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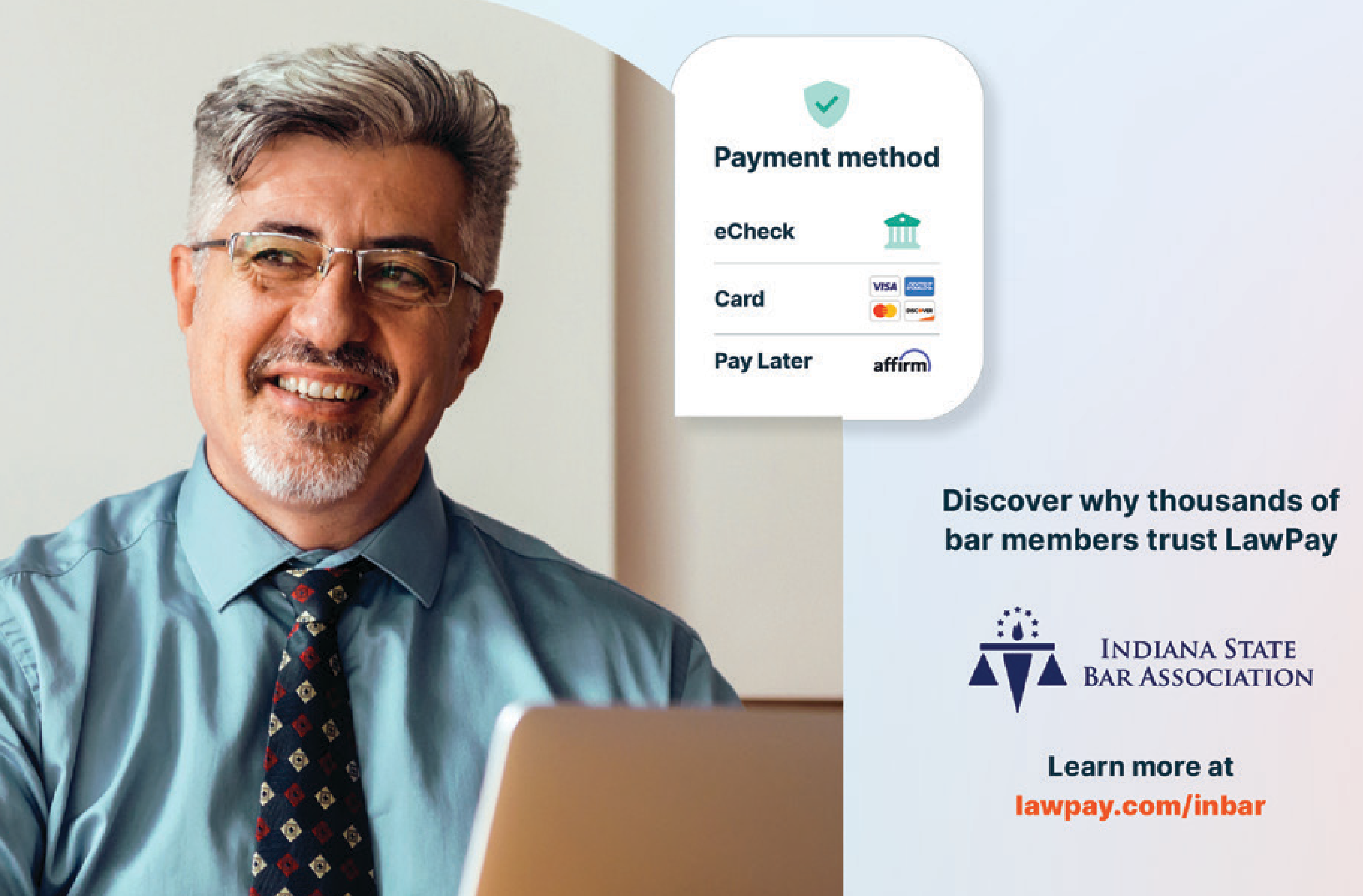

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RES GESTÆ

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12 **IMPROVING INDIANA CIVICS**

Improving Indiana Civics: Strengthening the Legal Pipeline Through Early Engagement
By Abigail Hopf

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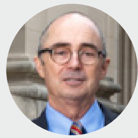

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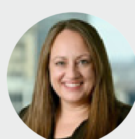

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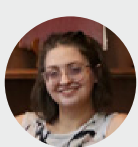

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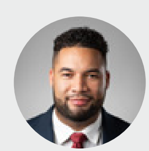

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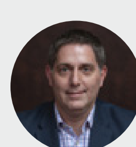

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INSPIRED TO BELONG AND ENGAGE

By John Maley

PRESIDENT'S PERSPECTIVE

Writing this after representing the Indiana State Bar Association at a federal court naturalization ceremony, I am inspired by the 59 new citizens from 23 nations who chose our country and worked to join us as citizens. My brief remarks to these fellow Americans centered on our unique and cherished system of justice based on the Rule of Law. We attorneys, judges, and legal professionals are privileged to be the pillars of our justice system.

Seeing the smiles and tears of these new members of our Indiana communities and these United States of America, it was evident how proud and joyful they are to be among us. And as a small participant in their transformative day, I was overcome with pride and joy in our justice system and the role we all play.

It was a coincidence that the focus of this column would be on membership and engagement in our association (now in its 130th year) after watching these 59 diverse women and men attain citizenship in our nation (now in its 250th year). The success of our nation and our association both turn on *membership and engagement* by persons of good moral character willing to serve in our own ways for the common good.

And so, my fellow Indiana lawyers, judges, and legal professionals, I ask you to join (or rejoin) and engage meaningfully in our association. Together we can fulfill the vision of our association to "serve and advocate on behalf of its members...and the public interest as the independent voice of the legal profession."

WHY NOW?

