APRIL 2026

# INDIANA STATE BAR ASSOCIATION RES GESTÆ MEMBER JOURNAL

## FEATURING:

# WHAT ATTORNEYS NEED TO KNOW ABOUT THE NEW FINCEN RESIDENTIAL REAL ESTATE RULE

## PLUS

From Intake to Closing: Building Better Client Communication

Mentoring: Sharing the “Invisible Rules”

and More

VOL. 69 NO. 8

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*The Indiana State Bar Association empowers members to thrive professionally and personally through advocacy, education, and connections.*




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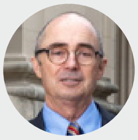

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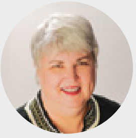

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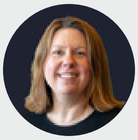

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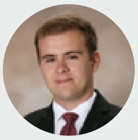

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# CONGRATULATIONS
## TO OUR 2026 INDIANA SUPERLAWYERS!

**John McLaughlin, Tony Patterson and Paul Kruse** are all Super Lawyers, with a combined total of 53 years earning this distinction, making this trio of attorneys among the most recognized personal injury attorneys in the state. If a client of yours has been in an accident and needs honest, experienced and trusted representation, we're ready to help you serve them. A free consultation with you and your client is just one call away.

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# MUSINGS ON THE PRACTICE

***By John Maley***

**PRESIDENT'S PERSPECTIVE**

My recent columns have been on weighty topics, including duty to protect children, pro bono service, and the rule of law and professional independence. Lately I've been reflecting on the many lawyers and judges who have positively impacted me in my 38 years as an attorney, and while I have this platform, I'd like to pass along some of their wisdom.

Always top of mind is my father, Robert Maley of Richmond, who was the epitome of the small-town trial lawyer and general practitioner who served so many with excellence, grace, and humility. Among top lessons learned from him include:

- **Life-work balance**—Dad never missed any of our appointments or events, even if it meant driving three hours round trip to watch a dual cross-country meet and then working late at night at the dining room table preparing for the next day of client work.

- **Kindness to all**—Dad seemed to know everyone in town on a first-name basis and went out of his way to chat with them, asking about their family, their work, their lives. He knew every legal secretary in town and their favorite flowers or candy, and he made a point of bringing these gifts when visiting other lawyers' offices. In tow with him often as a youngster, I was impatient in these settings, but early in my career recognized that his decency and kindness was sincere and part of his core.

- **Speaking simply and without legalese**—I remember vividly a first-semester law school discussion with Dad about contracts class. I rambled on about UCC 2-207, and he asked, "What's that?" Puzzled, I said something like, "You know what that is, don't you?" He commented, "Yes, I happen to know this one, but never assume the client, the other lawyer, jury, or even the judge knows the statutory citation, case names, or acronyms—speak and write plainly and avoid legalese."

- **Pro bono**—I didn't realize it until later in life (including hearing from many of his clients when Dad passed away), but Dad regularly provided pro bono guidance to many, and often from our front porch on Main Street. Often those families would drop off something within days after I'd seen him talking with them on the front porch—a bushel basket of produce or corn, or some other token of appreciation.

During law school I was impacted by a number of great professors, including Larry Wilkins and Bill Harvey, but none more than Larry Jegen ("Friend, are you with me?"). Feared by most non-accountants (and even by some CPAs), I was drawn to Larry because I was hungry to learn how to think critically like a lawyer and to be prepared for challenges

**"Lately I've been reflecting on the many lawyers and judges who have positively impacted me in my 38 years as an attorney, and while I have this platform, I'd like to pass along some of their wisdom."**

in legal matters. Although I knew I wanted to be a trial lawyer, I took all five of the tax courses Larry taught. The key insights learned were:

- **Know the law**—No one could hide from Larry and his demanding, Code-specific questions on like-kind exchanges or income in respect of a decedent. Although I haven't used these terms in my employment and civil trial practice, I learned to navigate statutes, regulations, agency guidance, and case law through Larry's demanding courses and inquisitions.
- **Be prepared**—Larry instilled the self-discipline of being 100% prepared, which is of course essential in practice.

After law school I had the privilege and honor of serving as a law clerk to U.S. District Judge Larry McKinney. For those who knew him, it won't be surprising that beyond a fabulous apprenticeship in federal procedure and trial practice, this was just fun. Key lessons learned:

- **Take law and justice seriously, but not yourself**—Judge had extraordinary reverence for the law and our judicial system, and he understood the importance of his role as an Article III federal judge. But he was a model of humility focused on the important job at hand, not himself or his ego. He genuinely liked and enjoyed being with people of all walks of life, and his sense of humor was a natural gift.
- **No substitute for time spent**—This common phrase from Judge was not related to sentencing but instead was a Monday regular for him after weekends full of time with his two sons (Judge was 44 when I started clerking for him in 1988, and his boys were in their formative years at that time). It has stuck with me through the years with our five boys and now with three grandchildren.

I had the pleasure of defending employment cases that Denise LaRue brought for her clients before she became a U.S. magistrate judge, and then in that role working with her in many of her cases. The main thing I learned from her:

- **Civility**—She didn't preach or demand civility; there was something organic about working with her that made us more civil. She was curious, kind, graceful, and made us feel valued and good. We had a number of challenging cases as opposing counsel; she zealously represented her clients, but we never had anything but civil, friendly conversations and correspondence. We all miss her, and we are better and more civil lawyers because of her.

In one case many years ago, I learned an important lesson from another lawyer. Without mentioning him by name, the takeaway was:

- **We usually don't know what stressors opposing counsel is facing**—Opposing counsel and I ended up in what could be labeled an email shouting match. We also exchanged some terse voicemails over what seemed to be fairly routine scheduling matters in a case. Fortunately, we were both upset about our dust-up, and we committed to cooling off and connecting the next day by phone. In that call I tried to listen more than talk, and I learned that counsel (now a good friend and referral source) was under some significant unrelated life pressures. Since then, I've tried to remember this possibility lurks behind someone's non-responsiveness, abruptness, or rudeness. I try to discipline myself to:
  - » Not respond immediately or even the same day; and
  - » When I do respond, either try the phone (even friendly voicemail) and/or start a new email (no law, custom, or practice requires us to reply to the same thread).

**"As lawyers, there can be great joy in doing excellent legal work. Yes, for litigators winning can help as well, but I've tried to practice by taking pride in the work product, striving to do my best, and then trusting our decision-makers (judges and juries) to make the call."**

Over the years there are some tips or guidance that I commonly employ, but can't claim first-use of nor trace from whom I learned these:

- **Brevity is the essence of clarity/Less is more**—Winning briefs and winning arguments tend to conform with these maxims. Yet too many briefs and too many court arguments start off with unnecessary warm-ups. If we can't explain in the opening paragraph why our client should prevail, it's unlikely to grab the judge suddenly at page 23.
- **Never say "to be honest with you" or "honestly"** —I'd like to take credit for this one, but I see others (including Bryan Garner) comment on this. It is extra verbiage/filler that detracts and implies that all else said or written is not honest.
- **"Um" as needless filler**—There is a dictionary definition for "um"—meaning "used as an expression of doubt or hesitation." I'd like to think that I don't use "um"—if I do, perhaps court reporters are kind to me and don't include it. But I have long since tried to avoid this and other unnecessary filler in speaking.
  - » It takes discipline, but there is nothing like reading one's own transcript to cause elimination of needless filler.
  - » If we wouldn't write it in a brief, why say it orally?
- **Happiness is reaching our full potential along lines of excellence**—Something like this is attributed to Aristotle, with Coach Vince Lombardi quoted as saying, "The quality of a person's life is in direct proportion to their commitment to excellence, regardless of their chosen field of endeavor." As lawyers, there can be great joy in doing excellent legal work. Yes, for litigators winning can help as well, but I've tried to practice by taking pride in the work product, striving to do my best, and then trusting our decision-makers (judges and juries) to make the call.

