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RES GESTÆ

VOL. 67 NO. 7
MARCH 2024

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Healthy Conflict in an Age of Avoidance
By Mike Tooley

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PUBLISHER STATEMENT:
Res Gestae (USPS-462 500) is published monthly, except for Jan/Feb and Jul/Aug, by the ISBA. Periodicals postage paid at Indianapolis and additional mailing offices.

POSTMASTER: Send address changes to Res Gestae, c/o

ISBA, 201 N. Illinois St., Suite 1225, Indianapolis, IN 46204.

DISABILITIES: If you have a disability which requires printed materials in alternate formats, please call 317-639-5465 for assistance.

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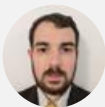
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President's Perspective

EXPLORING THE BIG TENT: ISBA LEADERS' THOUGHTS ON DIVERSITY

By Tom Felts

PRESIDENT'S PERSPECTIVE

Diversity, equity, and inclusion have been on a lot of people's minds, tongues, and radars recently, and like many subjects these days, not without controversy. I have talked about DEI (some people also include "belonging") in my opening President's Perspective and in my remarks upon being sworn in as ISBA president, emphasizing that both I and the ISBA are committed to these principles, describing the association as a "big tent" with room enough for all. It's just the right thing to do.

But it wasn't until I was asked to participate in the ISBA's award-winning *Open Conversations* program that I was required to look back on my life and career and identify the "why." Why should I or the ISBA be concerned about DEI? What forms should that concern take? Wouldn't it just be easier to set DEI aside and concern ourselves with matters that seem to more directly affect our legal and professional lives?

On paper that seemed to be the case. I mean, Felts, looks in the mirror. You're white, American-born, conservative, a former Republican office holder (judge), straight, able-bodied, a married father, of a mainstream religion—every non-protected

class category there is (I could include age if employment was involved). There's nothing "diverse" about me. I've worked hard to achieve everything I've enjoyed and could justifiably be held up in the minds of some as an example of "everyone should be judged on their own merits and that hard work alone will equate to success." I've since learned that's not always the case.

So, how and why did diversity issues begin to matter so much to me?



Like many things, it was a matter first of education. As was the case with many in my demographic categories, it took a major unfortunate and shocking event—the murder of George Floyd in May 2020 and the insight and conversations that followed—to open my eyes and mind. I was assisted by many along the way, Chief Justice Rush being the first. As some of you know, I spend the majority of my time as a senior

judge working on the Indiana Office of Court Services judicial education team. As a part of the increased emphasis on diversity and related issues, Chief Justice Rush signaled our education team that she wanted Indiana judicial officers to receive DEI training as a part of each judicial conference. Being a part

"Being a part of that planning process and then being present for these sessions really opened my eyes to the various and difficult paths those who differ from me have traveled and the continuing obstacles they face."

of that planning process and then being present for these sessions really opened my eyes to the various and difficult paths those who differ from me have traveled and the continuing obstacles they face.

As a further part of the court's efforts, Chief Justice Rush established the Supreme Court's Office of Diversity, Equity & Inclusion and hired Dr. Gina Forrest as its first executive director. Dr. Forrest presented training on DEI issues in a way that was very practical, down-to-earth, and relatable (I'll never forget her explanation of microaggressions, comparing them to marbles that are carried on one's back as extra burdens to carry). And Princess Darnell of that office tackled difficult issues such as appropriate

language and the importance of choosing the right words in a calm and inclusive way.

When I was selected for the ISBA leadership path, I knew I wanted to engage the ISBA Diversity Committee, not only to continue my personal growth in diversity awareness but also to meet the ISBA's younger attorneys in an area in which they were both present and passionate. That committee, under the leadership of former chair Lynsey David and current co-chairs Alex Van Gorp and April Keaton, not only provides great information about diversity-related events and programs but also offers a safe and encouraging place to talk freely about diversity-related issues—from encouraging legal career pipelines for middle and high school students

from historically underserved communities to collaborating with members of our affiliated minority bar organizations. My participation in that committee and most especially the opportunity for me to personally engage with those committee members have inspired me to continue to expand my diversity awareness and education. I have learned a lot but have a long way to go.

I wrote in my second column that one of my "themes" for the year was to recognize and highlight the Diversity Committee's work but also to take steps to integrate DEI perspectives into many aspects and areas of the ISBA. Following the "team" approach I previously outlined, I reached out to other bar leaders in this area and asked them



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these questions: (1) Specifically, what does a diverse ISBA look like? and (2) What specific steps shall we take to make that happen? The responses I received were very welcome, being both informative and instructive.

MICHAEL TOLBERT
(PAST ISBA PRESIDENT)

A diverse ISBA is one that reflects the melting pot of cultural ideas and attitudes that exists across our great country. As the saying goes, “there is strength in numbers.” However, I do not believe organizations can achieve greatness merely by adding members. Organizations like the ISBA will never reach their full potential until they embrace the varying viewpoints that can only be shared by minority groups through maximum participation and acceptance.

I believe the ISBA should have two small satellite offices in the following locations: (1) Southern Indiana (Evansville) and (2) Northern Indiana (Merrillville). The

"I wrote in my second column that one of my 'themes' for the year was to recognize and highlight the Diversity Committee's work but also to take steps to integrate DEI perspectives into many aspects and areas of the ISBA."

ISBA has been accused of being too “Indy centric” which hurts our diversity efforts. Satellite offices would help dispel this notion. I also believe that the ISBA should help organize something like the “Solo and Small Firm Conference” but gear it to the specialty bars (i.e., A Diversity Conference with Marion County Bar, Kimbrough Bar, Women’s Bar, etc.).

**APRIL KEATON (ISBA
SECRETARY AND DIVERSITY
COMMITTEE VICE-CHAIR)**

In my opinion, diversity in ISBA is about action as much as anything. Diversity is inviting, receiving, then acting on input from members

on their experiences, needs, and opinions about the practice and the role attorneys can play in meeting the legal needs of their respective communities. Diversity also includes acknowledging then building resources and sharing tools for addressing the unique professional, emotional, and mental needs of our fellow bar members. Lastly, I see diversity as an ongoing practice that should be built and maintained like any other core competency of the practice.

There is much more to discuss in the area of DEI, and I’ll continue the discussion next month. ☺



During the lunch hour, the Indiana Bar Foundation hosted a presentation by a team of We the People students—an instructional program for high, middle, and elementary school students that teaches the history and principles of the American constitutional democracy while enhancing students' understanding of government.

ISBA SECTION AND COMMITTEE LEADERS PARTICIPATE IN LEADERSHIP ENHANCEMENT WORKSHOP

ISBA's section and committee leaders gathered in January to boost their skills and learn how to better support their groups' goals. The workshop kicked off with an evaluation of their leadership styles, specifically in their roles as volunteer leaders. (While many attorneys already lead legal teams, leading a group of volunteers often requires a different approach and skillset.) The group then discussed challenges faced by each of their groups and brainstormed potential solutions.

The ISBA emphasizes that a successful team depends on its culture and the quality of relationships between its members. Quality relationships—particularly in sections and committees—lead to better ideas, more conclusive actions, and improved results. And as the team continues to achieve, relationships continue to flourish, creating a positive feedback cycle.

Enhancing leadership begins with understanding who we are as leaders. The workshop participants reflected on aspects of themselves that influence their perspectives and interactions with others. These could include demographics, personality traits, and/or major events that have shaped your life. For example, participants named the following aspects and experiences that influenced their styles:

- Being the first woman in their family to go to college
- Being the youngest child
- Graduating law school during an economic downturn
- Having lived in many regions of the U.S.
- Being introverted

- Facing mental health challenges
- Having a chaotic personality
- Struggling with empathy
- Having a tendency to overpower the room
- Not being creative

To explore potential bias—based on these experiences and others—the group discussed the Johari Window, a framework for understanding conscious and unconscious bias that increases self-awareness and understanding of others.

With this background, each leader then coupled a leadership assessment to identify their specific leadership style when working with volunteer groups. They identified a variety of styles, highlighting that there is no one “right way” to lead.