The association's membership year spans from July 1 to June 30. We are now in the midst of our annual campaign to get 10,000-plus members to renew and several thousand non-members to engage with us. For renewing members, the process is simple: Log in to www.inbar.org and click the "Renew Your Membership Now" link at the top of the page. For new members, joining is also easy: Visit www.inbar.org/join to get started.

WHY ME?

As we all consider our various member-based opportunities, the ISBA is hopefully at the top of our lists for membership and engagement. Membership benefits each of us in many, differing ways; but as the largest legal organization in Indiana, we lawyers, judges, and legal professionals have both the privilege and, I submit, a calling to belong to this association with its singular focus on

> **"The success of our nation and our association both turn on *membership and engagement* by persons of good moral character willing to serve in our own ways for the common good."**

Indiana's legal professionals and our system of justice.

PLEASE ACT

Many of us joined the association and/or our local bar associations at the suggestion, invitation, or for some even the direction of a colleague. This has led thousands of us to more rewarding and enjoyable careers. It's now our turn to be ambassadors of our association and to bring into the tent younger lawyers, colleagues down the hall, counsel we work with across the aisle, and other legal professionals. And I offer three simple tasks for action.

First, for current members, please promptly renew. It's simple, and your modest dues dollars collectively fund our staff and services that benefit us all.

Second, identify several lawyers you know well. Ask each one this week in person, by phone, or email: "I'm an Indiana State Bar Association member, are you?" If "no," talk with them about joining, and share how the ISBA has benefitted you. Let them know how easy it is to join at www.inbar.org.

Third, if you work with any paralegals, encourage them to join (and better yet, cover their dues). Many are unaware they can be members. They benefit greatly from ISBA programs, including continuing legal education and service opportunities.

MEMBERSHIP BENEFITS

There are multiple different ways to get involved and engaged. Consider the following ways to maximize your membership.

1. Sections and Committees: Some of the most significant collaboration within the ISBA occurs at our sections. Examples include Appellate Practice; Business Law; Family & Juvenile Law; General Practice and Solo & Small Firm; Litigation; and Probate, Trust & Real Property. Each offers excellent CLE, networking, and service leadership opportunities.

Likewise, our committees are active and impactful, including for instance our Legal Ethics, Well-Being, and Women in Law committees. These are great ways for lawyers across Indiana to come together with a common interest and purpose.

2. CLE: The ISBA offers outstanding CLE programming, both live and virtually. Speaking opportunities

are regularly available, and niche subjects are offered for attendees. All ISBA members receive unlimited access to our on-demand CLE library, with new programs added regularly.

3. Legal Research/Decisis: Members of the ISBA have access to Decisis for free. This is an intuitive, efficient, and reliable legal research platform. Members like its functionality, ease-of-use, and breadth.

4. Events and Networking: The ISBA offers multiple and diverse events throughout the year in different areas of Indiana. Our professional staff are excellent at planning and executing impactful events. We specialize in facilitated, open concept, activity-based, and cohort-structured events. Among our top recurring events are the Solo & Small Firm Conference, the Paralegal Symposium, the Associate Empowerment Series, and the Annual Meeting.

"It's now our turn to be ambassadors of our association and to bring into the tent younger lawyers, colleagues down the hall, counsel we work with across the aisle, and other legal professionals."

Please join me in serving as an ambassador for our association and our noble profession. Like the new citizens I celebrated with, let's be proud of our membership and joyful in engaging with our fellow members. If I can help you in these efforts, please contact me at jmaley@btlaw.com or 317-432-5509(c). Cheers.

ISBA UPDATE

By Res Gestae Editor

CONNECTING INDIANA LAW STUDENTS TO PRACTICE

The gap between legal education and real-world practice remains a challenge for many Indiana law students. They not only have to figure out what it means to be a professional, but what it means to be a lawyer, and an *Indiana* lawyer on top of that.

The ISBA and its sections and committees are working to bridge the gap by creating intentional opportunities for students to connect with attorneys, find mentors, and gain practical insights. Here's a summary of their work.

LEVELING THE PLAYING FIELD: ETIQUETTE DINNERS

For many students, networking, cocktail receptions, and formal events can feel unfamiliar. ISBA's etiquette dinners are designed to make those first interactions more approachable.

These are structured trainings with a twist—while students are learning the ins and outs of which fork to use or how to handle a cocktail hour, they are putting those skills into practice right alongside Indiana attorneys. Not only do the events level the playing field for first-generation students, but they also provide an intimate, low-stakes environment to learn more about Indiana's legal community, explore different practice areas, and see attorneys and judicial officers as real people (who may also not know which fork to use).

"This program is the epitome of equity. I feel like I can now show up confidently to networking opportunities—something I was a bit nervous about as a first-generation law student," said one attendee. "I was lucky to connect with corporate lawyers in transactional law. We discussed family life, professionalism, imposter syndrome, and helpful tips for realizing my career goals as well as general tips for legal success."

Other students have walked away with externship opportunities and mentors. Some have shifted practice interests. Each leaves with the initial relationships that shape their careers.

EXPANDING ACCESS TO OPPORTUNITIES

ISBA sections and committees have also been tackling financial barriers through scholarships

and stipends. The General Practice, Solo & Small Firm Section, for example, provides lodging and registration for Maurer and McKinney students to attend the Solo & Small Firm Conference. The Bankruptcy and Creditors' Rights Section provides stipends to students externing in federal bankruptcy court, while the Tax Section provides funds for students interested in practicing tax law after graduation.

These opportunities allow students to attend conferences, participate in specialized programming, and connect with practitioners in their areas of interest. Just as importantly, they provide an entry point into professional networks that support them well beyond law school.

BRINGING PRACTICE INTO FOCUS

The ISBA is also helping students better understand what day-to-day practice actually looks like. Through programs like the Pro Bono Committee's walk-in legal clinics, law students can observe real client consultations alongside volunteer attorneys. They gain exposure to a wide range of legal issues—from expungements and evictions to family law and immigration—and begin building practical communication, issue spotting, and decision-making skills.