Finally, I'm at the stage of my career when far too many lawyer-friends have passed, some before the opportunity to complete their careers and transition to retirement. Many practice and life lessons come to mind as I think of them, but one is particularly relevant to bar association service.

- **You must be present to win**—When president of the Indianapolis Bar Association, my dear friend John Kautzman used this theme. John sought to encourage bar members to actively participate in association meetings, events, and programs, reinforcing the idea that engagement and involvement are necessary to benefit from bar association offerings. To echo John, be present in ISBA and your local bar associations—the winning is all around us.

If you have comments or questions, please contact me at jmaley@btlaw.com or 317-432-5509(c).

ISBA UPDATE

*By Res Gestae Editor*

# ISBA STAFF UPDATES

A new year brings new staff updates and transitions. We have said goodbye to a couple of familiar faces, welcomed some new staff members, and internally adjusted our membership and liaison teams. Here is what you've missed.

## CERTIFICATIONS AND PROGRAMMING

In January, Director of Justice Initiatives Christine Cordial transitioned to a full-time position with the Radio Television Digital News Association. She continues working with ISBA on a part-time basis, overseeing the Rural Practice Academy, the Rural Practice Resource Hub, and other efforts related to ISBA's attorney shortage plan. If you have questions about or interest in access to justice initiatives, she can be reached at ccordial@inbar.org.

Christine previously handled administration for the Trust & Estate Specialty Board and the Family Law Certification Board. Those responsibilities are now managed by Chloe Hunt, ISBA's new Certification and CLE Manager.

Chloe oversees the certification and accreditation processes for ISBA's trust and estate and family law specialization programs, as well as the Indiana Registered Paralegal (IRP) program. She also supports ISBA's CLE team and section liaisons with programing and events.

Chloe previously worked for Indiana Online and Lawrence Central High School, where she partnered with teachers, students, and their families. She also brings association experience from her time at Raybourn Group International, an association management company partnering with Indiana groups. She can be reached at chloehunt@inbar.org.

## MEMBERSHIP AND SECTIONS/ COMMITTEES

In February, Associate Executive Director Carissa Long left ISBA after 18 years to become Executive Director of Habitat for Humanity of Johnson County.

Following her departure, ISBA combined its Sections and Committees team with its Membership staff, creating one unified team focused on member value and connections. Leah Baker, previously Section & Committee Manager, now serves as Director of Membership and oversees the team. She works alongside Julie Gott, Membership

Coordinator, and Amber Ellington, Section & Committee Manager.

To support this transition, ISBA also hired Jennifer Burnett as a new Section & Committee Manager. Jennifer previously worked with the IU School of Dentistry and IU School of Medicine as Assistant Director of their Pathway & Inclusive Excellence Programs. She brings more than 10 years of experience supporting committees and working groups, managing programs, and facilitating meetings. She can be reached at jburnett@inbar.org.

**Jennifer now serves as staff liaison to the following sections and committees:**

- Agricultural Law Section
- Animal Law Section
- Criminal Justice Section
- Diversity Committee
- Elder Law Section
- Family & Juvenile Law Section
- Health Law Section
- Latino Affairs Committee
- Legal Ethics Committee
- Military and Veterans' Affairs Committee
- Probate, Trust & Real Property Section
- Sexual Orientation & Gender Identity Committee
- Social Security Disability Law Section
- Women in the Law Committee

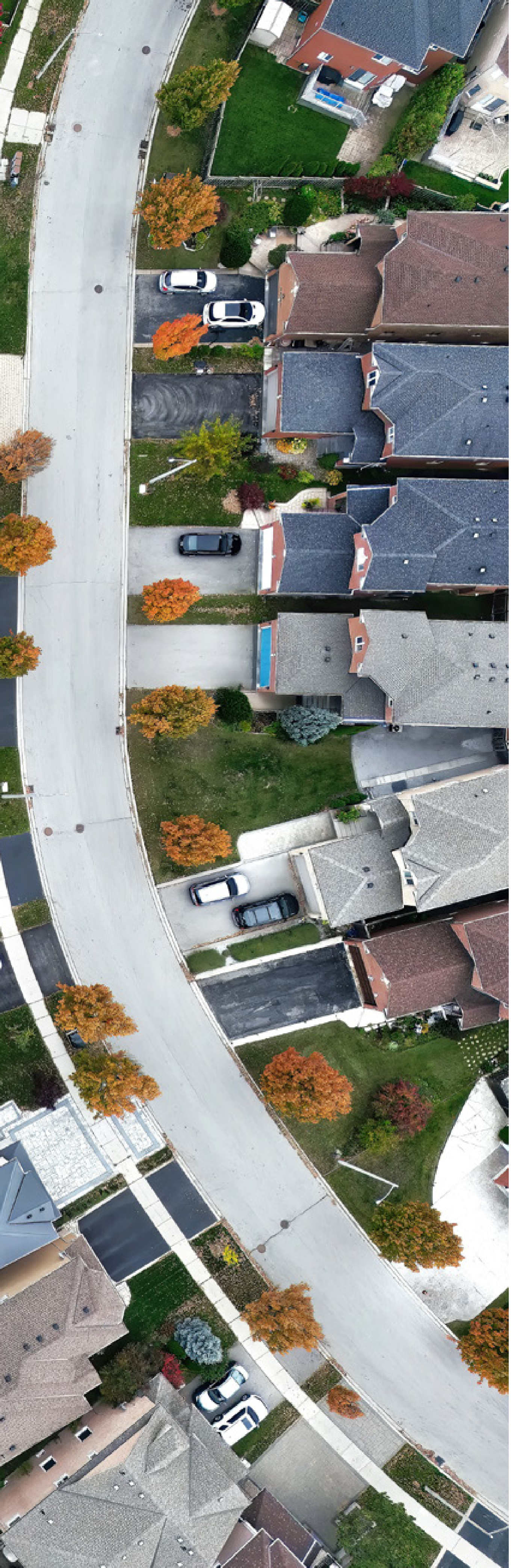
**Amber remains staff liaison to her current groups:**

- Alternative Dispute Resolution Section
- Appellate Practice Section
- Bankruptcy & Creditors' Rights Section
- Business Law Section
- Children's Rights Committee
- Construction & Surety Law Section
- Corporate Counsel Section
- Employment, Labor & Benefits Law Section
- Intellectual Property Section
- Land Use & Zoning Section
- Law Student Engagement Committee
- Lawyer Advertising Rules Review Committee
- Litigation Section
- Staff Counsel Section
- Unauthorized Practice of Law Committee
- Well-Being Committee

While Megan Lease, Communications Manager, now serves as liaison to the Affiliate Membership Committee (previously held by Carissa).

To learn more about ISBA's new hires and staff, visit inbar.org/contact_us.

# WHAT ATTORNEYS NEED TO KNOW ABOUT THE NEW FINCEN RESIDENTIAL REAL ESTATE RULE



FEATURE

***By Amanda L. Krenson***

If you have not heard about it yet, consider this your heads-up: If you are an attorney who closes residential real estate transactions, drafts deeds, and/or records deeds, you are now subject to a new federal reporting requirement for certain residential real estate transfers.

FinCEN—or the Financial Crimes Enforcement Network, a bureau of the U.S. Department of Treasury—issued a new federal regulation in 2025 which requires certain information be reported. The law went into effect on March 1, 2026, and is commonly known as the FinCEN Residential Real Estate Rule or "FinCEN RRER."

The rule imposes mandatory reporting requirements for specific non-financed transfers of residential real estate to entities or trusts. FinCEN intends to use this information to further combat money laundering in the residential real estate market. This is information which may not be captured by other Bank Secrecy Act reporting requirements covered under the Anti-Money Laundering or Suspicious Activity Reports programs. It also involves determining who are the natural persons who substantially control certain entities and trusts buying residential real estate in the United States.