From there, the group discussed the challenges their sections and committees most often faced and explored potential strategies for navigating them. They also outlined goals for their groups, including to:

- Increase participation of section members
- Deepen personal relationships with members
- Mentor the section’s or committee’s future leaders
- Ensure that good ideas have champions who can help make them happen
- Continue following the section’s strategic plan, or develop a strategic plan and ensure it has buy-in from future leaders
- Enhance communication between the council and the membership
- Modernize current programs

- Be more mindful of the variety of members’ motivations for being on a section
- Be more mentally present and prepared before meetings
- Conduct a poll of section leadership

The workshop was filled with excitement and optimism, with passionate leaders who are eager to serve their members. They

encourage you to reach out and share your ideas or requests with them.

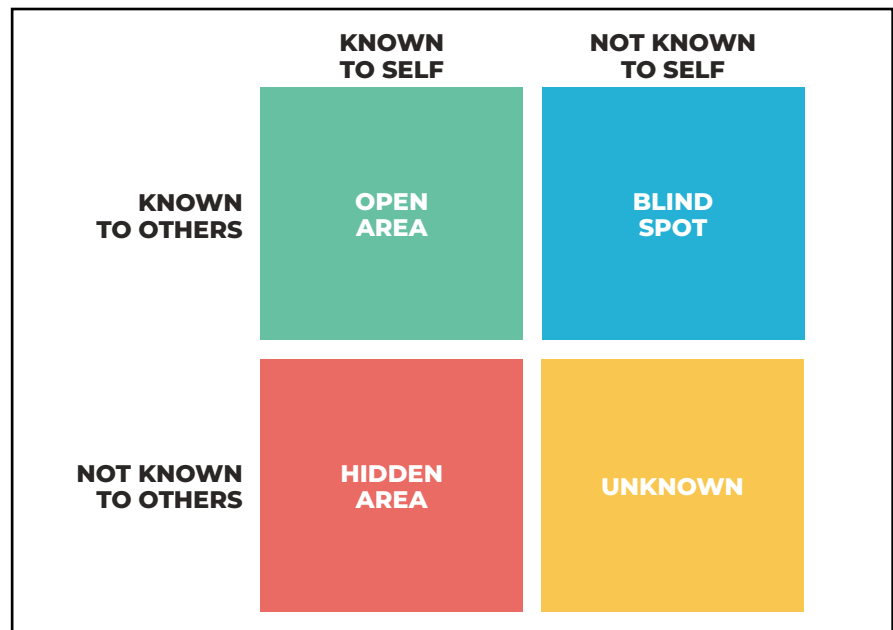
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HEALTHY CONFLICT IN AN AGE OF AVOIDANCE



By Mike Tooley

Prior to this month, I practiced as a labor and employment lawyer for over 32 years, representing employers of all shapes and sizes in connection with every sort of workplace dispute imaginable: single-plaintiff lawsuits, class actions, union organizing drives, and work stoppages.

This experience taught me two important lessons. First, as much as employment lawyers might enjoy the thrill of battle and bask in the glow of winning a difficult case, the employers that bear the cost and inconvenience of workplace disputes often feel differently. To them, the most successful workplace dispute they ever have is the one they *never have*.

Second, the secret most employment lawyers won't tell you is that employees who feel like they've been treated with dignity, had their talents developed, and been *led well* by their supervisors and higher ups rarely sue their employers, even when they part ways in less-than-ideal circumstances.

I believe in the truth of these lessons so much that I decided to become a full-time leadership coach and consultant focused on helping organizations build better workplaces with stronger leaders, healthier cultures, and more engaged workforces. In other words, rather than acting as the surgeon who operates on patients after they become critically ill, my focus now is on helping employers avoid having sick employees in the first place by practicing workplace wellness.

From that vantage point, I wanted to share some non-legal thoughts on one of the most pressing issues currently facing employers: how to deal with workplace conflict in a way that produces sharper thinking, better outcomes, and more collaborative teams.

If you base your conclusions about modern behavior on what you observe in the comments portion of social media or hear on talk radio, you might be inclined to think 21st-century humans love nothing more than a good fight—about politics, world affairs, religion, race relations, sports, or pretty much anything.

There's a difference between disagreeing and being disagreeable, though, and many of us seem to have lost our ability to do the former without becoming the

"From that vantage point, I wanted to share some non-legal thoughts on one of the most pressing issues currently facing employers: how to deal with workplace conflict in a way that produces sharper thinking, better outcomes, and more collaborative teams."

latter—so much so that we avoid talking with each other about things that truly matter unless we know in advance the other person agrees with our point of view. Rather than promoting true harmony, our unwillingness to engage in healthy conflict has limited our ability to learn from each other and transform as individuals, communities, and organizations.

DRAGONS AND AIRPLANES

In *12 Rules for Life: An Antidote to Chaos*, author Jordan B. Peterson retells a fable of a young boy named

Billy who wakes up one day to find a dragon the size of a cat sitting on his bed. When he brings it to his mother's attention, she tells him there's no such thing as dragons and goes about her day. Left to its own devices, the dragon mysteriously grows larger every day, eventually becoming big enough to put the family's home on its back and fly away.

After they are rescued, Billy's mother continues to deny there is a dragon until Billy insists that she look at it, at which point the dragon

immediately shrinks down to its original, less fearsome size. When Billy's astonished mother asks him why the dragon had to get so big, Billy observes, "maybe it wanted to get noticed."

Peterson's dragon tale is a classic parable for our modern age concerning unacknowledged conflict. Like the original version of the dragon, conflict normally presents itself in a manageable size at the beginning but can grow to threatening proportions the longer it is unacknowledged and



unaddressed. Paradoxically, treating the conflict as if it's not really there ("nothing to see here, move along") serves only to feed it, making it larger and more destructive.

Iconoclastic author Malcolm Gladwell makes a similar point about the dangers of avoiding conflict in a real-world setting in his book, *Outliers*. Gladwell contends that co-pilots from conflict-avoidant cultures are less likely to challenge the authority of their chief pilots than ones from cultures where conflict is embraced. While this deferential attitude might lead to a less contentious environment in fair weather, Gladwell argues that it can lead to unnecessary crashes in emergency situations in which pilots depend on getting immediate and direct feedback from their co-pilots to make the corrections necessary to avoid crashing. Like the refusal to see the dragon, the co-pilots' unwillingness to point out the pilots' error out of excessive deference can lead to disastrous consequences.

HEALTHY CONFLICT, HEALTHY TEAMS

While perhaps not as terrifying as dragons and airplane crashes, a pair of thought leaders on the modern workplace contend that our collective unwillingness to engage in healthy conflict results in less healthy teams and under-developed talent—the corporate versions of big dragons and plane crashes.

Patrick Lencioni makes this point persuasively in his book, *The Five Dysfunctions of a Team*. The primary dysfunction of unhealthy teams, Lencioni argues, is an absence of trust among team members stemming from a fear of being vulnerable and sharing your actual thoughts. This absence of trust leads directly to a fear of conflict, in which

team members stifle their legitimate disagreements over important issues in an attempt to preserve what he describes as "artificial harmony."

Putting a finer point on it, Lencioni reports from his experience as a management consultant that teams who fear conflict (a) have boring meetings, (b) create environments in which personal attacks behind closed doors escalate, (c) avoid dealing with crucial issues, and (d) fail to engage the perspectives of everyone on the team.

By contrast, teams who are willing to embrace conflict have *better meetings* in which the ideas of all team members are considered, important problems are solved, politics are minimized, and the critical issues are put on the table for discussion rather than being swept under the rug.

Which environment sounds more engaging to you?

Author Kim Scott takes this concept of healthy conflict at the team level and applies it to feedback at the individual level in her fantastic book, *Radical Candor*. Scott argues from her experience leading teams in Silicon Valley that strong managers must *directly challenge* their team members by giving them necessary feedback, making hard

calls, and setting a high bar for results. Managers who withhold this "tough love" out of a desire to avoid conflict or hurt feelings ultimately are engaging in what she calls "ruinous empathy" that will deprive the individual and the team of the information they need to improve.