Job shadowing builds on that exposure. Recently, ISBA Director of Career Enrichment Rebecca Smith matched 30 McKinney students with 30 ISBA volunteers. Over spring break, these students spent time inside firms, observing court proceedings, interacting with office staff, and learning more about the field. "I am not even being dramatic when I say this, but shadowing over spring break was a game changer," wrote one student. "From the moment I walked in, I was introduced to support staff and attorneys, given a tour of the space, and allowed to sit-in on a wide range of legal matters. I took a lot away and confirmed that I would like to pursue a career in municipal law and immigration."

BUILDING ONGOING CONNECTIONS

To build on all of this work, ISBA sections are expanding their presence on law school campuses and creating more consistent touchpoints between students and practicing attorneys. For example:

- The Tax Section holds on-campus events at each Indiana law school, including career panels, trivia nights, and networking socials. These initial connections often continue beyond the event, with members following up with attendees via email or other monthly touchpoints.
- The Environmental Law Section will shift their Summer CLE and Social into a bootcamp for law students and new attorneys this year. Members will cover foundational topics in the morning; then, that afternoon, they will sit down with students for a structured, "speed mentorship" lunch focused on pathways and career advice.
- Other sections are beginning work on introductory-level CLEs, from micro-learning opportunities exploring various Indiana courts to bootcamps on preparing wills and estate documents.

These initiatives reflect a broader, intentional effort to support Indiana's law students at every stage of their journey—from their first networking event to their transition into practice. By creating accessible entry points, expanding hands-on learning opportunities, and fostering ongoing mentorship, ISBA and its members are helping students not only find their place in the profession, but thrive within it.

Interested in learning more or getting involved? Contact your section liaison or Rebecca Smith at rsmith@inbar.org.

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IMPROVING INDIANA CIVICS: STRENGTHENING THE LEGAL PIPELINE THROUGH EARLY ENGAGEMENT

FEATURE

By Abigail Hopf

In January, the Indiana Bar Foundation (the Foundation) released its 2025 Civic Health Index, offering a comprehensive look at civic engagement across the state.[1] It doesn't paint a pretty picture. While Indiana has made meaningful strides in expanding civic education opportunities, engagement—particularly among younger generations—continues to lag behind other states.

Many young Hoosiers report feeling uncertain about how to engage in civic life. They describe confusion around participation, frustration with systems they do not fully understand, and a growing sense of disconnection from their communities.[2] As a result, fewer see themselves as active participants in the institutions that shape public life.

This increasing disenfranchisement carries its own consequences for Indiana's legal profession. When civic health declines, Hoosiers see the law not as a tool but as a barrier. A statewide attorney shortage drives "widespread legal illiteracy" and limits access points into the profession at a time when fewer students are considering law as a viable career path.[3] These issues compound with time, contributing to broader access to justice challenges.

Across Indiana, however, attorneys and educators are working to address both challenges by engaging students early—introducing them to the law, building foundational skills, and helping them find a place for themselves in Indiana's civic ecosystem.

WHERE INDIANA STANDS: A GENERATIONAL GAP IN CIVIC ENGAGEMENT

The National Conference on Citizenship defines civic health as "the way that communities are organized to define and address public problems."[4] Communities with strong civic health tend to have higher employment rates, stronger schools, and more responsive institutions.[5] Those without tend to experience more physical, psychological, and behavioral health issues, as well as slower economic development.[6]

Over the past 10 years, Indiana has covered substantial ground. We have increased key markers of civic health like voter registration, turnout, volunteerism, and charitable giving.[7] But the state still falls well behind

> **"When civic health declines, Hoosiers see the law not as a tool but as a barrier."**

national trends. Indiana ranked 41st in the nation for voter turnout in the 2024 general election, and 50th out of 51 jurisdictions for the 2022 midterms.[8] In terms of social interactions and political involvement, Indiana ranks low on attending public meetings or learning about politics (46th), discussing issues with neighbors (42nd), and posting about politics on social media (39th).[9]

Demographics like education level, socioeconomic status, and geography impact rates, but perhaps one of the largest shifts is based on age. Only 46.4% of Hoosiers 18-29 voted in the 2024 election (compared to 64% of those 30 and older).[10] Younger age groups are also considerably less likely to participate in traditional community-based activities, like spending time with neighbors, attending public meetings, collaborating on community projects, or consuming news related to political topics.[11]

The decline in traditional civic engagement is not due to a lack of interest, though. Young Hoosiers beat older generations in two categories: discussing political issues or posting their views on the internet.[12] They are also participating in extracurricular activities at rates at or above the national average.[13] Instead, studies show that administrative hurdles, confusion, and political inefficacy leave young Hoosiers feeling siloed.[14] They don't know *how* to participate. They are overburdened by inaccurate information, struggle to get to the core reasons behind policy decisions, or flounder in a sea of uncivil discourse. Many 18- to 24-year-old non-voters simply explained it by saying "my vote doesn't matter."[15]

Young adults *want* to engage, particularly within their immediate social circles. What they're missing, though, are structured opportunities to expand their perspectives, connect the dots, and see civic engagement in action.

THE MISSING PIECE: WHAT BRIDGES THE CIVICS GAP

"Civic engagement is not an innate skill," noted Dr. Stephanie Serriere.[16] "[I]t must be cultivated early through…experiences that allow young Hoosiers to engage in respectful dialogue, listen to differing opinions, and find common ground."

The Foundation provides many of these structured opportunities already—including We the People, mock trial, and the introduction of a new high school diploma civics seal.[17] But some of the most effective civic learning opportunities come through connections. Students need to see people like them in positions of engagement. They need safe opportunities to ask questions, rebuild trust, and strengthen communication skills.