## REPORTABLE TRANSACTIONS

A reportable transfer occurs when the following four conditions are met:

1. Residential real property is transferred;
2. The transfer is non-financed;
3. The property is transferred to a transferee entity or transferee trust; *and*
4. No exception applies.[1]

To assist in understanding just how pervasively this law reaches into the depths of real estate transactions, let me share the following:

The law defines a residential real property as a 1–4 family structure, vacant land where the buyer intends to build a 1–4 family structure, or mixed-use property where a 1–4 family structure either exists or is intended to be built by the buyer.[2]

## REPORTING CASCADE

**1**

**The person listed as the closing or settlement agent on the closing or settlement statement;**

**2**

**If no person described above is involved, the person that prepares the closing or settlement statement for the transfer;**

**3**

**If no person described above is involved, the person that files with the recordation office the deed or other instrument that transfers ownership of the residential real property;**

**4**

**If no person described above is involved, the person that underwrites an owner's title insurance policy for the transferee with respect to the transferred residential real property, such as a title insurance company;**

**5**

**If no person described above is involved, the person that disburses in any form, including from an escrow account, trust account, or lawyers' trust account, the greatest amount of funds in connection with the residential real property transfer;**

**6**

**If no person described above is involved, the person that provides an evaluation of the status of the title; or**

**7**

**If no person described above is involved, the person that prepares the deed or, if no deed is involved, any other legal instrument that transfers ownership of the residential real property, including, with respect to shares in a cooperative housing corporation, the person who prepares the stock certificate.[3]**

A non-financed transfer isn't just a cash deal. It is any transfer where the financing does not come through a traditional financial institution where the institution already has an anti-money laundering program in place. This means that private lender, that cash deal, that contract for deed, that seller-carryback mortgage, that gift from mom and dad to a trust, could all trigger a reportable transaction.

Finally, the type of entity or trust taking title matters. If the grantee is a trust or business entity, it may be reportable—unless it is subject to one of the 20 exemptions for entities or trusts.

### REPORTING PERSON

The person required to file the FinCEN report is known as a "reporting person," and many attorneys may fall under this definition in their line of work. The reporting person must gather and report identifying information for both the beneficial owners of the transferee entity or transferee trust and those individuals who are delegated as authorized signers on behalf of these entities or trusts.

As an attorney, you may be a "reporting person," required by federal law to file these reports. There is a list of seven distinct functions which a real estate professional may perform in a reportable transfer, and each person who performs one of the listed functions described in the reporting cascade may be required to report. If a person performs the first function described in the cascade, that person would be the reporting person; but if no one is serving that function, then the responsibility to report continues to cascade down until it arrives at a person who is performing the stated function.

> **"This means that private lender, that cash deal, that contract for deed, that seller-carryback mortgage, that gift from mom and dad to a trust, could all trigger a reportable transaction."**

All of a sudden, drafting a deed or handling a courtesy recording carries a lot more weight than it used to.

See the reporting cascade chart on page 14.

If none of the above functions are performed for a given reportable transfer of residential real property, then a report is not required to be filed.[4]

Reports must be filed by the final date of the month following the month when the closing occurred or 30 calendar days after the date of closing, whichever is later.[5] This means you have about 30–60 days from the date of closing to comply with the FinCEN reporting requirement.

The certification for the report must be maintained for five years.[6] Even though the law doesn't require maintaining the reporting information, you would be wise to recognize that the federal government will be reviewing these records and may be helped by having original copies of what was stated and signed, and likewise, you may behoove yourself in keeping these records as well since there are significant penalties.

As you can see, there is a lot of risk here—not only in handling the report, but also in securely storing personal identifying information. FinCEN recognized this and provides that you can charge a reasonable fee for reporting obligations imposed on you by this law.

## CONSEQUENCES

Finally, let's talk about consequences. The penalties for noncompliance are stiff. Unlike some other federal regulations or laws pertaining to reporting information to the federal government, this one carries a possibility of five years imprisonment and up to $250,000 in fines for willful violations of the law. It also carries possible civil penalties: $1,394 per violation, up to $108,489 in total for a pattern of misconduct. There is no "good faith" safe harbor law to protect you for "trying," either.

I tell you this not to scare you, but to prepare you. There is a need for members of the bar to help each other as we navigate this new compliance landscape.


> **"As you can see, there is a lot of risk here—not only in handling the report, but also in securely storing personal identifying information. FinCEN recognized this and provides that you can charge a reasonable fee for reporting obligations imposed on you by this law."**

## LEARN MORE NOW

So how can you get up to speed if this is "new news" to you?

1. Review the law. 31 CFR § 1031.320 contains the final rule.[7]
2. Review the publicly available materials that FinCEN and the American Land Title Association have published concerning FinCEN.[8] Each provides a great deal of information and resources.
3. If you determine that you fall into the Reporting Cascade and need to start filing reports, sign up for a Bank Secrecy Act portal account,[9] and then start obtaining buyer and seller information for reporting. Your local Indiana Land Title Association, American Land Title Association, and the various title insurance agents may have resources to help you. Reach out to them. We are all in this together.

---

*Amanda's 15-year career has focused on everything property law since 2010. She is currently Vice President, Underwriting Counsel for the Upper Midwest Agency Division at Fidelity National Financial, the nation's largest title insurance company.*

## ENDNOTES

1. Code of Federal Regulations § 1031.320 (b)(1).
2. *Id.*
3. Financial Crimes Enforcement Network, *Residential Real Estate Frequently Asked Questions: What Is the Reporting Cascade?* (February 13, 2026), https://www.fincen.gov/rre-faqs#I_2.
4. *Id.*
5. 31 CFR § 1031.320 (k)(3).
6. 31 CFR § 1031.320 (l).
7. Additional commentary can be found here: https://www.federalregister.gov/documents/2024/08/29/2024-19198/anti-money-laundering-regulations-for-residential-real-estate-transfers.
8. *See* Financial Crimes Enforcement Network, *Residential Real Estate Rule*, https://www.fincen.gov/rre; American Land Title Association, *Financial Crimes Enforcement Network*, https://www.alta.org/topics/fincen.
9. Available at https://bsaefiling.fincen.gov/auth/login.

# FROM INTAKE TO CLOSING: BUILDING BETTER CLIENT COMMUNICATION INTO YOUR PRACTICE

***By Andrew Kryder***

chinnarach - stock.adobe.com

Sometimes as lawyers, it's easy to fall into the routine of focusing on the work: going to court, drafting documents, filing paperwork, arguing motions. Client communication easily slips to the back burner. As lawyers, we know a case is advancing appropriately, but in the eyes of the client, silence doesn't signal diligence. It signals neglect and incompetence.

Let's take a closer look at what the Indiana Rules of Professional Conduct require and what can happen when lawyers fail to communicate with their clients. We will review some practical strategies to keep clients informed, and reshape the way we view client communications. Regular client communication should not feel like a chore but rather an opportunity. When done right, it can be easy, keep you out of sticky ethical situations, improve your client relationships, and help your business grow.

## THE DUTY TO COMMUNICATE UNDER RULE 1.4

The Indiana Rules of Professional Conduct make client communication a professional responsibility, not an optional courtesy.

**"Regular client communication should not feel like a chore but rather an opportunity."**

Rule 1.4(a) provides that a lawyer must:

1. **Promptly inform the client** of any decision or circumstance requiring the client's informed consent;
2. **Reasonably consult** with the client about the means by which the client's objectives are to be accomplished;
3. **Keep the client reasonably informed** about the status of the matter;
4. **Promptly comply with reasonable requests** for information; and
5. **Consult with the client** about any relevant limitation on the lawyer's conduct.

Rule 1.4(b) goes further, stating: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

Clients hire us for our expertise, our guidance, and our ability to explain complex legal issues in an easy-to-understand way. Communicating that advice and guidance should be a priority at every stage of the case. How do you communicate with clients at their intake appointment, during the representation process, and when you conclude their legal matter? Craft standard communication for each stage that can be easily modified.

Your clients shouldn't be left guessing about their legal matter. Rule 1.4 requires timely, clear, and consistent communication during the *entire* course of representation.