For both teams and individuals, avoiding conflict means the dragons get bigger, the planes crash, and performance suffers. This is where leadership comes in.

RULES FOR HEALTHY CONFLICT

Hard-core boxing aficionados might be familiar with the Marquess of Queensberry Rules adopted in the late part of the 19th century, which turned boxing from bareknuckle brawling into the "gentlemen's sport" in which gloves were required, low blows were prohibited, and fighting was confined to the limits of the ring.

In a similar vein, it's possible to come up with rules for the modern workplace that will avoid the polar extremes of no-holds-barred brawling on the one end and Lencioni's "artificial harmony" on the other. Here are a few:

1. **Face the dragon when it's small.** My former partner at Ice Miller, Ryan Poor, has a brilliant saying to describe the effect of unresolved conflict: "Nothing

"There's a difference between disagreeing and being disagreeable, though, and many of us seem to have lost our ability to do the former without becoming the latter—so much so that we avoid talking with each other about things that truly matter unless we know in advance the other person agrees with our point of view."

"By contrast, teams who are willing to embrace conflict have better meetings in which the ideas of all team members are considered, important problems are solved, politics are minimized, and the critical issues are put on the table for discussion rather than being swept under the rug."

festers well." Conflict on a team doesn't go away by refusing to acknowledge it. Instead, it becomes bigger, more corrosive, and more destructive. Deal with the dragon when it's small rather than waiting for it to carry your house away.

2. **You owe your teammates your support AND your opposition.** General George S. Patton—no stranger to conflict himself—famously said, "If everyone is thinking alike, then somebody isn't thinking." Just like muscles require tension to grow,

individuals and teams require active opposition in the way of alternative views being offered to point out potential errors, sharpen their thinking, and achieve synergies. Iron sharpens iron by clashing not cuddling, so don't deny your teammates the benefits of your different perspectives.

3. **Keep the conflict in the ring.** Just like a boxing ring, healthy conflict requires boundaries. Express disagreements openly, keep them in the room, and leave them there when the bell rings. Nothing contributes to a toxic culture more than disagreements being whispered behind closed doors rather than expressed and dealt with openly. Healthy conflict is not a license to be a pot-stirrer.
4. **Assume positive intent.** When someone takes issue with your idea, resist the temptation to assume bad motives. Attribute to them the same motive you would ascribe to yourself under the circumstances—namely, that you have a different perspective you'd like to share for the betterment of the team—and extract whatever value you can from their observation either to make your idea better or abandon it if necessary.
5. **Attack the issue, not the person.** The corollary to Rule



No. 4 is that you must not only assume positive intent but *embody* it as well. This means separating the issue from the person and attacking the former while respecting the latter. It also means avoiding “getting historical” by bringing up previous disagreements to score points instead of solving the problem.

6. **Seek first to understand, then to be understood.** The fifth habit from Stephen Covey’s *7 Habits of Highly Effective People* is as critical for healthy conflict among teams as it is for individual effectiveness. Listen deeply for the essence of what your colleague is trying to say—perhaps repeating it back to them to make sure you got it right—rather than looking for the first opening to sneak in your rebuttal. When you understand the direction they’re coming from, disagreements over next steps become much easier to navigate.
7. **Agree to disagree.** Finally, if there’s one rule of healthy conflict I wish our nation could embrace, it’s that reasonable people can and should disagree *without becoming unreasonable* about it. Some of the dearest people in the world to me have drastically different ideas about all manner of things—different from me and from each other—and I cannot imagine how much poorer my life would be if they canceled me out of their lives for my own differing views. You win some arguments and lose some in the workplace just as in politics, and healthy conflict requires you to handle both with grace and charity.

My favorite observation about healthy conflict comes from the film *Jerry Maguire*, when Jerry’s last remaining client turns to his frustrated agent in a pivotal scene and says, “You think we’re fighting. I think we’re finally talking!” What rules *would you add* to the list above to help your team start “finally talking” to achieve its goals together? ☸

Mike Tooley is a founder of Upstream Principles LLC, which provides individual coaching programs tailored for the unique needs of business owners, CEOs, and organizational leaders as well as workshops and custom presentations for their teams. Mike retired from Ice Miller LLP in February 2024 and is giddy to report he no longer keeps track of his days in six-minute increments!

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IMMIGRATION IN INDIANA AND OTHER THINGS TO CONSIDER WHEN REPRESENTING NON- CITIZENS

By Haddy Rikabi



As the 2021 American Community Survey shows, 378,953 Hoosiers are foreign-born nationals.¹ Over half that number are non-citizens. These individuals often face bias, language barriers, immigration concerns, and other unique situations that make accessing Indiana's legal system an intimidating process for both the client and their representation.

To make matters worse, Indiana faces a severe shortage of immigration lawyers. Only 31% of non-citizens facing deportation in immigration court in Marion County have a lawyer representing them.² No one should be refused representation or legal relief solely because of their immigration status or being a non-citizen. The severe shortage of lawyers who practice immigration law is profound and can be addressed with more lawyers ready to serve non-citizens. If lawyers discover they are representing a non-citizen, they should be aware of their client's immigration status and related interests.

WHO ARE THE NON-CITIZENS IN INDIANA?

In 2021, about 5.6% of Indiana's population was comprised of foreign nationals: 165,105 were naturalized citizens and the remaining 213,848 were non-citizens.³ An estimated 39% of non-citizens in Indiana had no lawful immigration status.⁴

The largest country of origin for immigrants in Indiana is Mexico, with more than 25% of the foreign-born population, followed by India (7%), Myanmar (4.6%), and China (4%).⁵ More than four-fifths of foreign-born Hoosiers report speaking English well,⁶ but access to justice for non-English speaking immigrants remains a significant issue.⁷ Nearly 200,000 Hoosiers do not speak

"Lawyers are not required to know the exact consequences of crimes, but upon discovering the person who is being represented is not a citizen, the client must be advised that a conviction may revoke a status or cause deportation."

English, with Spanish being the most spoken native language.⁸

ISSUES TO CONSIDER FOR NON-CITIZENS

One of the most important aspects to consider when working with a non-citizen client is to see whether their current case will affect their immigration status. Many legal proceedings, especially those involving criminal law, may jeopardize a client's immigration status, lead to deportation, or prevent a non-citizen from gaining or changing an immigration status.⁹

For example, a criminal defense lawyer was found deficient in providing legal representation because he failed to inquire whether his client was a United States citizen.¹⁰ The client's admission of guilt to a theft-related crime and one-year prison sentence, even with its suspension to probation, was classified as an "aggravated felony" under immigration law that resulted in a permanent bar from any lawful immigration status in the United States.¹¹

Lawyers are not required to know the exact consequences of crimes, but upon discovering the person who is being represented is not a citizen, the client must be advised that a conviction may revoke a status or cause deportation.¹² While discovering the potential consequences of a client's case, be careful not to divert too much attention onto a client's immigration

status. Only reveal information that is pertinent to the proceedings and that does not prejudice the client.¹³

It is also important to consider language barriers when working with foreign-born clients. Remember that 200,000 Hoosiers do not speak English proficiently. Lawyers can and should use an interpreter to communicate with foreign-born clients who are not proficient in English.¹⁴ Indiana courts regulate certified legal interpreters who interpret for non-English-speaking parties in state legal proceedings.¹⁵ There is a directory of certified legal interpreters available for 140 languages.¹⁶

However, not all courts will be able to provide an interpreter due to cost or availability of certain languages. The struggle to find competent interpreters has delayed legal proceedings and challenges in finding one can jeopardize rights.¹⁷ For interpretation outside of court proceedings, attorneys who do not share a language with the client should use competent, qualified interpreters.¹⁸ If an attorney cannot afford to utilize an interpreter or is unable to provide one, she should refer the client to an attorney who can provide one or communicate in the client's language.¹⁹

AVOIDING BIAS IN REPRESENTING NON-CITIZENS

A case party's immigration status—or lack thereof—may divert litigants' attention or invite bias against

awarding relief solely for not having a lawful immigration status. As such, Indiana courts advise against introducing a party's immigration status unless it is relevant to the proceedings.²⁰