Legal professionals are uniquely positioned to meet those needs. They can model civic and professional

> **"Young adults *want* to engage, particularly within their immediate social circles. What they're missing, though, are structured opportunities to expand their perspectives, connect the dots, and see civic engagement in action."**

engagement, provide access to real-world perspectives, and teach the important critical thinking, communication, collaboration, and civil dialogue students need to be informed citizens. In doing so, they not only help break down student silos but also provide a foothold into the legal profession.

Across Indiana, attorneys are already stepping into this role—bringing civic learning to life and helping students see both their place in their communities and their potential within the legal profession.

EXAMPLE FRAMEWORKS: ATTORNEYS BUILDING CIVIC SKILLS AND LEGAL PATHWAYS

The Classrooms to Courtrooms Project

In 2020, Indianapolis attorney Norris Cunningham began exploring ways to address diversity initiatives in Indiana's legal profession. On all the taskforces he was a part of, from all the managing partners he met, he kept hearing the same statement: "We would love to have a more diverse workforce when it comes to attorneys. But, quite frankly, the pool of attorneys out there isn't very large."[18]

The solution, he realized, was to start earlier.

Partnering with Arsenal Tech High School and educator Dawn Walker-Seyerle, Norris helped put together a Law Education class integrating mock trial, traditional education, and visits from practicing attorneys. Each week, students would not only learn about government and legal systems, but they would interact with volunteer lawyers, prosecutors, and public defenders.

In their first year, the "Classrooms to Courtrooms: Building Broader Pipelines to Legal Education" program taught two one-semester classes with a total of 32 students. Volunteers from Stoll Keenon Ogden PLLC, Norris's firm, as well as the Defense Trial Council of Indiana, also helped coach a team of eight students for the Indiana High School Mock Trial Competition. By their third year, they had expanded to a full-year course with five separate classes, 165 students, and three mock trial teams.[19]

"The whole purpose of the program is for us to be able to give the kids an opportunity to interact with lawyers in the community and learn whether or not they have an interest in the law," Norris said. "But more important than that, they are learning skills that are going to help them no matter what walk of life or what profession they go into."

Through coursework and the mock trial experience, students learn how to analyze evidence, develop arguments, and present cases. "It's a great opportunity for students to work together," said Dawn. "We are working on language acquisition. We are working on writing, public speaking. We talk a lot about why you need to vote in class."

But for the students, the real value comes in meeting practicing attorneys for the first time in a meaningful way. "My grandma told me it was unrealistic for someone in our family to become an attorney," said one student, who knew she wanted to be a lawyer since seventh grade. "Most people of color hear that from their families—pick a realistic dream or realistic occupation. I just wanted to prove everyone else wrong and prove myself right. So, I started staying after school for mock trial...They are excited to see me here. They tell me how proud they are of me and how far I've grown. I'm recognized here."

By building consistent relationships with legal professionals, students gain access to guidance, encouragement, and opportunities that might otherwise remain out of reach. "There are days when I get to sit back and watch things happen, watch those connections," said Dawn. "I know that these young people are going to do some great things, and this course, this opportunity that they have, is only going to help them. To propel them into thinking, 'Oh, I can do that.'"

Street Law Programs in Northern Indiana

In northwestern Indiana, attorneys Kendra Key and Paul Sweeney took a different approach. Their goal was simple: make the legal profession visible and accessible in an easy-to-replicate way for other volunteers.

"Most people of color hear that from their families—pick a realistic dream or realistic occupation. I just wanted to prove everyone else wrong and prove myself right."

Through a series of outreach sessions at Merrillville High School, they brought together attorneys, judges, and legal educators to speak directly with students about their paths to the profession. Representatives from ICLEO, Ivy Tech, and IU McKinney provided practical information about education pathways and next steps. Following the sessions, Kendra and Paul developed a list of local attorneys willing to host students for job shadowing, with a focus on connecting students of different backgrounds to attorneys who looked like them.

The program not only addressed the earliest stage of Indiana's legal pipeline, but it also reinforced to students that participation in legal and democratic institutions is open to anyone who is willing to engage.

Kendra, as chair of ISBA's Diversity Committee, is now working to expand this work in other communities across the state. The Committee is seeking volunteers who have connections with local schools or educators and who are interested in setting up high-impact, low-time-commitment visits with high school students. If you want to learn more, contact Jennifer Burnett at jburnett@inbar.org.

Avon High School Speech & Debate Team

Not all civic education begins with a direct introduction to the legal field. Some programs meet students where they are and provide meaningful skill-building opportunities with support from practicing lawyers and community leaders. At Avon High School, Linda and Mike Langford did just that.

Avon High School serves more than 3,400 students, 50% of whom qualify for free or reduced-price meals.[20] Approximately 17% of the school's students speak English as a second language. So, when

Linda was asked to rebuild the school's speech team in 2020, she knew they had a real opportunity to intentionally support students of all backgrounds in developing confidence, communication skills, and critical thinking.

Linda and Mike, an attorney and mediator with The Mediation Group, identified a dozen volunteers—some teachers, some past speech and debate participants, some lawyers—who could work with students on individual events. Their emphasis was not just on performance, but on the skills students could learn throughout the program.

"We often tell our team members that our top hope for them is to 'find their voice,'" Mike said. "Sometimes because of the awkwardness of the teenage years or because adults have a way of suggesting that a high school student's opinions are uninformed and not important, our teenagers can become reluctant to research a topic, take a position, and then, importantly, voice the opinions they have formed. Speech and debate provide them with a platform to do just that and then to take that found voice to an audience."

Students are required to consider multiple sides of an issue, form their own opinions, then present their thoughts in a clear and well-argued manner. "In an age where the loudest voices with the harshest talking points often dominate the airwaves and social media, speech and debate shows that there's a better way," Mike added. Participants work closely with other competitors and teammates, building peer network groups while also collaborating individually with professional volunteers across multiple disciplines (professors, lawyers, even AI experts).