## WHEN SILENCE BECOMES A PROBLEM

In many states, the leading reason for client grievances against their attorney is a lack of communication. When lawyers fail to communicate, there can be severe consequences ethically, professionally, and financially. Common problems that arise from poor client communication include:

### Loss of Client Trust

Even when no formal grievance is filed, lack of communication diminishes client trust and confidence. Clients often equate silence with neglect. Clients hire lawyers to help with sensitive legal matters: divorce, personal injury, real estate, criminal defense, and business disputes. The client is relying on you as a lawyer to guide them through a difficult, often complex, situation. Without regular communication, clients are left to wonder if their legal matter is being neglected and whether their interests are being protected.

### Negative Financial Consequences

Have you ever lost a client due to poor communication? Clients who feel ignored may seek other counsel, or refuse to pay legal bills, all of which impact your firm's bottom line. Think about how much time, energy, and resources you invest in acquiring new clients. Don't squander your efforts because you have not thought through how to deliver regular updates. A client lost because of poor communication is almost always preventable.

### Bad Reviews

Have you ever received a bad review that mentions poor communication? Dissatisfied clients are often the most vocal. Once the review is posted, your reputation is tarnished and it can impact your law firm's revenue. A recent study showed that as many as 98% of consumers rely on reviews to inform their purchase decision, with some consumers listing it as the number one factor.[1] As a lawyer, you have an ethical duty to keep your clients informed. But also, as a law firm owner, you can't afford to have your law firm branded negatively by dissatisfied clients. You can't prevent every bad review, but you can minimize certain types of bad reviews through regular communication.

## TIPS TO COMPLY WITH ETHICAL RULES AND KEEP YOU, YOUR STAFF, AND YOUR CLIENTS HAPPY

Failing to properly communicate with our clients can have many negative consequences. The good news is that good communication, done correctly, can lead to many positive things in your practice. Here are some practical solutions to improve client communication.

### Set Expectations Early

Start by establishing a communication policy at the very beginning of your representation. Let clients know how you will contact them and when they can expect updates. Establish what types of communications are billable and how clients can reach you in emergencies. Putting these things in your engagement letter or discussing the communication schedule helps avoid misunderstandings.

### Use Templates for Routine Updates

Not every update needs to be crafted from scratch. Create email

**"Being a lawyer can sometimes be a thankless job. You know how hard you are working for clients. Why not let them know too?"**

templates for common milestones like "Complaint Filed," "Discovery in Progress," or "Mediation Scheduled." These can be customized swiftly and go a long way toward keeping clients updated. Or consider using AI tools to help you craft first drafts of communications. When doing so, be sure to proofread thoroughly.

**Delegate Strategically and Thoughtfully**

Train paralegals or support staff to provide certain types of updates under your supervision. Clients often just want reassurance that something is happening. A five-minute call from your assistant may make all the difference and save you the time of a much longer call at some point in the future.

**Schedule Communication as a Task**

Use your case management system or calendar to set reminders for regular check-ins with each client, even if there's no major development. A simple "just checking in" message every so often can maintain rapport and prevent grievances. A phone call or email demonstrates to the client that you are attentive.

**Consider Using Zoom Calls**

Video conference calls create a scheduled beginning and end to the meeting. This way you do not get "stuck" on a call. A virtual call also allows you to have a better read on your client's understanding of the conversation. Having the ability to see your client's reactions can help you gauge whether additional explanation is warranted.

**Take Credit for What You Have Done**

Being a lawyer can sometimes be a thankless job. You know how hard you are working for clients. Why not let them know too? When you complete something on a client's case, call and tell them. By doing so, you are fulfilling your ethical responsibility, and they will likely be grateful for the update. You may even get a thank you.

### One Outbound Call Can Prevent Two Incoming Calls

Sometimes returning calls can feel like a chore, especially when it interrupts your day. However, one regularly scheduled, outbound, status call to your client can eliminate, or drastically reduce, the same client calling multiple times for updates. Avoiding these situations saves you and your staff time and frustration.

### Just Make the Call; Even When It Is Bad News

Delivering bad news is never easy. As attorneys we sometimes have to relay disappointing news. Perhaps there was an adverse ruling, or a deposition did not go as planned. A natural reaction may be to delay reporting unfortunate outcomes. However, postponing these types of conversations never makes it easier. Just make the call. Be even and direct. Most times the call will go better than you had envisioned.

## CONCLUSION: COMMUNICATION AS A CORNERSTONE OF PRACTICE

All too often, attorneys view communication as a chore. Instead, view regular communication with your clients as an opportunity to create relationships. Regular communication builds trust, prevents complaints, and benefits your bottom line. Plus, you will be surprised how grateful most clients are when you keep them informed.

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*Andrew Kryder is the founding member of the Kryder Law Group. The firm focuses on personal injury matters throughout the state.*

## ENDNOTE


1. Subhash Jha, Abhijit Biswas, and Prashanth Ravula, *Research: What Consumers Find Persuasive in Online Reviews*, Harvard Business Review (February 18, 2025), https://hbr.org/2025/02/research-what-consumers-find-persuasive-in-online-reviews.

# MENTORING: SHARING THE "INVISIBLE RULES"

***By Donna J. Bays***

I'm grateful for the mentors who helped me over the years. Their very direct lessons were invaluable.

### ALAN GOLDSTEIN TOLD ME...

**Don't object every time you can.** You'll slow down the trial and frustrate the judge. Sometimes, that objection will emphasize facts you want to downplay. Object only when the answer might hurt you *and* planting that possibility in the mind of the judge is worth the risk.

**Always choose incompetence over conspiracy**. When facing questionable behavior by opposing counsel, don't assume they're acting out of malice. Presume the other lawyer is doing the best they can. Even in these challenging times, bad conduct is often the result of incompetence, not intentional trouble making.

### GALE PHELPS TOLD ME...

**The client isn't always right**. A long time ago, Gale chastised me after I filed a divorce case on the statutory grounds of *impotence existing at the time of the marriage*. That "stunt" (her word) did nothing to improve my client's results. When I explained that the client explicitly told me to use that ground, Gale asked, "Are you willing to risk everything you hold dear for this client?" Of course not. That was the last time I mentioned impotence in any court filing. Lesson learned. I should have used legal advice to persuade the client that allegation was a bad idea.

**"'You can catch more flies with honey than you can with vinegar.' Always a strong believer in the Golden Rule, my mom, Ruby Bays, wasn't a lawyer, but she was right. The Oath of Attorneys requires us to 'abstain from offensive personality.' Always treat other attorneys the same way you would like to be treated."**

## MY MOM TOLD ME...

**"You can catch more flies with honey than you can with vinegar."** Always a strong believer in the Golden Rule, my mom, Ruby Bays, wasn't a lawyer, but she was right. The Oath of Attorneys requires us to "abstain from offensive personality." Always treat other attorneys the same way you would like to be treated.

## MY TURN TO MENTOR

Following my own mom's advice, when my daughter became a lawyer 13 years ago, I gave her a lot of "invisible rules" to follow. We talked about that during a recent phone call. She encouraged me to share my "rules" with the next generation of attorneys. Here they are (with a little updating):

1. **Emergency Outfit**: Keep a professional court-ready outfit in your office at all times. Not just a suit, shirt, and tie. Include shoes, socks, undergarments, and accessories. You never know when an emergency hearing will pop up, an important client will show up without an appointment, or a clothing malfunction will occur.

2. **Emergency Toiletries**: Keep a toothbrush, toothpaste, deodorant, makeup, and comb/brush in your desk. If you wear contacts or glasses, keep contact lens solution or glass cleaner. The garlic in that Italian lunch was good, but you might want to freshen up afterward. For coffee mishaps and such, Tide to Go and disposable wipes are your best friends.

3. **Don't Show Off Credentials Too Early**: Don't hang your law degree and certificate of admission on the wall as soon as you're admitted. You want to be seen as a full-fledged lawyer from day one. You want people to trust your professional advice, not worry about how limited your experience is. Wait a few years to display those documents in your office.