However, a party's immigration status may matter in some instances and may need to be disclosed when seeking relief in state court that will affect an immigration-related legal proceeding. For example, one of the most in-demand types of immigrant visa applications, Special Immigrant Juvenile Status, offers lawful permanent residence to children who lack any status to remain legally in the United States.²¹ A state court order of a minor child's custody that involves a finding of abandonment, abuse, or neglect from at least one of the child's parents, along with other factual findings, is needed before filing this immigration application.²²

Despite the availability of Special Immigrant Juvenile Status and its dependency on state court orders, some courts in Indiana have been reluctant to grant such orders due to bias against non-citizens and the nature of these proceedings involving parties who are non-citizens without a legal status.²³ Yet the lack of an immigration status or the facts involving the allegation of abuse, neglect, or abandonment that occurred in a foreign country should not affect the ability to file a state court petition in Indiana courts to enable this application.²⁴ Indiana

"Providing a more open legal environment can help connect non-citizens to legal representation and make Indiana more welcoming to them."

case law has consistently informed state courts to accept custody or guardianship petitions requesting fact findings for use in this type of visa application, as the core relief sought is no different than other family law cases.²⁵

CONCLUSION

No one should be refused representation or legal relief solely because of their immigration status

or for being a non-citizen. If taking on a case involving a non-citizen or potential immigration relief, ensure the client is fairly advised of potential immigration consequences. Likewise, a client's difficulty in understanding English should not bar them from representation and an interpreter should be provided if a lawyer intends to hear their case. Providing a more open legal environment can help connect non-

citizens to legal representation and make Indiana more welcoming to them. 

Haddy Rikabi is the senior immigration attorney with Catholic Charities Archdiocese of Indianapolis Immigration Legal Services. He previously worked in immigration law in law firms and Catholic Charities Archdiocese of New Orleans.



ENDNOTES

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2. TRAC Immigration, *Individuals in Immigration Court by Their Address, Pending Cases With and Without Attorneys* (Aug. 2023), <https://trac.syr.edu/phptools/immigration/addressrep/>.
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7. More than 200,000 Indiana residents were reported in the 2020 Census to be English limited. Ind. Jud. Branch Div. of State Ct. Admin., About the Program, <https://www.in.gov/courts/admin/diversity/language-access/about-interpreter/> (last accessed November 20, 2023).
8. About 60% of non-English proficient Indiana residents report speaking Spanish as their primary language. 2015 U.S. National Limited English Proficient (LEP) Population Maps - Number by State (Indiana), available at <https://www.lep.gov/maps>.
9. *Bobadilla*, 117 N.E.3d 1272, 1283 (Ind. 2019) (citing *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010)).
10. *Bobadilla*, 117 N.E.3d at 1277 n.3 (citing 8 U.S.C. § 1227(a)(2)(A)(iii)).
11. 8 U.S.C. § 1101(a)(43)(G).
12. *Bobadilla*, 117 N.E.3d at 1283-84.
13. *Escamilla v. Sheil Sexton Co.*, 73 N.E.3d 663, 664-665 (Ind. 2017) (citing Ind. Evid. R. 403).
14. ABA Formal Op. 500: Language Access in the Client-Lawyer Relationship (Oct. 6, 2021).
15. Ind. Rules of Court, Interpreter Code of Conduct and Procedure & Disciplinary Process for Certified Court Interpreters & Candidates for Interpreter Certification (last amended Jan. 1, 2021), available at <https://www.in.gov/courts/rules/interpreter/index.html>.
16. Ind. Jud. Branch Div. of State Ct. Admin., "Find a Registered Court Interpreter," <https://courtapps.in.gov/interpreters>.
17. See *Ponce v. State*, 9 N.E.3d 1265, 1268-69 (Ind. 2014) (identifying delays of trials or non-prosecution of crimes due to inability to provide interpreters); Ind. Supreme Court, Language Access Advisory Comm., Language Access Plan for the Indiana Judicial Branch (Feb. 2019).
18. See ABA Formal Op. 500, at 6-8.
19. *Id.* at 8 (citing Model R. Prof. Conduct, R. 1.16(a)(1)).
20. *Escamilla*, 73 N.E.3d at 669 (trial court's denial of worker's compensation to a plaintiff because of his lack of an immigration status was prejudicial).
21. 8 U.S.C. § 1101(a)(27)(J); 8 C.F.R. § 204.11(b).
22. 8 C.F.R. § 204.11(b).
23. See e.g., *In re Xitimul*, 137 N.E.3d 945, 952 (Ind. Ct. App. 2019) (reversing Circuit Court Judge's refusal to hear a guardianship petition solely because all parties involved were non-citizens); *Bonilla v. Maldonado*, 127 N.E.3d 1181, 1183 (Ind. Ct. App. 2019) (reversing Circuit Court Judge's refusal to make immigration-related findings for paternity claim solely because they were sought for an immigration benefit).
24. *In re Luis*, 114 N.E.3d 855, 857 (Ind. Ct. App. 2018).
25. *In re Kevin Yafet Mendoza Bonilla*, 127 N.E.3d 1181, 1185-1186 (Ind. Ct. App. 2019).



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CONTINUING THE CONVERSATION ON ATTORNEY ATTIRE



In the December 2023 issue of *Res Gestae*, we shared Jon Pactor's article "The Ethics of Attorney Attire" and asked you to join in on the conversation. Attire is constantly changing and updating, and we wanted to capture as many perspectives and viewpoints as possible.

Here are your responses.

JOHANNAH ANDERSON

As a non-traditional law student, I was horrified during my 1L orientation when we were asked to come in business formal for our final orientation day and there was a surplus of crop tops and mid-drifts across the atrium. Our school has a surplus of non-traditional students, and it was shocking to see what was considered business formal. We are encouraged to come to class in business casual. One professor told us during orientation that we should dress in a way that if we were to run into someone at any time that we would like to network with, we wouldn't be ashamed of how we look. We should dress in a way that represents who we are and what we can do. I see court the same way: If you show up in court looking sloppy, people will assume your work is sloppy. I have worked in the corporate world for years, and I will hire someone who looks like they dressed for the interview every time over someone who shows up with a half-effort outfit. I wouldn't trust my lawyer if they couldn't or, worse, wouldn't put the effort into a professional outfit. What else are they not putting full effort into? What else do they not understand the nuances of?

HON. WILLIAM BOKLUND

As a child of the 1960s I cannot help but have an opinion on the question of attire in professional responsibility. During my college years, like many others I dressed down, wearing long hair, dirty blue jeans, and sloppy t-shirts. Even for a while in law school that was my general attire. I noticed though that as time passed, more and more of my fellow students began to appear in suits, ties, and with shorter hair. Eventually, when I took a clerkship, I grudgingly did the same.

When I began practicing law with a lawyer just a year older than me, we often reverted to our college clothes on days when not appearing in court. On one such day, while wearing

nasty blue jeans, a flannel shirt, and work boots, I was called to court unexpectedly by a bailiff. I urged him to call another deputy prosecutor who was dressed appropriately. He simply said, "Get over here; the judge wants you. It's your case."

With no time to change clothes, I appeared in the Circuit Court Commissioner's courtroom to address a case in which a defendant had been arrested for failure to appear. Everyone (not an exaggeration) stared at me. The judge found the defendant in contempt and ordered him incarcerated. When the jailer arrived to take the man into custody, he said something to the judge, who waved his hand in the general direction of both of us. I guess I looked sloppier, less lawyer-like, because the jailer told me to stand up and put my hands behind my back. I jumped up and said, "Not me! Him!" That brought a roar of laughter from the gallery. The jailer looked at the judge for confirmation. He nodded, and the jailer took the defendant into custody instead of me.

I know my story is an extreme one, but it is telling. In 1851, a populist movement brought forth a new Indiana Constitution, Section 21 of which provided: "Every person of good moral character, being a voter, shall be entitled to admission to practice law in all Courts of justice." After that, without any training at all, any man walking around in a courthouse might have been a lawyer. It took until 1935 to reverse that madness and begin to make the practice of law a profession again.