Linda and Mike's work speaks for itself. Since 2020, the program has grown from 10 students to more than 125 competitors. They have captured three straight 3A State Championships (most recently in March), 11 individual state championships, and have had more than 60 competitors qualify for the National Speech and Debate Tournament. Graduates have gone on to receive Academic All-American awards, full scholarships, and admission to universities like Princeton, Notre Dame, and Duke.

"Now as a coach, I see that same light being lit for our high school students. They, too, see a lane opening to marry their interests with future education and career opportunities."

For students who go on to pursue legal careers, programs like this often serve as an entry point. For others, they foster a lifelong ability to engage thoughtfully and constructively in their communities. "In the 1980s, I actively competed in high school speech and debate at New Castle High School," Mike shared. "That experience highlighted for me just how much I enjoyed researching, writing about my research, forming and then delivering persuasive arguments to an audience. Becoming a lawyer felt like a natural connection between my interests and my ability to help clients.

"Now as a coach, I see that same light being lit for our high school students. They, too, see a lane opening to marry their interests with future education and career opportunities. They now have the confidence to know that, with diligent practice, they can become effective public communicators who have an important voice to share."

HOW YOU CAN GET STARTED

One of the most encouraging aspects of these programs is their accessibility. They all began with a single conversation, a volunteer making a connection, or an educator reaching out. Attorneys do not need to create large-scale programs to make an impact. The Foundation has multiple opportunities for attorneys and legal professionals to get engaged and support students or teachers.[21] ISBA's Diversity Committee has multiple initiatives in place to support the pipeline and mentor students. For those looking to start something new, it's as simple as connecting with a local school, bringing a colleague, and sharing your experience.

"Volunteer at your local high school to start an extracurricular program like speech and debate," shared Mike. "Or become a coach for an already existing program. If time doesn't allow for coaching, then tournaments are always in need of judges. Passing on our knowledge and experience can go a long way towards improving the way high school students persuasively form their own voices."

"You can start small," shared Dawn. "Have a club, meet after school for a couple of hours and build on that. Bring in people from the community to get to know our students. They deserve to know what opportunities are out there."

Meaningful engagement begins with small, consistent efforts. Over time, those efforts build relationships, expand opportunities, and create lasting change.

A SHARED RESPONSIBILITY FOR INDIANA'S CIVIC FUTURE

Indiana's civic health will not improve through policy alone. It will be shaped by the relationships, experiences, and opportunities we create for the next generation. Attorneys are uniquely positioned to contribute to that effort.

Through mentorship, education, and community engagement, they can help students understand not only how the legal system works, but how they can be part of it. They can model professionalism, encourage dialogue, and provide the access that many students lack. Strong civic health means more than participation. It means ensuring that individuals of all ages believe their voices matter—and have the tools and confidence to use them.

Across Indiana, that work is already underway. The opportunity now is to expand it.

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THE INDEX FUND PROBLEM: JURY SELECTION AS AN EXERCISE IN HUMILITY

By Alex M. Ooley

The Written Publications Committee offers this op-ed as food for thought for Indiana lawyers. Share your perspective at www.inbar.org/jury-selection and we will publish your response in an upcoming issue of *Res Gestae*.

In 1973, Princeton economist Burton Malkiel made a claim that scandalized Wall Street: a blindfolded monkey throwing darts at a newspaper's financial pages could pick a portfolio as well as the experts.[1] Half a century later, the data has largely vindicated him, and the implications extend beyond finance into the courtroom.

As trial lawyers, many of us are trained to believe that jury selection is an art, perhaps even a science. We study body language. We parse a prospective juror's occupation, neighborhood, and reading habits for clues. We develop theories about which demographics favor plaintiffs and which favor defendants. We trust our instincts, honed, we tell ourselves, by years of practice. But what if our confidence in this process is as misplaced as a stock picker's belief that he can consistently beat the market?

"None of this is an argument to treat jury selection as meaningless. It matters. The point is humility about how much it matters in a typical case, given time and information constraints."

MONKEYS, DARTS, AND THE HUMBLING DATA

Malkiel's provocation did not remain theoretical for long. In 1988, *The Wall Street Journal* launched its Investment Dartboard Contest, pitting professional stock analysts against *WSJ* staffers throwing actual darts at stock tables.[2] After 100 contests, the professionals won more often, but by a far narrower margin than most experts would have predicted.[3] Later, Research Affiliates simulated "monkey" portfolios by randomly selecting baskets of stocks and found that a large majority of these random portfolios beat the standard capitalization-weighted index over long periods, largely because of structural quirks in how indexes are constructed.[4]

Then there are the real animals. A chimpanzee named Raven reportedly threw darts at a board of internet companies and beat thousands of human money managers during the dot-com era.[5] A Brazilian monkey, "Adam Monk," picked stocks for the *Chicago Sun-Times* by circling choices with a red pen and outperformed both the index and many active managers during the mid-2000s, including in 2008 when his portfolio lost far less than the broader market.[6,7] A British tabby cat named Orlando, choosing stocks by dropping a toy mouse on a grid, beat a team of professional investors in a year-long contest.[8]

The punch line, as Malkiel has often emphasized, is not that monkeys are financial savants. It is that markets are sufficiently noisy and competitive that most humans overestimate their ability to pick winners.[9]

THE PARALLEL TO VOIR DIRE

Voir dire has the same noise problem. We are trying to forecast how six (or 12) strangers will absorb evidence, judge credibility, and deliberate as a group after a trial we have not yet tried. We may be right in a given case, but it is difficult to know whether we were right because of skill, because the evidence proved itself, or because we simply got a favorable draw.

None of this is an argument to treat jury selection as meaningless. It matters. The point is humility about how much it matters in a typical case, given time and information constraints.

The data on active fund management illustrates the scale of overconfidence. The SPIVA scorecards show that a clear majority of actively managed U.S. equity funds underperform their benchmarks over long horizons, and that the proportion of managers who beat the market shrinks further as the time window lengthens.[10] The rational response has been the rise of the index fund, an instrument that does not pretend to outsmart the market but instead captures its aggregate performance at a low cost.

