeals was asked to interpret a provision in a construction contract requiring the contractor to submit a dispute concerning the contract to arbitration. In this case, the lawsuit was initiated by the owner of the construction project. The contractor denied the claim, filed a counterclaim and then argued all claims must first be arbitrated. The Court of Appeals disagreed finding “the contract does not generally require the project owner to arbitrate their claims but does generally require [contractor] to arbitrate its claims.” The court remanded to the trial court to consider whether to delay arbitration of the counterclaims pending resolution of the project owner’s claims.

BURDEN TO SET ASIDE DEFAULT JUDGMENT

In Inspire Outdoor Living v. Norris, 2022 WL 2921321, at *1 (Ind. Ct. App. July 26, 2022), Inspire Outdoor Living appealed a trial court’s order granting Norris’ motion for relief from a default judgment. In his Verified Motion to Set Aside Default Judgment, Norris stated he had “meritorious defenses” to the claims against him along with “valid claims for damages” in his favor. The Court of Appeals held these allegations “without citation to any alleged factual support, [were] insufficient to make a prima facia showing of a meritorious defense” as required by Indiana Trial Rule 60(B). Thus, the court reversed and vacated the trial court’s order setting aside the default judgment.

DAMAGES FOR DESTROYED REAL ESTATE

“When land is permanently damaged, the measure of damages is the pre-damage market value of the land minus the post-damage market value.” Nordin v. Town of Syracuse, 2022 WL 2721041, at *1 (Ind. Ct. App. July 14, 2022). “When
a building is permanently damaged—that is, when the cost of repairing the building exceeds the building’s pre-damage market value—the proper measure of damages is the full pre-damage market value, without subtracting the post-damage market value.” Id. In *Nordin*, the Indiana Court of Appeals reversed the trial court’s damage assessment of a destroyed cottage. The trial court had used the measure of damages applicable to land when it awarded the owner of the cottage the difference between the cottage’s pre-damage and post-damage market values. The cottage owner also sought damages for the full cost to repair or rebuild the cottage, which exceeded the pre-damage market value due to the need to elevate the foundation to comply with a local flood control ordinance. The Court of Appeals held the cottage owners were not entitled to a trial on this claim. Judge Crone issued a separate opinion dissenting to this part of the court’s opinion. Judge Crone stated: “a jury should be allowed to determine whether the Nordins may recoup any or all of those expenses as damages, in addition to the pre-flooding market value of the Cottage, demolition costs, and any other damages ‘proximately caused by the tortfeasor’s breach of duty.’”

**UIM LIMITS COULD NOT BE SETOFF BY PAID WORKER’S COMPENSATION BENEFITS**

In *Kearschner v. American Family Mutual Insurance Company*, 2022 WL 2709480, at *12 (Ind. Ct. App. July 13, 2022), the Court of Appeals relied on the Indiana Supreme Court’s decision in *Justice v. American Family Mutual Insurance Company*, 4 N.E.3d 1171 (Ind. 2014) to hold the insurance policy’s provision allowing a setoff for paid worker’s compensation benefits from the underinsured motorist (UIM) limits was unlawful and unenforceable.
The policy stated that any UIM limits of liability will be reduced by "[a] payment made or amount payable because of bodily injury under any workers’ compensation or disability benefits law or any similar law." The court held this setoff provision violated the protections afforded by Indiana Code section 27-7-5-2.

**UIM LIMITS COULD NOT BE SETOFF BY MEDICAL PAYMENTS COVERAGE**

In *Erie Insurance Exchange v. Craighead*, 2022 WL 2678572, at *1 (Ind. Ct. App. July 12, 2022), Craighead received medical payments coverage (MPC) totaling $10,000. Craighead argued Erie Insurance Exchange (Erie) should pay him $50,000 in underinsured motorist (UIM) coverage. Erie argued only $40,000 was owed because the policy allowed a setoff for the MPC payments. Erie then indicated it would pay Craighead the undisputed amount of $40,000 in UIM coverage only if Craighead signed a release as to the disputed $10,000. The Court of Appeals acknowledged the policy contained a setoff clause specifically allowing a setoff of "auto medical payments provision in this or any other policy applicable to the loss[,]" but, nonetheless, concluded the MPC payments were not triggered because of the tortfeasor’s wrongful act. *Id.* at *5. "An MPC payment, even by the liable party, does not qualify as an 'amount paid in damage' pursuant to Section 27-7-5-5(c)(1)(A) because it is not made as amends for a wrong." The Court of Appeals further held Erie’s withholding of the undisputed $40,000 in UIM coverage created a genuine issue of material fact regarding whether Erie acted in good faith. *Id.* at *8.

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(privileges and immunities) of the constitution, but found the statute unconstitutional as against Article 4, Section 23 (special legislation). The commission appealed to the Indiana Supreme Court. Additionally, the plaintiffs filed a cross-appeal challenging the trial court’s ruling on Article 1, Section 23.

In its analysis, the Court first looked to the history of the special legislation provision within the state’s constitution. The Court found the drafters were clear on their stance on special legislation, quoting Governor Whitcomb at the time of drafting who said, “...if calling a convention to amend the constitution were productive of no other result than furnishing an effectual remedy for this growing evil of special and local legislation, it would be abundantly justified.” The Court noted “while the drafters expressed a preference for general laws, [they] also recognized that special laws were sometimes necessary.” Moreover, the Court found “little guidance existed in distinguishing between special and general legislation.”