Apparently, being not quite as subject to fads as Americans, the British barristers still don wigs and black robes when appearing before similarly attired judges who sit at an elevated bench in often

majestic, beautifully wood-trimmed courtrooms. When asked why, one barrister said, "The wigs are part of a uniform that create a visual separation between the law and those being brought up before it."

In my later years, I served as a Superior Court Judge and then as a Senior Judge, for together almost 30 years. I have seen a terrible trend that reduces majestic courtrooms to the equivalent of Holiday Inn banquet rooms with judges sitting at eye level with everyone seated in the room. Now, should we lower the standard for lawyer apparel? It feels like we are drifting backward toward 1851 and Section 21.

In short, I strongly believe that appropriate attire should be an ethical responsibility.

JOHN CONLON

When I was a student at IU Bloomington, I worked for a lawyer who had somewhat of a maverick streak. While he would wear a suit and tie to court, he might not wear socks. At an emergency hearing of some sort, he showed up in court wearing plaid Bermuda shorts. The court was not pleased. Can't recall if he was sanctioned or not but I do know the incident was written up in the local paper. I won't mention the attorney's name although he has been dead for many years.

A few years later in the mid-1970's, I was an associate in the New Albany office of a Louisville law firm. One July day I had a hearing on a criminal matter in the Harrison-Crawford Circuit Court in Corydon. As I was leaving the office, the

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partner in charge of the office told me that when I got there to be sure to leave my coat and tie in the car. When I looked puzzled, he said, “because if you don’t, you will be the only one in court wearing a coat and tie.” Sure enough when I got to the court room, both the circuit judge and the prosecutor were in shirtsleeves.

I guess both stories support the notion that whether you like to dress up or dress down when making a court appearance, for the sake of your client, you probably should dress to at least look like you fit in.

DARRIN GOWAN

What a fascinating topic. Would we ask a police/fire officer witness to appear in their dress uniform, or in “civilian” clothes? Would we ever see a physician on the stand in a white lab coat, or a surgeon in scrubs? Obviously, the physical appearance of a witness is not an analog to the responsibility of an attorney in this conversation, but it does go to the lengths to which a counselor will craft presentation to the court and jury to paint a certain picture.

And what of certain non-Euro cultures whose highest and best professional attire options may look like leisure wear to an American juror? There are formal outfits far short of a white collar or cross on a chain that might evidence someone as a religious cleric in some cultures. The court might never know. Attire only begins to delve into attorney appearance, as we’ve seen many courts wrestle with cultural hairstyles, religious headwear and jewelry, tattoos and piercings. A dress code that attempts to legislate, or even provide guidelines, on “acceptable” or “professional” attire might rival the length of the Tax Code.

Even a court’s best efforts at general conformity to a vague standard might be unknowingly thwarted in good faith. In *My Cousin Vinny*, a sincere attempt to obtain a formal suit for a court appearance nearly gets an attorney cited for contempt as the last-ditch effort (resulting in a garish maroon mid-70s wedding tuxedo) is taken by the court as mocking. I can’t imagine a formal dress code that could be specific enough to be universally effective. And that doesn’t even consider the minefield that is gender-specific clothing these days. A female attorney appearing in a jacket and pants, with a white blouse and necktie, would be viewed as perhaps an uncomfortable yet still professional choice, but a male-presenting counselor in a dress or gown might cause more distraction than empathy in the jury.

The standard I see as most effective is the simplest and most basic prohibitions. Whatever you wear must be clean, not malodorous, free from any logo or printed message, not torn. (But again, who will decide what is an odor or a scent? Or what designer may have chosen to portray a very quality piece as intentionally torn?)

KEN NUNN

I have been a lawyer for 56 years. I read with great interest the article “The Ethics of Attorney Attire” and I agree 100%.

I currently have 35 dark blue suits... custom made. I would never, never, never go to court without wearing one of my dark blue suits. I always wear a white shirt and I always wear a tie.

In fact, as I dictate this letter, I am wearing a dark blue suit, white shirt, and a tie every day...five days a week. I wear the dark suit every day



at the office because I never know when a client will come in. When I go out to lunch, I want to look like a lawyer.

However, there was a time early in my practice when there was a fashion trend with plaids, polka dots, and all kinds of colorful ties, sports jackets, and pants. Even the judges wore such clothes. I was really glad when the black robes came along. My white shirts are custom made and I usually order them 25 at a time. I always wear a red tie and I buy those red silk ties by the dozen.

Overall, we have 14 attorneys in our office and we have a dress code of white shirts, dark suits, and a tie.

I do dress casually when I come to the office after hours at night and on weekends. My casual attire is a navy blue sports coat and dark grey pants.

NORM TABLER¹

I don’t remember *when* the steady slide toward casual attire began, but I do remember *how* it began. One



day years ago I realized that for weeks I had been seeing associates without ties. That was startling. I asked a fellow partner about it. He reported that management now allowed a lawyer to come to work dressed casually *if it was appropriate for the day ahead*.

I bit, asking how one *knew* if it was appropriate. He said management considered it appropriate if the lawyer's day involved no court appearances, depositions, or meetings with government officials, clients, or client prospects. I didn't share my inner reaction with my partner. It was, *why in the world would I announce to the rest of the firm that I had nothing important going on? Wouldn't it be simpler to send a firm-wide memo declaring that my practice was on the skids and my partnership share should be cut?*

So, I have never dressed casually at the office, not even now in retirement. It's not just that I won't admit not needing to impress a judge or client on any given day.

Everyone already knows that about retirees. It's partly habit. After all, I've been donning suit and tie every workday morning for fifty years.

But it's more than that. I dress up because I *like* to. Wearing a suit and tie was part of what attracted me to the law. Growing up in a small farming community, I yearned to be like the men in town who seemed to be running everything: the bank, hospital, newspaper, electric company, city hall. They all wore suits and ties. It was the uniform of the important.

The same was true of the larger world. President Eisenhower, House Speaker Sam Rayburn, Walter Cronkite—they all wore suits and ties. It was impossible to picture them in any other attire. (OK, Ike used to wear an army uniform, but we were at war for crying out loud!)

I should add Perry Mason to the list. Every week he reminded me that if I became a lawyer, I could expect to wear a suit and tie in the office, as well as in court when facing down slippery opponents like D.A. Hamilton Burger and Lt. Tragg—both of them in suit and tie, by the way. And as a bonus, I would have an office and telephone, as well as a Della Street-like secretary.

All that was in the back, if not front, of my mind in the fall of 1967 when I took pen in hand and applied to law school. Suit and tie were part of the image I aspired to. They remain so today. I don't begrudge my colleagues their casual wear. It's just that for me personally—and paradoxically—casual wear in the office wouldn't be *comfortable* wear.

HON. WILLIAM WILSON

I never thought of proper attire as having a basis in our legal ethics, but in some ways that makes sense.

I can recall a conversation I once had with retired St. Joseph Circuit Court Judge John Montgomery. He expressed disapproval of lawyers going to the office in casual attire. As he put it, people need to look like lawyers are supposed to look. Clients expect it. I saw this principle come up at a mediation I once conducted. One of the attorneys dressed casually, and it sent the wrong message to the other side. The other side felt that the attorney wasn't taking the case seriously since he didn't bother to "dress up." I don't recall the outcome of the mediation, but I know I had to spend quite a bit of time trying to direct that party's focus on the case and off of the attorney.

Being a judicial officer, I find some relief in knowing I need to appear in professional attire each day unless there's a darn good reason. Even when I don't have hearings, I feel uncomfortable in anything less than a sport coat and tie. I'm a public official and need to look like it when I'm walking around the courthouse.