Now return to voir dire. Lawyers often approach jury selection with the same confidence that active fund managers bring to stock picking. We believe our experience and intuition allow us to identify favorable jurors and strike unfavorable ones. Yet empirical work on "scientific jury selection" has found, at best, mixed evidence that consultants and highly structured methods reliably produce better outcomes than more basic approaches, and that the strength of the case itself is usually the dominant driver of verdicts.[11]

This is not to discount the value that experienced jury consultants can bring, particularly in complex or high-stakes cases where deeper juror analysis and expanded voir dire tools are available. Specialized jury consultants, who devote their practice to studying juror behavior and decision-making, can provide meaningful insight and strategic advantages in the right case. The primary point is not that jury consultants lack value, but that many practitioners operate outside that environment and must navigate voir dire with more limited resources and time.

Like investing, jury selection has outliers. Some trial teams specialize intensely in voir dire and juror research, and large firms can institutionalize that approach. Morgan & Morgan, for example, publicly describes senior trial lawyer Keith Mitnik as a resource

> **"For the rest of us, lawyers who might see a jury trial once every year or two, and who must also juggle discovery, motion practice, and client counseling, the opportunity to develop and test jury-picking theories is limited."**

who assists other lawyers at the firm with their trials, including voir dire strategy.[12] In a "Trial Lawyer Nation" podcast, Mitnik describes working with a jury consultant, Eric Oliver, in the context of selecting a jury for a cigarette case, illustrating how specialization, repetition, and better tools can plausibly improve decision-making at the margin.[13]

But even specialization should not breed too much swagger. A new 2026 preprint compared professional jury consultants to supervised machine-learning models in a standardized mock-juror setting and reported that the models outperformed the consultants under identical informational constraints.[14] Even if one views that as early and not definitive, it reinforces the practical point: unaided human intuition under time pressure should be treated cautiously.

THE RARE EXCEPTION

Of course, there are genuine outliers. In the investment world, Warren Buffett stands as the canonical example of someone who appears to have beaten the market over decades through a consistent philosophy, discipline, and an institutional platform that lets him act on it. The legal world has its own legends. Clarence Darrow famously offered rules of thumb about jurors' religious backgrounds and personalities,[15] and modern consultants such as Cathy "Cat" Bennett built entire careers on designing and picking juries in high-stakes civil and criminal trials across the country.[16]

But these are the Buffetts of voir dire. They devoted enormous time, focus, and institutional support to a narrow slice of practice. For the rest of us, lawyers who might see a jury trial once every year or two, and who must also juggle discovery, motion practice, and client counseling, the opportunity to develop and test jury-picking theories is limited. As with active managers who beat the index for a few years and then regress toward the mean, it is hard to distinguish genuine expertise from good fortune.

THE MISSING INDEX FUND AND THE "INDEX MINDSET"

Here is the uncomfortable truth: In investing, the solution is elegant. If you cannot beat the market, you buy the market. An index fund captures the broad performance of all stocks without the hubris of selection. It is cheap, efficient, and, over time, beats the vast majority of active managers.

So, what is the closest thing to an "index mindset" for jury selection?

It begins by acknowledging the baseline: the venire is already a kind of diversified portfolio, drawn from the community and filtered through eligibility rules, hardship screening, and challenges for cause.[17] Peremptory strikes are not a way to engineer a "winning jury." They are a limited risk-management tool to remove a small number of jurors who appear meaningfully incompatible with your theory or your client.[18]

An index mindset also forces attention back to what we can actually control: preparation, theme discipline, witness clarity, and credibility. If you assume you cannot reliably pick the "perfect jury," you build a case that can win across a wide range of reasonable jurors. That is not resignation. It is diversification.

Finally, humility is not the opposite of competence. Rather, it is part of competence. Indiana's rules explicitly contemplate time-limited voir dire.[19] Within that reality, our obligation is not to perform confidence. It is to ask better questions, avoid stereotype-driven guessing, and communicate realistic expectations about uncertainty. Tools like questionnaires, where courts allow them, can help by eliciting more candid, case-relevant information in a format jurors may find less socially pressurized than open court.[20]

HUMILITY AS STRATEGY

The uncomfortable conclusion is good news if we let it be. We may not have an index fund for jury selection, but we can still adopt the index fund's virtues: disciplined process, reduced overconfidence, and honesty about what we know

and what we do not. In a practice area where pretending to predict the unpredictable can harm clients, humility is not a slogan, it is a strategy.

Alex Ooley is an attorney based in southern Indiana whose practice focuses primarily on criminal defense. He is a firearms instructor and frequently writes and speaks on self-defense law and firearms-related litigation. He is also the host of "The Forge of Freedom" podcast, where he explores legal and policy issues involving individual rights and the justice system.

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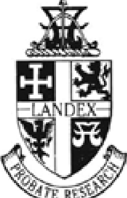

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CELEBRATING 30 YEARS OF *KIGER*'S IMPACT ON ENVIRONMENTAL INSURANCE COVERAGE

By Colin Connor and Sarah Reece

Thirty years ago, on March 27, 1996, the Indiana Supreme Court published the landmark decision *American States Ins. Co. v. Kiger*,[1] which shaped Indiana insurance coverage law. The court held that both forms of the pollution exclusion—the original "sudden and accidental" version and the more recent "absolute" form—were ambiguous. This meant that insurance companies were liable for cleanup costs unless the insurers explicitly identified the pollutant at issue. This decision revolutionized pollution cleanup operations throughout Indiana and ensured that policyholders were entitled to the coverage they purchased from their insurers for expensive cleanup operations.