4. **Dealing with Slow Days**: At first, you may not have enough work to stay busy. Don't just go play. Use the extra time to check out court livestreams at public.courts.in.gov/incs#. You

**"Although electronic communication is universal these days, communications on paper still mean more than email. A message on a notecard has a personal touch that sticks with people."**

can see how lawyers present testimony, get exhibits admitted, and make objections in the real world. Even better, go to your local courthouse, watch some hearings, and swap business cards with the attorneys there. And call experienced lawyers. They can help you know how particular judges handle cases.

5. **Go to the Movies**: From time to time, a particular case or client will push your buttons. That makes it hard to focus on the right thing. Sometimes when the stress gets to me, I walk out of the office and go to an afternoon movie. Try it. The world looks a whole lot brighter after that distraction. If movies aren't your thing, go for a hike, play with your dog, or find another healthy way to hit the reset. Protect the relationships with your loved ones and release that stress before heading home.

6. **If You Weren't There...**: Outside trial, don't recite your client's version of events as known fact unless you were there. Start with phrases like "my client states" or "my client reports." Have your client sign factual pleadings. That puts the client's trustworthiness on the line, not yours.

7. **Set Boundaries**: To avoid burnout, you need strong boundaries with clients. At the first meeting, tell them which hours you're available and when you're not. Barring a true emergency, stop interacting with clients at 6 p.m. Use notification controls on your phone to pause those alerts when the office is closed. Unless you do criminal defense, there's very little you can do for a client after courts

and businesses close. Think hard before you pick up the phone or send an email after hours. Instead, use an email scheduler to send that email when business hours resume, and calendar that call for first thing the next morning.

8. **Read the Rules**: Before each trial, re-read the Rules of Evidence. Even now, I check them the night before evidentiary hearings. Some judges ask for the applicable rule number when you object. You don't want to be outlawyered because you can't argue the right 803 exception to the hearsay rule. If you struggle with authentication, put a shorthand version of the rule in your trial outline, along with legal citations that are likely to help. On appeals, re-read the Rules of Appellate Procedure to ensure your brief is in full compliance.

9. **Elevator Speech**: Can you tell others what you offer in the time an elevator ride lasts? If not, prepare a 20-second introduction speech to use when you meet new people.

10. **Write It with Ink**: Although electronic communication is universal these days, communications on paper still mean more than email. A message on a notecard has a personal touch that sticks with people. When colleagues make partner, earn leadership positions, or get awards, use the U.S. mail to send written congratulations. If you don't have notecards with your name and/or firm logo, print that message on letterhead.

11. **Swap Business Cards**: Sit next to strangers when you go to conferences and bar association activities. Don't walk away until you get to know who they are and exchange business cards. Digital cards are great but make sure you also have printed cards. Not just for old people, but because that card is a trigger that can't disappear into a phone. When you get a business card, make note of one interesting fact you learned about that person. When you get back to the office, add those people to your social media contacts and holiday card list. Then, mail them a (paper) letter telling them how much you liked meeting them and learning about that interesting fact.

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**"Sit next to strangers when you go to conferences and bar association activities."**

# YOUR ISBA MEMBERSHIP EXPIRES ON JUNE 30

***By Res Gestae Editor***

Your membership with the Indiana State Bar Association (ISBA) will expire on June 30. If you are not enrolled in auto-renewal, please take a moment to renew today to maintain uninterrupted access to your benefits.

**HOW TO RENEW:**

1. Visit www.inbar.org and log in with your ISBA username and password.
2. Click “Renew Your Membership Now.”
3. Review and update your profile information as needed.
4. Your current membership category will be pre-selected, based on your previous year’s membership. If you need to change it—if you have moved from a government role to private practice, for example, or transitioned into retirement—contact Julie Gott at 317-639-5465 ext. 937 or jgott@inbar.org.
5. Add or remove any section membership, then finalize your renewal and generate an invoice.

For step-by-step tutorials and additional guidance, visit www.inbar.org/membershipFAQ. Have a question that isn’t addressed? Contact Leah Baker at lbaker@inbar.org or Julie at jgott@inbar.org.






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Stay connected. Stay informed. Stay engaged. Renew your ISBA membership today and remain a vital part of Indiana's legal community.

CRIMINAL JUSTICE NOTES

*By Liz Houdek*

# JANUARY CASES ADDRESS EVIDENTIARY REQUIREMENTS FOR OWI CHARGES, CREDIT TIME FOR PRETRIAL GPS MONITORING, AND MORE

**The Court of Appeals issued several published opinions in January addressing recurring challenges in criminal practice including evidentiary requirements for enhanced OWI charges, credit time for pretrial GPS monitoring, statutory interpretation in child pornography cases, and the representative sampling doctrine in drug possession cases.**

## INDIANA COURT OF APPEALS

### THE STATE MUST PROVE WHEN OPERATION OCCURRED TO INVOKE THE THREE-HOUR OWI STATUTORY PRESUMPTION, AND THE CLOCK DOESN'T START WHEN OFFICERS ARRIVE

Enhanced OWI charges hinge on proving specific blood alcohol concentration, despite the reality that testing never occurs at the moment of driving. Indiana Code § 9-30-6-15(b) attempts to address this by providing a rebuttable presumption. If a chemical test is administered within three hours of operation, the results are presumed to reflect the defendant's alcohol concentration equivalent (ACE) at the time of operation. In *Stokes v. State*, 25A-CR-1740, the Court of Appeals reiterated that the three-hour window must be measured from actual operation, not from when officers develop probable cause or arrive at a scene.

In that case, officers arrived at a crash scene around 2:00 a.m. and found Stokes nearby with signs of intoxication. A blood draw at 3:21 a.m. showed an ACE of approximately 0.20 grams—well above the 0.15 threshold for enhanced charges. However, the officer didn't know when the accident occurred and Stokes testified he had crashed while distracted by his phone, then spent 1.5 to 2 hours drinking liquor while waiting for a tow truck.

The Court of Appeals reversed the Class A misdemeanor conviction. Relying on *Mordacq v. State*, 585 N.E.2d 22, 26 (Ind. Ct. App. 1992), the court clarified that the three-hour window is measured from when the vehicle was last operated—not from when the officer arrived or from when probable cause developed. Without evidence of when the accident occurred, the blood draw fell outside the statutory window and the presumption was unavailable.

The court's reasoning underscores an important limit on the state's evidence. Without the presumption, "blood alcohol content varies over time" and the blood test alone was insufficient. The state could have bridged this gap with retrograde extrapolation testimony but chose not to. The officer's observations established visible intoxication, sufficient for lesser OWI charges, but "the ACE count requires proving a specific scientific measurement, not merely visible intoxication." The court remanded with instructions for the trial court to determine whether to enter a conviction for operating while intoxicated endangering a person (Class A misdemeanor) or operating while intoxicated (Class C misdemeanor).

## CHARGING CHILD PORNOGRAPHY UNDER THE OBSCENITY PROVISION REQUIRES IMAGES TO MEET THE OBSCENITY STATUTE'S NARROWER DEFINITION AND EXPOSED CHESTS DON'T QUALIFY

Indiana's child pornography[1] statute creates multiple paths to conviction, but the prosecution must choose its theory carefully. Subsection (d)(1) applies when the defendant knows the child is under age 18. Subsection (d)(2) applies when the child merely "appears to be" under age 18 but adds a limitation that the image must be "obscene (as described in IC 35-49-2-1)."

In *Evans v. State*, 25A-CR-1416, this statutory structure provided the basis for reversing two convictions.

The defendant faced four charges for possessing child pornography. Two involved images of prepubescent females with exposed chests and nipples. The charging information referenced subsection (d)(2), requiring proof of obscenity.

The defense argued these images couldn't be obscene under the statute cited in the charging information. The child pornography statute broadly defines "sexual conduct" to include uncovered female nipples. But subsection (d)(2) doesn't use that definition. It requires obscenity "as described in IC 35-49-2-1," and the obscenity statute defines "sexual conduct" much more narrowly. That statute covers only exposed genitals of a person under sixteen, genitals in sexual context, sado-masochistic


abuse, and sexual conduct with animals. It excludes uncovered female chests.