Attorneys have the greater burden—especially women—of trying to figure out whether a wardrobe choice is adequate. I won't ever give fashion advice, but I can offer a thought that my father once said to me: There's nothing wrong with dressing better than the average in the place. Of course, one need not wear a tuxedo to a neighborhood cookout or even a court appearance, but my dad is right. If your professional appearance is a little better than everyone else around you, it says a lot in your favor. ☸

ENDNOTE

1. Excerpted from "Why the law suit fits this lawyer's style," ABA Journal, March 21, 2019, <https://www.abajournal.com/voice/article/the-law-suit-it-suits-my-style>.

By Joel Schumm



SPEEDY TRIALS, IDENTITY DECEPTION, AND MORE

In December, the Indiana Court of Appeals issued published opinions addressing, among other things, speedy trials and identity deception. This column summarizes those cases as well as memorandum decisions involving sentencing waivers, discretion in sentencing after revocation, and belated appeals.

INADEQUATE TRIAL COURT RECORDS CONTRIBUTE TO REVERSAL FOR SPEEDY TRIAL VIOLATION

The defendant in *Hoback v. State*, No. 23A-CR-411, 2023 WL 8793245 (Ind. Ct. App. Dec. 20, 2023), bore the burden under Criminal Rule 4(C) to show that he was not brought to trial within one year and that any delay was not caused by him, congestion of the court's calendar, or an emergency. Delay cannot be charged to a defendant for "absent or missing" docket entries. *Id.* at *3.

The majority found the trial court's record for delay past one year "woefully inadequate"; docket entries, such as "[a]dditional dates requested" or that the trial was "cancelled" for the reason "[o]ther," did not specify which party sought the delay. *Id.* at *4. Moreover, the entry cancelling the jury trial did not reset the **trial date**, which would have triggered an obligation to object on Rule 4(C) grounds if the new date was beyond the time limit. *Id.* Put another way "Hoback did not waive his discharge claim by failing to object to the order setting a status conference outside the one-year time period." *Id.*

Judge Felix dissented. First, he would have found the claim waived based on a lack of

cogent argument on some points and defense counsel's otherwise "significant noncompliance with Appellate Rule 46," which "substantially impede[d]" review of the claim. *Id.* at *6. Moreover, he believed the defendant "acquiesced in, if not requested, the delay." *Id.* at *5. Unlike an earlier reversal in which the CCS did not "provide any insight as to why the case was reset," one entry was "signed by both counsel and at least three docket entries from the court explain[ed], albeit not in great detail, why the trial was cancelled and a status conference reset." *Id.* at *7.

One can hope for better clarity going forward. Beginning January 1, 2024, Criminal Rule 4.1(A)(4) requires: "When granting or ordering a continuance, the court

must designate whether the delay is excluded from the Rule 4 time period due to the act of the defendant, court congestion, or emergency."

SPEEDY TRIAL CLAIM WAIVED

In a Criminal Rule 4(B) case, *Miller v. State*, No. 23A-CR-1793, 2023 WL 9010596, at *1 (Ind. Ct. App. Dec. 29, 2023), the trial court entered a congestion order vacating Miller's trial three days before his scheduled trial date because of a trial in another case. After his case was scheduled for a date beyond the seventy-day deadline, Miller moved for discharge.

The Court of Appeals found his claim waived. First, the Court of Appeals rejected Miller's claim that no objection was required

because it was impossible to reschedule the trial within the Rule 4 deadline. Rather, because the congestion order was entered a few days before Miller's speedy-trial deadline, he was required to object. *Id.* at *2. Second, Miller's pro se letters objecting "to any and all continuances" were immaterial because "once counsel is appointed, a defendant speaks through his counsel and the trial court is not required to respond to the defendant's pro-se requests or objections." *Id.* at *3.

IDENTITY DECEPTION CONVICTION UPHeld UNDER 2021 STATUTE

Under an earlier version of the identity deception statute, Indiana courts have reversed convictions when the defendant did not use



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identifying information of a real person, such as using a fictitious name. *See Brown v. State*, 868 N.E.2d 464 (Ind. 2007); *Duncan v. State*, 23 N.E.3d 805 (Ind. Ct. App. 2014), *trans. denied*.

Although the defendant in *Kendall v. State*, No. 23A-CR-1473, 2023 WL 9010711 (Ind. Ct. App. Dec. 29, 2023), relied on those cases, the Court of Appeals upheld his conviction under the statute, which was amended in 2021.

Kendall told police his name was “Tyler Cliver” and his date of birth was “August 3, 1988.” *Id.* at *1. Although the date of birth was correct, the name was not.

Under the amended statute, identity deception occurs when “a person who, with intent to harm or defraud

another person, knowingly or intentionally obtains, possesses, transfers, or uses identifying information to profess to be another person[.]” Ind. Code § 35-43-5-3.5(a) (court’s emphasis). The legislature also amended the definition of “identifying information” to include “information, *genuine or fabricated*, that identifies or purports to identify a person, including: (1) a name, address, date of birth...” Ind. Code § 35-43-5-1(i), (court’s emphasis). Although the key terms are not defined in the statute, the Court of Appeals provided dictionary definitions of genuine, fabricate, and purport.¹

Based on these amended statutes, the Court of Appeals affirmed the conviction because it could not “say that the current version of the

statute requires that the identifying information must coincide with any real person or an existing human being.” *Id.* at *7.

MEMORANDUM DECISIONS

Effective January 1, 2023, memorandum decisions “may be cited for persuasive value to any court by any litigant.” Ind. Appellate R. 65(D)(2). This column ends with a few noteworthy memorandum decisions.

SENTENCING WAIVERS IN PLEA AGREEMENTS

In *Hook v. State*, No. 23A-CR-820, 2023 WL 8946141 (Ind. Ct. App. Dec. 28, 2023) (mem.), the parties entered into a plea agreement that included the following provision:

you are expressly waiving your right to such appeal under Appellate Rule 7, and are expressly waiving your right to appeal your sentence on the basis that it is erroneous or otherwise challenge the appropriateness of your sentence, or on the basis that the court abused its discretion so long as the Judge sentences you within the terms of this plea agreement.

Id. at *2.

Nevertheless, the trial court told the defendant at the guilty plea hearing: “You are not agreeing to your sentences, so you don’t give up your right to appeal your sentences.” *Id.* at *1. The court made a similar remark at sentencing, to which the State objected, citing the sentencing appeal waiver provision. *Id.* The trial court repeated the mis-advisement and soon after appointed appellate counsel.

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The defendant challenged his sentence on appeal under Appellate Rule 7(B). The Attorney General filed a motion to dismiss, relying on *Davis v. State*, 207 N.E.3d 1183 (Ind. 2023), a 3-2 opinion based on similar facts, which held the defendant must pursue his claim on post-conviction relief and not direct appeal. The motions panel denied the motion to dismiss, requiring the State to file a brief and raise the issue on cross-appeal. *Hook*, 2023 WL 8946141, at *2.

After this considerable time and expense, the Court of Appeals ultimately dismissed the appeal, noting that it “retains the authority to reconsider rulings by the motions panel while an appeal remains pending.” *Id.* at *2.

TRIAL COURTS MUST EXERCISE DISCRETION WHEN IMPOSING SENTENCE AFTER VIOLATION

After finding a defendant has violated the terms of his community corrections placement, the trial court stated it “can’t modify the terms” of the “agreed sentence” and imposed the sentence provided in the original plea agreement in *Gross v. State*, No. 23A-CR-734, 2023 WL 8911218 (Ind. Ct. App. Dec. 27, 2023) (mem.). The Court of Appeals reversed:

The trial court is bound by the terms of a plea agreement when initially sentencing a defendant but when a defendant subsequently violates the terms of that sentence, the trial court has discretion to determine what sanction to impose under the probation revocation statute. When the trial court indicates it has not exercised that discretion, reversal and remand is warranted.

Id.



DISMISSAL OF BELATED APPEAL DIVIDES COURT OF APPEALS

In *Kennedy v. State*, No. 23A-CR-565, 2023 WL 8827739 (Ind. Ct. App. Dec. 21, 2023) (mem.), the defendant filed a written motion requesting appointment of appellate counsel less than two weeks after his sentencing. The trial court granted the motion more than three months later, and appellate counsel filed a notice of appeal four days later.