Plews Shadley Racher & Braun's George Plews, Peter Racher, and Jeff Claflin represented the policyholder, Kiger, in the case. In 1990, the City of Danville found petroleum in portions of the city's sanitary sewer and determined that the source was a leak in an underground storage tank at the Kiger's

"This decision revolutionized pollution cleanup operations throughout Indiana and ensured that policyholders were entitled to the coverage they purchased from their insurers for expensive cleanup operations."

gas station.[2] Between 1991 and 1992, the Indiana Department of Environmental Management (IDEM) spent over $400,000 cleaning up the contamination from the gasoline and subsequently sought reimbursement costs from the Kigers.[3]

Kiger requested that his insurer, American States Insurance Company (American States), defend and indemnify him for the costs.[4] American States denied coverage and asserted 26 separate defenses to avoid paying.[5] American States first claimed the pre-1985 form of the pollution exclusion, which barred coverage for damages from pollutants unless the release of pollutants was "sudden and accidental." American States argued the gasoline release was not temporally "sudden," since it took place over a number of years.[6] Kiger responded that "sudden" did not have an exclusively temporal element, and the phrase "sudden and accidental" could be interpreted to mean "unexpected and unintended."[7]

The court rejected the American States argument, finding that the term "sudden and accidental" was ambiguous, since it admitted at least two plausible interpretations. Importantly, the court noted "there exist[ed] a lack of clarity" amongst the insurance industry on what this exclusion meant. Some within the industry had construed it to simply state a ban of coverage for deliberate polluters.[8] Because it was ambiguous, the court favored coverage and

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found that this exclusion did not exclude Kiger's gasoline leak.[9]

The court went on to construe the so-called "absolute" pollution exclusion, which appears in policies sold after 1984. This exclusion purports to exclude coverage for damages from the release of any "pollutants." "Pollutants" was defined in the policies very broadly, including "any solid, liquid, gaseous or thermal irritants or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed."[10]

The Indiana Supreme Court first found that the American States' position was an "oddity."[11] Why would insurers sell "a 'garage policy' to gas stations when that policy specifically excluded the major source of potential liability...?"[12] But the court found that the essential problem with this form of the exclusion was the overbroad definition of "pollutants." This definition was so broad that it would negate virtually all coverage for any claims involving a substance other than base neutral water.[13] For example, if the policy's language is applied literally, the claim of a customer slipping on a grease spill would be excluded.[14] Because the exclusion was so overbroad, it was ambiguous. The court held that the "language of the contract must be explicit," and because this form of the exclusion was not, the exclusion must be "strictly construed against the insurer in favor of coverage."[15]

Since 1996, the Indiana Supreme Court has consistently applied this decision in many contexts, each time holding that exclusions relying on a broad definition of "pollutants" are unenforceable.[16] *Kiger* has been cited 198 times by various state and federal courts throughout the country, and Indiana has solidified itself as a leader in pro-policyholder insurance coverage because of this case.

Kiger has provided crucial support for environmental cleanups, which can cost tens of millions of dollars. Business owners can utilize the insurance protection they purchased to ensure that they stay in business despite often substantial and unexpected environmental expenses. It has supported cleanups where the businesses that generated the contamination are no longer in existence. Perhaps most importantly, the coverage *Kiger* supports helps to guarantee that the environment is adequately remediated and protected from releases and spills. The Supreme Court protected all of these important interests in this 1996 decision.

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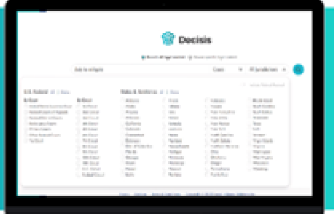

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"Since 1996, the Indiana Supreme Court has consistently applied this decision in many contexts, each time holding that exclusions relying on a broad definition of 'pollutants' are unenforceable."

"*Kiger* has been a vital part of Indiana's efforts to clean up pollution in our state," said George Plews, one of PSRB's lawyers on the case. "It has gathered billions of dollars for that work."

"Plews Shadley Racher & Braun is proud to have represented Indiana policyholders in *Kiger* and countless other cases," said Peter Racher, another member of the PSRB team. Jeff Claflin, a third PSRB lawyer on the case, adds, "To this day, the firm continues to fight for policyholders to ensure they receive the coverage they deserve under the policies they purchased." ⚖

Colin E. Connor practices in a variety of areas including environmental litigation and insurance coverage. He has extensive experience with various types of insurance policies, including commercial general liability ("CGL"), first-party property, pollution-liability policies, etc. He works on high stakes cases with hundreds of millions of dollars at issue, as well as small individual claims.

Sarah Reece was a summer associate at Plews Shadley Racher & Braun for two summers before joining the firm full-time. During law school, Sarah served as an editor of the Indiana Health Law Review. Sarah is active in the Indianapolis Bar Association where she served as Chair of the Law Student Division prior to joining PSRB full-time.

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VIRTUAL TESTIMONY, NOTICE FOR PROBATION REVOCATION, AND MORE

During February, the Indiana Supreme Court issued two criminal transfer opinions, addressing good cause to allow virtual testimony by a witness and due process for probation revocation, while also deciding two life without parole (LWOP) direct appeals.

INDIANA SUPREME COURT

LIMITS ON VIRTUAL WITNESS TESTIMONY

As remote court proceedings became far more prevalent during the COVID-19 pandemic and since, Indiana courts have been required to establish, modify, and apply parameters. Interim Administrative Rule 14(C) permits courts to conduct a testimonial proceeding "remotely for all or some of the case participants for good cause shown." In *B.N. v. Health and Hospital Corporation*, 199 N.E.3d 360 (Ind. 2022), the Indiana Supreme Court held in the civil context that a good-cause showing requires "particularized and specific factual support." *Id.* at 364. In February, the court was asked to consider the rule in the context of a criminal proceeding in *Shabazz v. State*, 274 N.E.3d 114 (Ind. 2026).