The Court then looked to precedent, noting that constitutionally challenged statutes are presumed constitutional and a high amount of deference is given to the legislature. Thus, the Court began its inquiry by asking whether the statute is “amenable to a general law of uniform operation throughout the state.” Said differently, if the statute cannot be made to apply on a general basis, then the inquiry will conclude, and the act deemed constitutional. If the answer to the above inquiry is yes, then the Court must examine whether the law, even in general form, is special as applied. The Court reasoned “legislators decided to permit a particular form of gambling and identified the universe of Indiana counties suitable to host riverboat gambling.” Moreover, the Court held not every county could have a riverboat gambling operation because not every county is “home to a suitable body of water.” So the Court reasoned that riverboat gambling cannot be subject to a uniform law of general applicability, therefore the inquiry must end and the act be deemed constitutional. The plaintiffs argued in the alternative, contending all counties which were “home to a suitable body of water” must be treated alike, pointing again to the different referenda format based on each county. The Court disagreed. “Distinctions drawn between Lake County and others fit this purpose of local law.” The Court reasoned that in LaPorte and Porter counties, “the shore contains both incorporated and unincorporated territory. It thus seems sensible to stage a vote of all persons in the county.” Whereas in Lake County, “the whole of the waterfront is covered by substantial cities whose residents have the greatest interest in how the shore is used.”
Justice Givan was the lone dissenter. Although the justice agreed the statute was not unconstitutional because it affected only counties and cities where a riverboat was possible, he failed to see the rationale in what determined a citywide versus countywide referendum. Justice Givan held that “to make an exception for Lake County as to the need for a countywide referendum is not logical merely because the entire lake front in Lake County is within the corporate limits of cities within the county.” Noting that a riverboat would have countywide ramifications regardless, Justice Givan could not justify “treating Lake County any different than the taxpayers of other counties.”

CONCLUSION

After 1993, the Indiana General Assembly would pass other controversial pieces of gaming legislation including a casino at French Lick (2003), slot machines at racetracks (2007), riverboats moving into land-based facilities (2015), and mobile sports wagering (2019). However, a critical distinction exists between these recent legislative acts and those of 1989 and 1993. Without the State Lottery Act and riverboat language, none of the recent legislation would have been possible, let alone constitutional.

Perhaps most interesting is how the debate over gaming in Indiana intersects with so many other public policy issues, including economic development, government spending, tax collection, consumer demand, and free-market principles. This was especially apparent during the 1993 legislative session. One is challenged to think of another issue that affects state government in such a vast, yet intricate manner.

Today, gaming has a significant fiscal effect on the state of Indiana. Gaming tax revenue represents the third or fourth largest source of tax revenue for the state, depending on the year and economic climate. Moreover, as other Midwestern states progress in adopting various forms of gaming, the competition for gaming revenue among border states increases rapidly. Further complicating matters is the consolidation of the gaming industry itself as well as the technological advancements of the 21st century.

"Without the State Lottery Act and riverboat language, none of the recent legislation would have been possible, let alone constitutional.”

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Today’s mobile devices no longer make it necessary for persons to be physically present in a casino to place a wager. State legislatures across the country, including Indiana, are already beginning to grapple with these issues. The burgeoning demand for internet gaming will soon force state legislators to decide on the policy matter and the future of gaming in Indiana. Ironically, some of the concerns around internet gaming deal with the potential financial impact to riverboat casinos. While the history of gaming in Indiana does not tell us what the future will hold, it leaves little doubt as to the delicate balance required among political, state, and private interests.

**FOOTNOTES:**


2. Id.


5. Id.

6. Legislative procedure required the House to either accept all Senate amendments to House Bill 1001 or file a dissent. Acceptance would send House Bill 1001 to the governor for signature and a dissent would send the budget bill into conference committee.


11. Under Appellate Rule 4((A) (1)(b), the Supreme Court has mandatory and exclusive jurisdiction over the appeal of any decision of a trial court holding a state statute unconstitutional.

12. Id. at 299

13. Id. at 300

14. Id.

15. Id. at 301

16. Id.

17. Id.

18. Id.

19. Id.

20. Id.

21. Id. at 305

22. Id; Two of the five justices participating in the Moseley decision, Justices Roger O. DeBruler and Richard M. Givan, had also participated in *State v. Nixon*, 384 N.E.2d 152 (1979), the decision discussed in part one of this article in which the state’s Pari-Mutuel Wagering Act was declared unconstitutional. In both cases, Justice DeBruler voted to hold the challenged legislation constitutional, and Justice Givan voted to hold them unconstitutional.
Continued from page 20...

Judge in Tippecanoe County for 14 years. Chief Justice Rush earned her undergraduate degree from Purdue University and received her law degree from Indiana University Maurer School of Law.

Joshua C. Woodward is counsel to Chief Justice Rush and is also an adjunct professor at his alma mater, Indiana University Robert H. McKinney School of Law. Both before and during law school, Josh was a middle school and high school mathematics teacher in Indianapolis. After graduating law school in 2017, he clerked for Judge Mathias and Chief Justice Rush before taking his current position.

FOOTNOTES:

1. The Federalist No. 78 (Alexander Hamilton).
10. Id.
**EMPLOYMENT DESIRED**

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