Because the notice was not filed within thirty days of the final judgment (sentencing), the Court of Appeals dismissed, insisting that the defendant should have availed himself of the provisions of Post-Conviction Rule 2 for a belated appeal. *Id.* at *2.

Judge Pyle dissented, noting the delay that led to the defendant’s untimely appeal was caused by the trial court’s untimely appointment of appellate counsel. Invoking the court’s ability to deviate from the rules under Appellate Rule 1, he would have decided the appeal on its merits. *Id.* at *3. ☞

ENDNOTE

1. The opinion includes definitions from American Heritage and from Black’s Law Dictionary. In evaluating a vagueness claim in *Brown*, 868 N.E.2d at 467, “which hinges upon how ordinary people understand statutory language,” the Indiana Supreme Court remarked that it preferred “to consult standard dictionaries, not a specialized legal dictionary as cited by the State.”

By Adrienne Meiring¹



IT'S NOT A PARTY IF IT'S EX PARTE: A REVIEW OF THE EX PARTE RULES

Domestic relations and juvenile matters raise special challenges for practitioners and judges. Highly emotional and often contentious, these cases sometimes present emergencies (both perceived and actual), and there is a temptation to cut corners to address matters quickly or to protect children from repeated interviews. However, the hallmark of our justice system is to provide all interested parties with a fair opportunity to be heard before an impartial judicial officer.

The Office of Judicial and Attorney Regulation recently has seen a rise in complaints about improper ex parte communications in domestic relations and juvenile cases. Indiana Professional Conduct Rule 3.5(b) provides, “A lawyer shall not...communicate ex parte with [a judicial officer] during the proceeding unless authorized to do so by law or court order...”² Indiana Judicial Conduct Rule 2.9 sets forth in more detail the ethical guideposts as to when ex parte communications are authorized or prohibited.³

Under Rule 2.9(a), a judge may not “initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter.”⁴ An exception exists for communications for “scheduling, administrative, or emergency purposes.”⁵ To come within this safe harbor: (1) the communication must not pertain to substantive matters; (2) the judge must reasonably believe that no party will receive a procedural or tactical advantage from the communication; and (3) the judge must promptly notify all parties about the communication and give them an opportunity to respond.⁶

Three recent disciplinary matters—*Matter of Day*,⁷ *Matter of Meade*,⁸ and *Public Admonition of Referee Johnston*⁹—highlight the ethical traps that cause attorneys and judges ex parte problems.

ETHICAL TRAP #1—MEETINGS IN CHAMBERS

In-chambers meetings pose a particular risk for ex parte issues. In *Matter of Meade*, the Indiana Supreme Court imposed a seven-day suspension on a judge who conducted an unrecorded CHINS hearing in chambers without allowing an unrepresented paternal grandmother-intervenor (who was

"The Office of Judicial and Attorney Regulation recently has seen a rise in complaints about improper ex parte communications in domestic relations and juvenile cases."

in the hallway) to be present.¹⁰ During this hearing, the judge also considered and ruled on three oral motions without giving the intervenor an opportunity to be heard. The foster parents' counsel appeared telephonically for the hearing, but after the hearing concluded and the attorney ended the phone call, the judge asked the mother's counsel to assist the court reporter with a minute entry regarding the hearing. Foster parents' counsel later communicated to counsel for the Department of Child Services (DCS) that her recollection of the judge's oral rulings was different, but her proposed changes were not incorporated into the final order.¹¹ In issuing the sanction, the Supreme Court explained that the judge's conduct "diminish[ed] public confidence in the judiciary" and "erode[d] the public's perception of the courts as dispensers of impartial justice."¹²

The *Meade* case serves as a caution for judges and attorneys who participate in meetings in chambers. When substantive matters are discussed in chambers, judges need to make sure to include all parties or their representatives, including those unrepresented by counsel. Even if a judge and attorney are not discussing substantive matters about pending cases while alone in the judge's office, they should be aware of the perception problem with this practice. Other parties may question what was discussed.

ETHICAL TRAP #2—EMAILS AND UNSOLICITED CORRESPONDENCE

Although email and other electronic communications provide an easy way to quickly notify the court of scheduling or procedural issues, these types of communication can pose ethical headaches. If judges and attorneys become too familiar corresponding electronically, they may forget to include a necessary party in the communication, which could result in a violation of the ex parte rules. Judicial officers and attorneys must be mindful that judicial officers have

a duty to notify all parties about communications received, even when the communication pertains solely to scheduling or procedural matters, as the other parties must be given an opportunity to respond.¹³

Unsolicited letters sent only to the court from parties and third persons also can pose ethical issues for judicial officers if appropriate remedial measures are not taken. The judicial officer must provide copies to all parties and give them a chance to respond. Attempts to mitigate the damage of an unauthorized ex parte substantive

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communication by refusing to review it and destroying the material is insufficient compliance under Rule 2.9.¹⁴

Matter of Day illustrates the ethical peril of failing to adhere to these principles, as the court publicly reprimanded a judge for repeatedly engaging in unauthorized ex parte communications (primarily emails) with DCS attorneys without notifying guardian ad litem (GALs), court appointed special advocates (CASAs), and unrepresented parties.¹⁵ The judge also was reprimanded for shredding, without reading, ex parte correspondence sent to the judge by represented parents, rather than providing copies to all parties.¹⁶ The court took the opportunity in the decision to re-emphasize the necessary requirements for the scheduling, administrative, or emergency exception to apply; and the required judicial actions to take after receiving an unsolicited ex parte communication.¹⁷

The *Day* decision is a reminder to judicial officers and attorneys to be cautious with emails and other electronic communications. Attorneys and judges should make sure all parties, including GALs or CASAs, are carbon copied in these communications. And, if a party cannot be copied on the communication due to lack of electronic access, the judge or opposing attorney must ensure the individual promptly receives a written copy of the communication, so the individual can respond, if necessary. Judges also should have procedures in place, and discuss them with staff, about how to handle unsolicited ex parte communications.

ETHICAL TRAP #3—WHEN THE INTENT TO PROTECT CHILDREN LEADS TO NONCOMPLIANCE

Undeniably, the work of family and juvenile law practitioners and judges is difficult. No one wants to see children unnecessarily traumatized by repeated interviews or questioning on sensitive topics. For this reason, the law permits certain exceptions to normal proceedings to lessen the impact on children, such as *in camera* interviews of children by judges.¹⁸ Nonetheless, failure to adhere to the legal requirements authorizing

"Nonetheless, failure to adhere to the legal requirements authorizing exceptions or creating an exception when one does not legally exist not only creates due process issues, but it may lead to claims of ethical misconduct. This is true even if the judicial officer's intent is to protect a child from the rigors of family law litigation."

"Just remember—tailor your conduct to avoid perception problems, include all parties on communications sent to the judge, and strictly adhere to the legal requirements when asserting an exception to the ex parte rules."

exceptions or creating an exception when one does not legally exist not only creates due process issues, but it may lead to claims of ethical misconduct. This is true even if the judicial officer's intent is to protect a child from the rigors of family law litigation.

The matter of *Public Admonition of Johnston* serves as a cautionary tale regarding this ethical trap. In *Johnston*, a referee agreed to a public admonishment from the Judicial Qualifications Commission for "temporarily suspending a father's parenting time with his minor daughter based, in part, on notes received from a Guardian Ad Litem (GAL)" that the referee "did not circulate to the father and his counsel or allow either to review when they requested to do so."¹⁹

The referee requested the notes when the GAL submitted a report to the court, after the GAL interviewed the child, expressing concerns about the child returning to live with her father. Instead of holding an *in camera* interview with the child, the referee elected to review the notes *in camera* to avoid requiring the child to submit to a second interview in which the child might feel frustrated and traumatized by giving another statement against her parent.²⁰ At a subsequent hearing on a petition to modify custody, the referee temporarily suspended the father's visitation rights and denied counsel's request to review the GAL's interview notes.²¹

The Qualification Commission acknowledged that, while judicial officers may want to modify certain court procedures to alleviate stress on a child, judges still must ensure that proceedings are conducted in a manner consistent with the Code of Judicial Conduct, which includes refraining from engaging in or considering ex parte communications not otherwise authorized by law.²² Since no statute or rule allows for *in camera* review of a GAL's notes, the referee was in violation of Judicial Conduct Rule 2.9.