The Court of Appeals agreed and reversed the convictions. Because the images showed only exposed chests—conduct explicitly excluded from the obscenity statute's definition—they could not satisfy the "patently offensive depiction of sexual conduct" element and therefore could not be obscene under subsection (d)(2). When the state chooses to proceed under a provision requiring obscenity, it assumes the burden of proving obscenity under the referenced statute's terms, not under more expansive definitions found elsewhere. The defendant's other two convictions were affirmed.

### THE COURT CONTINUES TO DRAW A FIRM LINE BETWEEN CONFINEMENT AND MONITORING, EVEN WHEN GPS TRACKING LASTS YEARS

Defendants awaiting trial can face a difficult choice between remaining in jail or accepting release conditions that may feel nearly as restrictive. When those conditions last for years, the question of whether defendants should receive credit toward their eventual sentence often arises.

In *Williams v. State*, 25A-CR-687, the defendant spent three years on pretrial GPS monitoring before his conviction. After receiving an 11-year sentence for child molesting and sexual misconduct with a minor, he sought credit for those 1,114 days, arguing that constant electronic surveillance constituted a form of confinement. The trial court denied the request and sentenced him to 11 years in the Department of Correction

The Court of Appeals affirmed that ruling and applied the framework from *Hickman v. State*, 81 N.E.3d 1083 (Ind. Ct. App. 2017), for determining whether a placement constitutes confinement. GPS monitoring, the court concluded, differs from confinement because Williams could work, faced no geographic exclusions, had no reporting requirements, and maintained privacy in his home. The device "merely tracked his location." The court also noted that

Williams "voluntarily accepted GPS monitoring to secure pretrial release," suggesting he should not benefit from recharacterizing a choice made to avoid jail.

The decision confirms that GPS monitoring—even when prolonged—does not earn credit time. Arguments for credit will likely succeed only when monitoring is combined with other restrictions that more closely approximate actual confinement, such as strict geographic limitations, curfews, or frequent reporting requirements that substantially curtail freedom of movement.

## TESTING A SINGLE PILL CAN PROVE THE WEIGHT OF AN ENTIRE BAG, BUT ONLY WHEN THE PILLS ARE TRULY IDENTICAL

The representative sampling doctrine addresses a practical question in drug prosecutions: Must the state test every item seized to prove total weight? The Indiana Supreme Court answered this in *Woodford v. State*, 752 N.E.2d 1278 (Ind. 2001), holding that testing a representative sample can be sufficient if the circumstances support an inference that untested material is the same substance.

In *Hunt v. State*, 25A-CR-1260, the Court of Appeals applied this doctrine and affirmed a Level 3 felony methamphetamine conviction. Hunt was found with two bags of multicolored tablets and told officers the tablets were ecstasy but "would test positive for methamphetamine." One bag contained pills all stamped with an "F symbol." The state tested one pill from that bag, weighing 0.28 grams, which tested positive for methamphetamine. The remaining untested pills weighed 17.84 grams, which is enough to cross the 10-gram threshold for Level 3 felony enhancement. The second bag was neither tested nor weighed.

Defense counsel argued insufficient evidence because only a single 0.28-gram pill was tested. The court disagreed, finding "the single pill from the bag of identically-marked pills was a sufficient representative sample," particularly given Hunt's statement to officers.

When pills are visually identical (same color, same stamp), contained in a single bag, and the defendant makes admissions about their contents, courts will likely find testing one pill sufficient. Stronger defense arguments exist when the seized substances vary in appearance, are separately packaged, or the defendant makes no incriminating statements about their contents.

Hunt also challenged his 12-year sentence as inappropriate, noting he wasn't charged with numerous other offenses the facts could have supported. The court found the sentence appropriate given his criminal history which included gang affiliation since age 11, multiple probation violations, and commission of the offense while on parole.

## REFUSING TO IDENTIFY YOURSELF IS A CRIME EVEN WHEN MOTIVATED BY GENUINE BELIEF IN CONSTITUTIONAL RIGHTS

Indiana Code § 34-28-5-3.5 requires individuals to provide their name, address, and date of birth when lawfully detained by police. The statute's mens rea requirement, "knowingly or intentionally," here raised the question of whether a defendant's subjective belief in a right not to identify negates the requisite mental state.

In *Jelks v. State*, 24A-CR-1971, the defendant was stopped for driving with a fictitious license plate. When the officer requested identification, Jelks handed him a document asserting "Freedom from Government" and refused multiple requests to identify himself. At trial, Jelks testified he had valid identification in his wallet but believed he was "observing his rights" and didn't have to identify himself under the Constitution.

The Court of Appeals rejected the argument that Jelks's belief in a constitutional right to refuse negated the knowing or intentional element. The court held that "motive for refusing was irrelevant" because the statute "merely requires evidence of knowing or intentional failure to identify oneself to law enforcement." The record showed Jelks deliberately chose not to provide information he possessed and was legally required to provide.

The decision reinforces that a mistake of law—even a sincere mistake of constitutional law—generally does not negate mens rea. Jelks knew the officer was requesting identification, knew he had the ability to comply, and deliberately refused. That the refusal was based on a misunderstanding of his rights doesn't change the knowing and intentional nature of his conduct.

## ENDNOTE

1. Indiana Code § 35-42-4-4 changed its statutory terminology from "child pornography" to "child sexual abuse material" effective July 1, 2025. The previous terminology was in use during this prosecution.

ETHICS

*By James Bell and Conor Delehanty*

# ETHICAL USE OF FLAT FEES

**The Disciplinary Commission recently issued Advisory Opinion #2-25 which serves to guide Indiana lawyers on their use of flat fees. Additionally, Advisory Opinion #2-25 provides some needed guidance on how to bill for the use of AI. This article will define a flat fee, summarize some of the "do's and don'ts" of flat fees, share highlights from Opinion #2-25, and let you know what you can or can't do when you make the mistake of charging an unreasonably low flat fee.**

## WHAT A FLAT FEE IS AND WHY YOU SHOULD CHARGE ONE

First of all, let's make sure we are on the same page. Fixed or flat fees are "advance fees that are agreed to cover specific legal services regardless of length or complexity."[1] Advisory Opinion #2-25 defines a flat fee as a "fixed fee for future legal services that a lawyer charges for all services related to a particular matter or for a specific component of legal services (e.g. drafting a will or defending a client in a criminal case through trial or a plea)."[2]

Flat fees benefit clients because these fee arrangements allow for clients to have cost certainty and allow for lawyers to get paid up front. Fixed fees can also benefit the attorney-client relationship as they allow a client to avoid worrying about what the next monthly bill might (or might not) reveal, and lawyers can avoid the sometimes-adversarial discussion with clients about accounts receivable. Finally, flat fees eliminate the administrative chore of monthly billings that arise from billable hour work.

## WHY YOU SHOULD NOT CHARGE A FLAT FEE

However, there are reasons not to charge a flat fee. For example, because the practice of law is unpredictable, it is hard to charge a fixed fee that always turns out to be fair to both the client and the attorney. If possible, flat fees should be reserved for cases that are predictable and which have a clear

**"If possible, flat fees should be reserved for cases that are predictable and which have a clear beginning and an end."**

beginning and an end. Additionally, if the lawyer does not finish the case, figuring out the exact amount of a fair refund in a flat fee can be a challenge. As shown by Advisory Opinion #2-25, some planning at the front end and a carefully crafted fee letter can avoid some of these issues.

## DO'S AND DON'TS WHEN CHARGING A FLAT FEE

**DO** place the flat fee in your operating account and treat it as "earned upon receipt."[3] In addition, communicate that you are doing this to your client in the engagement letter.