By remaining conscious of these common ethical pitfalls, legal practitioners and judges can avoid ex parte problems. Just remember—tailor your conduct to avoid perception problems, include all parties on

communications sent to the judge, and strictly adhere to the legal requirements when asserting an exception to the ex parte rules. ☯

Adrienne Meiring is the executive director of the Office of Judicial and Attorney Regulation.

ENDNOTES

1. Special thanks to Brandon Rickey, 3L at IU McKinney School of Law, who assisted with this article.
2. Ind. Prof. Cond. R. 3.5 (2023).
3. Ind. Prof. Cond. R. 2.9 (2023).
4. *Id.*
5. *Id.*
6. *Id.*
7. 206 N.E.3d 371 (2023).
8. 200 N.E.3d 448 (Ind. 2023).
9. *Public Admonition of Referee Barbara Johnston*, St. Joseph Probate Court (July 1, 2022) at www.in.gov/courts/jqc/admonitions/.
10. 200 N.E.3d at 450.
11. *Id.*
12. *Id.* at 451.
13. Attorneys should be mindful that Prof. Cond. R. 8.4(f) prohibits attorneys from knowingly assisting a judge in violating the Code of Judicial Conduct.
14. Ind. Prof. Cond. R. 2.9(B) (2023).
15. *Matter of Day*, 206 N.E.3d 371 (Ind. 2023).
16. *Id.*
17. *Id.*
18. See I.C. 31-17-2-9.
19. *Johnston* at www.in.gov/courts/jqc/admonitions/.
20. *Id.*
21. *Id.*
22. *Id.*

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By Dakota C. Slaughter
and Curtis T. Jones



PREMATURE DISMISSAL, LACK OF FINAL JUDGMENT, AND MORE

The Indiana Supreme Court issued two civil opinions in December 2023, which flowed from the same two cases where the court had granted transfer earlier in the month. The Indiana Court of Appeals published 11 civil opinions that month. This article highlights the two Supreme Court opinions and three opinions from the Court of Appeals.

INDIANA SUPREME COURT

NOT SO FAST: PREMATURE DISMISSAL OF APPEAL

Taylor v. Allen County Board of Commissioners, 222 N.E.3d 946 (Ind. 2023)—A pro se incarcerated individual filed a civil action against a county board of commissioners, that county's public defender's office, and two individual public defenders. Following an adverse ruling from the trial court, the individual appealed to the Court of Appeals, where he timely tendered his brief and appendix. The clerk issued a Notice of Defect on the materials, which provided the individual with 20 days to correct the defects. Three days after the notice (i.e., still within period to cure the defects), the Court of Appeals issued an order dismissing the appeal with prejudice. The Indiana Supreme Court granted transfer on December 13, 2023, and vacated the Court of Appeals' order, finding that the appeal was prematurely dismissed.

JURISDICTIONAL JOLT: LACK OF FINAL JUDGMENT FALTERS APPEAL

DeCola v. Norfolk Southern Corporation, Inc., 222 N.E.3d 938 (Ind. 2023)—The underlying dispute involves a quiet title action over property acquired through a tax sale. The new owner moved for judgment on the pleadings, but the former owner opposed, arguing it never received proper notice of any of the proceedings, including the county's decision to tax the property and the tax sale itself. As the response and reply briefings from both parties

included exhibits (i.e., matters outside of the pleadings), the trial court converted the motion into one for summary judgment, as instructed by Trial Rule 12(C). Following the trial court's denial of the converted summary judgment motion, the new owner filed a motion to reconsider, and the former owner filed their own motion for final judgment, seeking summary judgment on all claims. The trial court did not rule on either motion, which renders the motion to reconsider denied under Trial Rule 53.4(B).

The new owner appealed the denial of summary judgment. The Court of Appeals reached the merits and affirmed the denial in a memorandum decision. However, Indiana appellate courts generally have jurisdiction only over appeals from final judgments. With no applicable exception to the final judgment rule, the court granted transfer on December 8, 2023, and dismissed the appeal for lack of jurisdiction, as the trial court's order denying summary judgment was not an entry of final judgment.

INDIANA COURT OF APPEALS

Isgrig v. Trustees of Indiana Univ., No. 23A-CT-1332, 2023 WL 8899620 (Ind. Ct. App. Dec. 27, 2023)—An IU Bloomington student was studying in a campus building when an undisturbed exterior window suddenly and inexplicably fell out of its casing, striking the student. The student filed a negligence claim against the university, relying on the inferential doctrine of *res ipsa loquitor*. The university moved for summary judgment, arguing in part that *res ipsa loquitor* did not apply because the university did not have exclusive control of the window and because the student could not also establish the elements



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of premises liability. The trial court granted summary judgment for the university.

The Court of Appeals reversed, rejecting both of the university's aforementioned arguments. The court found a prerequisite establishment of premises liability "illogical" for triggering application of *res ipsa loquitor*, as that would obviate the need for the doctrine, which is designed to permit an inference of negligence when

direct evidence is lacking. However, remaining consistent with a recent appellate decision (*Griffin v. Menard, Inc.*, 175 N.E.3d 811 (Ind. 2021)), the doctrine only applies in a premises liability case if the injury results from an undisturbed fixture or other component and the incident would not normally occur absent negligence. In that vein, the court further concluded that the designated evidence showed the university exercised exclusive

control and management over the window at the time it fell, and that a factfinder could reasonably conclude the window's falling would not occur absent negligence.

Jennings v. Smiley, No. 23A-CT-303, 2023 WL 8588842 (Ind. Ct. App. Dec. 12, 2023)—A driver struck a pedestrian crossing a two-lane street in Carmel. In discovery, the pedestrian filed a motion to compel certain cell phone data of the driver to determine whether the smartphone navigation app Waze was running at the time of the accident, serving as a potential distraction for the driver. The trial court initially granted the motion to compel, but switched course, later denying the motion to compel upon the driver's motion to reconsider, which raised privacy concerns on discovery into the desired data.

Following an adverse decision resulting from the jury trial, the pedestrian appealed, arguing the denial of discovery into the cell phone data constituted reversible error. The Court of Appeals affirmed, finding no abuse of discretion in the denial of the motion to compel.

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The court concluded that due to the “significant privacy concerns,” *id.* at *3, the burden of discovery outweighed its likely benefit, as the record did not provide sufficient indication that the driver was using her phone at the time of the accident.

Professional Construction, Inc. v. Historic Walnut Square, LLC, No. 23A-PL-654, 2023 WL 8899614 (Ind. Ct. App. Dec. 27, 2023)—
Amidst a construction project for multifamily housing units in Terre Haute, contractual disputes arose between the owner and general contractor. The general contractor demanded arbitration pursuant to the contract, but the owner refused. The general contractor then sued the owner in Wisconsin (where both are headquartered), seeking to compel arbitration. Shortly after, the owner filed an action in Indiana for breach of contract. The contractor responded in the Indiana action with a motion to enforce

the arbitration agreement. The owner opposed the motion, arguing the contractor waived its right to enforce the arbitration provision by filing the earlier action in Wisconsin. The Indiana trial court agreed, denying the motion, and finding that the contractor’s filing in Wisconsin (instead of with an arbitration organization) constituted waiver. The contractor appealed.

As a preliminary matter, the Court of Appeals first held that “at least in the context of the [Federal Arbitration Act], courts are the proper arbiters of whether a party has waived its right to arbitrate by litigation-related conduct,” *id.* at *6, as opposed to the arbitrator. The court also concluded that the contractor’s filing of the Wisconsin action to enforce the arbitration clause was not conduct inconsistent with its right to arbitrate, and thus did not constitute waiver. The Court of Appeals reversed the trial court’s denial of the motion to compel

arbitration and remanded with instructions to stay the litigation pending arbitration. ☞

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