**DO** communicate to your client in an engagement letter that flat fees are not refundable "except for failure to perform the agreed upon legal services."[4]

**DON'T**, however, communicate to your client that the flat fee is "non-refundable." Generally speaking, this is not true. "Lawyers are required to refund all unearned fees, even with flat fees, if the lawyer's services are terminated, for any reason, before the agreed-upon services are fully performed."[5]

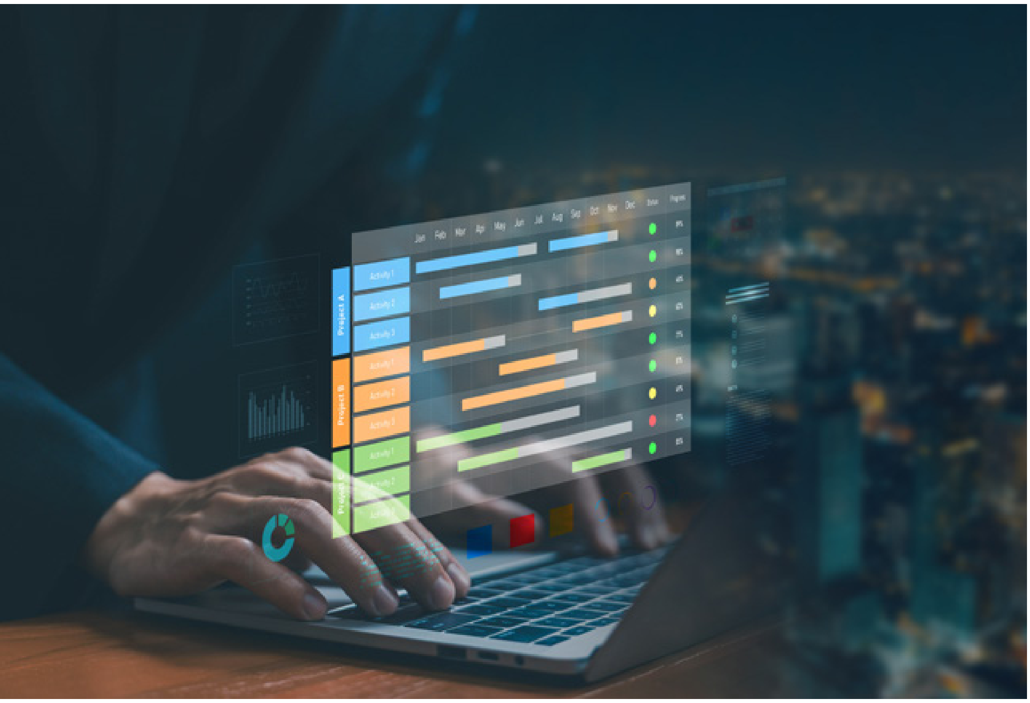
When a refund is necessary, **DO** give a reasonable refund based on "what percentage of work [has been] performed compared to what remains to be done."[6] For example, let's say you agreed to finish an entire misdemeanor matter for $2,000. If the matter is 50% completed when you withdrew, then $1,000 should be refunded. (**Please note**: Determining that the case is 50% completed (or getting your client to agree that that is the case) is easier to write about in an article than it is to accomplish in practice.)

When withdrawing from a flat fee case before the case is over, **DON'T** base a refund on "an inventory of billable hours showing that the lawyer has 'earned' the entire flat fee."[7] Generally, a flat-fee refund is not based on the amount of work a lawyer performed, but how much of the case was completed.

**DO** state in your fee letter what the flat fee covers and what it does not. Does that $2,000 you charged for a misdemeanor case cover a jury trial, motion to suppress, and an appeal? If your fee agreement simply stated, "I will represent you in your misdemeanor case," it might. "Flat fees are fully earned by the attorney when the bargained for legal services are completed."[8] In your fee agreement, **DO** state the scope of representation, when the scope of representation will be fulfilled, and what the fee does and does not cover.

## WHAT TO DO WHEN THE FLAT FEE YOU CHARGE IS TOO LOW

According to Rule 1.5(a) of the Indiana Rules of Professional Conduct, attorney fees must be "reasonable." Maybe it is out there, but we have never seen a disciplinary case where the lawyer was accused of charging an unreasonably small fee. However, it seems under-appreciated that an unreasonably low flat fee can lead an attorney to take on too much other work, which can lead to burnout and an inability to meet all of the attorney's obligations to all of his clients.



"Put as much in your flat fee agreement as possible regarding what the scope of representation is and is not."

If an attorney finds him or herself in the middle of a case in which he or she has charged a flat fee that is too small, the lawyer must be aware of Rule 1.8(a). According to Comment [1], Rule 1.8(a) "applies when a lawyer seeks to renegotiate the terms of the fee arrangement with a client after representation begins in order to reach a new agreement that is more advantageous to the lawyer than the initial fee arrangement."

In other words, Comment [1] states that a lawyer has a conflict of interest if the lawyer, in the middle of the case, is seeking a higher flat fee than originally negotiated. In the (maybe rare) instance where the client believes that a higher fee is warranted, the lawyer should follow the guidance in Rule 1.8(a), including advising the client in writing of the "desirability of seeking" and ensuring the client "is given a reasonable opportunity to seek the advice of independent legal counsel" before entering into the new fee agreement.

## RECOUPING COSTS FOR THE USE OF AI

Have you been to a CLE lately? It is now required that the term "AI" be used 19 times an hour. In honor of this requirement, we will end this article with a discussion of AI and what can be charged for it.

Generally, reasonable expenses can be passed on to a client, but "overhead expenses for ordinary office maintenance, such as maintaining a library, obtaining malpractice insurance, renting office space, and paying utilities, cannot be assessed as a surcharge."[9] Advisory Opinion #2-25 does not state whether AI is overhead or not. However, the commission states that the "best approach is to discuss with clients the advantages (and any potential disadvantages) of using a particular AI tool and to explain any added benefits that the tool provides that would justify a surcharge."[10] If the client consents to the surcharge, that expense should be included in the engagement letter or other communication.[11]

## TAKEAWAYS AND CONCLUSIONS

If everything goes perfectly, flat fees are a great idea. Unfortunately, things don't always go as planned.

- Put as much in your flat fee agreement as possible regarding what the scope of representation is and is not.
- Flat fees are earned upon receipt; however, flat fees are also refundable if the work is not completed.
- Charging a non-refundable fee is risky business. In almost all instances, it will be deemed to be an unreasonable fee.

## ENDNOTES

1. *In re Kendall*, 804 N.E.2d 1152, 1154 (Ind. 2004).
2. Indiana Supreme Court Disciplinary Commission, Advisory Op. #2-25, Ethical Use of Alternative Fee Arrangements (Flat Fees) (Dec. 19, 2025) at p. 1.
3. *Id.*
4. *Id.* at p. 2.
5. *Id.*
6. *Id.* at p. 4, n. 2.
7. *Id.*
8. *Id.* at p. 2.
9. *Id.* at p. 6, citing ABA Formal Ethics Opinion 93-379, p. 7 (1993).
10. *Id.* at p. 7.
11. *Id.*




*By Matt Giffin and Aidan T. Parker*

# COURT OF APPEALS DISCUSSED SBOA STATUE, ACCESS TO COURT RECORDS RULE 6, AND APPELLATE RULE 46 IN JANUARY

**In January 2026, the Indiana Supreme Court decided no civil cases and granted transfer in no civil cases. The Indiana Court of Appeals issued 10 published civil opinions, four of which are summarized below.**

## INDIANA COURT OF APPEALS

### SBOA STATUTE FURNISHES CAUSE OF ACTION FOR ATTORNEY GENERAL'S CLAIM TO RECOVER EXCESS COMPENSATION FROM FORMER SCHOOL CORPORATION EXECUTIVES

In *State of Indiana ex rel. Rokita v. Pfister, et al.*, 2026 WL 139447 (Ind. Ct. App. Jan. 20, 2026), the Court of Appeals held that the statute empowering the attorney general to bring civil actions to enforce State Board of Accounts (SBOA) special investigation findings, Ind. Code § 5-11-5-1(a), creates a stand-alone cause of action, and that the attorney general need not allege any underlying tort to state a claim under it.


The defendants were superintendent and assistant superintendent of the Town of Munster school corporation for over a decade. Their annual employment contracts provided for additional employer contributions of 4% and 3%, respectively, to annuity funds of their choice. After their retirement, the school corporation alerted SBOA to potential excessive compensation. The SBOA investigation revealed that the defendants had caused the school corporation to compound the annuity percentage contributions they received each year and that they had received other forms of excess compensation, resulting in over $300,000 in total additional compensation being received by each defendant. The attorney general commenced a civil action against the defendants under Ind. Code § 5-11-5-1, seeking to hold each defendant responsible for reimbursing the overpayment on grounds that it had resulted from his "malfeasance, misfeasance, or nonfeasance in office." The trial court granted the defendants summary judgment on two principal grounds: that the contract language governing the employer annuity contributions was ambiguous, and that Ind. Code § 5-11-5-1 did not furnish the attorney general a stand-alone cause of action, absent breach of an underlying duty.

The Court of Appeals reversed both rulings. First, it held that the defendants had received excess compensation, because the contract language providing for "each year an additional [annuity] contribution" of 4% or 3% was unambiguous and foreclosed an interpretation permitting year-over-year compounding. Second, it rejected the defendants' argument that failing to reimburse the overpayments after being notified of them was not actionable "nonfeasance" under Ind. Code § 5-11-5-1. It reasoned that political subdivisions, as SBOA-audited entities, "must observe" SBOA's Uniform Compliance Guidelines—themselves promulgated pursuant to express statutory authority. Taken together with the fact that an SBOA special investigation report referred to the attorney general for litigation must enumerate the "uniform compliance guideline or the specific law" alleged to have been violated, no "valid, underlying cause of action" is needed when the attorney general states a claim under Ind. Code § 5-11-5-1 for violation of the guidelines. The court thus agreed with the attorney general that "Section 5-11-5-1 *is* the cause of action." 2026 WL 139447, at *10 (emphasis original). The Court of Appeals remanded for trial.

### ACCESS TO COURT RECORDS RULE 6 GOVERNS WHETHER PLAINTIFFS CAN PROCEED PSEUDONYMOUSLY

In *Doe v. Reibel, et al.*, 2026 WL 120268 (Ind. Ct. App. Jan. 16, 2026), the Court of Appeals applied Access to Court Records (ACR) Rule 6 to hold that two plaintiffs had not satisfied the rule's balancing test for the exclusion of their names from public access and therefore could not prosecute their lawsuits under "Jane Doe" pseudonyms.

The plaintiffs in this consolidated appeal alleged that the same defendant had used cameras to spy on them while they were house-sitting for him in violation of Indiana's voyeurism law—and in one plaintiff's case had committed sexual assault. Both plaintiffs filed their complaints as Jane Does without seeking the trial court's permission to do so. The defendant moved to strike the complaints on grounds that the plaintiffs' failure to proceed under their real names violated Trial Rules 10 and 17, as interpreted in *Doe v. Town of Plainfield*'s multifactor test. 860 N.E.2d 1204, 1208–09 (Ind. Ct. App. 2007). The trial court granted the motions to strike, permitted the plaintiffs to amend their complaints, and certified for interlocutory appeal.

The Court of Appeals affirmed on different grounds, rooting its analysis in the ACR Rules. First, it held that a party's name constitutes "information" falling within the definition of "court records" to which the ACR Rules apply. Second, the court concluded that ACR Rule 5(b)(2), which *requires* exclusion of names of victims of sex crimes under Ind. Code Chapter 35-42-4, does not apply in a civil case, at least where the allegations do not fall within that chapter's definition of sex crimes. Third, the court held, in an apparent matter of first impression, that "a party's request to use a pseudonym—when not covered by A.C.R. Rule 5—is subject to the test provided by A.C.R. 6[.]" 2026 WL 120268, at *4. Applying that rule's balancing test, the court concluded that the public interest would not be "substantially" served by exclusion of the plaintiff's names in a civil matter, noting that statute does not expressly protect the identities of voyeurism victims as it does for other defined sex crimes. It further reasoned that the plaintiffs had not demonstrated a "significant risk of substantial harm" from disclosure of their names, primarily because the names of both victims had already been disclosed in connection with the separate criminal proceedings against the defendant. In finding that the overall balance weighed against the plaintiffs' bid for anonymity, the court emphasized that, unlike the victims in a criminal case, the plaintiffs had purposely availed themselves of the court system. *Id.* at *6–7 (citing *Doe v. Ind. Black Expo, Inc.*, 923 F. Supp. 137, 141 (S.D. Ind. 1996)).

### PRO SE LITIGANT'S RELIANCE ON FICTITIOUS CITATIONS AND OTHER VIOLATIONS OF APPELLATE RULE 46 RESULT IN WAIVER

In *Wilcox v. Gingrich*, 2026 WL 249093 (Ind. Ct. App. Jan. 30, 2026), the plaintiffs sued construction contractors on a contract dispute. Although the jury awarded the plaintiffs $67,825.44 for breach of contract related to a residential barn conversion, the plaintiffs appealed the defense verdict on their Home Improvement Contracts Act (HICA) and fraud claims and sought a recalculation of damages.

The plaintiffs brought their appeal pro se. The Court of Appeals ruled that their appellate brief violated Appellate Rule 46 in several ways: It cited nonexistent cases, mischaracterized case law, and included an incomplete and inaccurate table of authorities. Assuming from the nature of these violations that the plaintiffs had relied on AI to generate their brief, the court found it impossible to evaluate their arguments on their merits and concluded they had waived those arguments on appeal. While it declined to sanction the pro se plaintiffs, it cautioned all parties, including represented parties, of the sanctionable consequences of citing fictitious case law.

### PETITION FOR JUDICIAL REVIEW OF A STATE EMPLOYEE'S TERMINATION WAS PROPERLY DISMISSED FOR FAILURE TO TIMELY FILE THE AGENCY RECORD, BUT CONSTITUTIONAL CHALLENGE TO THE CIVIL SERVICE REFORM ACT WAS NOT PRECLUDED BY FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

The Court of Appeals in *Burke v. Indiana Department of Correction*, 2026 WL 217344 (Ind. Ct. App. Jan. 28, 2026), affirmed the dismissal of a direct challenge to a plaintiff's termination by the Department of Correction, citing the plaintiff's failure to timely file the agency record with her petition for judicial review in accordance with *Teaching Our Posterity Success, Inc. ("TOPS") v. Indiana Dep't of Education*, 20 N.E.3d 149 (Ind. 2014). The court reversed and remanded on the plaintiff's challenge to the constitutionality of the Civil Service Reform Act.

The Department of Correction terminated the plaintiff for failing to report and document an inmate's improper cell phone use, and the plaintiff filed an administrative claim for wrongful termination. The claim was denied at the first two levels of administrative review because the plaintiff was determined to be an "unclassified" at-will employee, whose termination did not violate any public policy. The State Employees' Appeals Commission (SEAC) confirmed the dismissal on the same grounds. In her subsequent petition for judicial review, the plaintiff argued that she was, in fact, a classified employee under the Civil Service Reform Act and raised a constitutional challenge to the act under the Indiana Constitution's "single subject" clause, Ind. Const. Art. 4, § 19. The trial court dismissed on procedural grounds, citing the plaintiff's failure to timely file the agency record with the court.

The Court of Appeals affirmed that ruling, applying the Supreme Court's *TOPS* holding that a petitioner "cannot receive consideration of its petition where the statutorily-defined agency record has not been filed." 20 N.E.3d at 155. The court rejected the plaintiff's argument that a statutory change enacted after her petition was filed, which put the burden of filing the agency record on the agency, should apply, noting the General Assembly failed to provide clear textual indication of retroactive application.

The court also addressed whether the plaintiff's petition for judicial review properly raised two types of declaratory judgment claims: one regarding the SEAC's classification determination and another presenting a facial challenge to the constitutionality of the Civil Service Reform Act. The court held that the petition adequately pleaded a claim for declaratory relief, but that the classification claim should have been presented on administrative review. It held that the constitutional challenge, however, was not precluded by the plaintiff's failure to exhaust administrative remedies, because the SEAC would not have been capable of resolving that constitutional claim. The court reversed and remanded on the question of the Civil Service Reform Act's constitutionality.

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