Interim Administrative Rule 14 defines a "remote proceeding" as "any proceeding, including without limitation entire proceedings or parts of it, using telephone or videoconferencing capabilities to allow case participants to appear virtually." Interim Admin. R. 14(A)(1). Emphasizing that "not all court proceedings are the same," the Indiana Supreme Court reiterated "for testimonial proceedings—those where a trial court receives sworn oral testimony—the rule expressly acknowledges that '[p]resenting live testimony in court remains of utmost importance.'" *Id.* (quoting Interim Admin. R. 14 cmt).

In *Shabazz*, the state asked the trial court to permit a witness to testify virtually. Rule 14(C) establishes a presumption that all testimonial proceedings, such as criminal trials, will be conducted in person, but allows courts to conduct a testimonial proceeding "remotely for all or some of the case participants for good cause shown." *Id.* Moreover, proceedings must always "comply with constitutional and statutory guarantees." *Id.* The court held in *Shabazz* that good cause requires the state to present "case-specific evidence that allowing a particular witness to testify remotely is necessary to prevent a concrete and substantial harm that would otherwise likely occur and that could not be adequately addressed if the witness were to testify in person." *Shabazz*, 274 N.E.3d at 120.

The "good cause" standard for virtual testimony was not met in *Shabazz*, a murder prosecution, merely because the witness (Jones) was incarcerated four hours away and the county jail did not have the resources to transport him. *Id.* at 122. First, the state failed to offer any testimonial, documentary, or other evidence demonstrating the witness's inability to testify in person. *Id.* Although the state asserted that a transport order had been filed and that the county jail lacked "resources," there was no transport order in the record and "unsworn statements by attorneys are not evidence." *Id.*

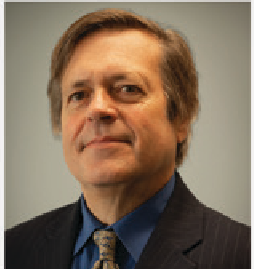
Second, even if the representations had been supported by evidence, the state did not establish that requiring the witness to testify in person would have caused a concrete or substantial harm. "[M]ere inconvenience or expense, standing alone, do not constitute the types of harm that public policy deems important enough to justify permitting a witness to testify remotely against a criminal defendant." *Id.* The state's suggestion at oral argument that transporting an incarcerated witness from a penal facility might pose safety risks in the absence of adequately trained officers was not presented to the trial court. *Id.* "And even if it had been, the identified risk, standing alone, doesn't explain why transporting Jones in particular would have posed a concrete or substantial danger." *Id.*

Because the state failed to make the required good cause showing, the trial court abused its discretion in permitting the witness to testify virtually. *Id.* at 123. Nevertheless, the court affirmed the murder conviction because the witness's testimony was, at most, cumulative. *Id.* at 124. The jury heard multiple independent, corroborating bases to convict Shabazz as an accomplice to murder. Therefore, Shabazz failed to show that the probable impact of the error, considered in light of all the evidence, undermined confidence in the verdict. *Id.*

REVOCATION OF PROBATION REVERSED

In *Ewing v. State*, 273 N.E.3d 1107 (Ind. 2026), a divided supreme court held that a "community corrections case manager's petition to revoke his *work release* did not notify him that the prosecutor was also seeking to revoke his subsequent *probation* too." *Id.* at 1109 (emphasis in original). As the majority explained, notice "must be sufficiently detailed and timely to provide a reasonable opportunity to

E. Victor Indiano



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prepare a defense." *Id.* at 1112. Thus, "the State cannot seek revocation based on alleged facts or violations that are different from those alleged in the revocation petition." *Id.* Just as the state "can't deviate from the petition's factual allegations," due process does not allow the state to "seek a sanction (probation revocation) that deviates from the one the petition identifies (work release revocation)" because "both thwart the ability to prepare a defense." *Id.*

Put another way, the "State cannot seek sanctions beyond those identified in a revocation petition unless the defendant has actual notice that the State is seeking those sanctions." *Id.* at 1114. But none of the hearings after the work release violation adequately advised Ewing that the violation might result in probation revocation; therefore, the revocation of his probation was reversed. *Id.* at 1115-16. Prosecutors can avoid this notice problem in future cases when they seek sanctions beyond what community corrections requested in its petition: "file a second petition identifying the additional sanctions the prosecutor seeks, and the trial court can hear both petitions together at a final hearing." *Id.* at 1115.

Justice Slaughter, joined by Justice Massa, dissented. In their view, the state, through the community-corrections case manager, provided sufficient notice. The petition notified Ewing "of how he violated probation. And his plea agreement, along with the governing statute, notified him of the implications. Together, these things fulfilled all that due process requires." *Id.* at 1117.

JURY FAIR-CROSS-SECTION CHALLENGE

In *Carr v. State*, 274 N.E.3d 444 (Ind. 2026), a LWOP direct appeal, the Indiana Supreme Court rejected claims that the defendant's "constitutional right to an impartial jury was violated, the trial court erred in admitting certain evidence, the trial court erred in its final jury instructions, and his sentence is inappropriate." *Id.* at 451.

As to the impartial jury claim, to establish a prima facie violation of the Sixth Amendment's fair-cross-section requirement that a group was excluded from the jury, a defendant must show "(1) that the group alleged to be excluded is a 'distinctive' group in the community," "(2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community," and "(3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." *Duren v. Missouri*, 439 U.S. 357, 364 (1979). In *Carr*, "of the 120 persons called for the venire panel, sixteen were dismissed without appearing, leaving 104 potential jurors, only three of which, according to defense counsel, looked to be 'possible minorities.'" 274 N.E.3d at 453. And just one of those three potential jurors appeared to be African American. *Id.*

Because Carr only presented his venire and did not show underrepresentation on a regular basis, he failed to prove African Americans were systematically excluded from jury selection under *Duren*. *Id.* at 455. Moreover, that Indiana is one of thirty states that does not collect juror race and ethnicity data on jury questionnaires "isn't the same as excluding minorities from being selected to sit on the jury in the first place." *Id.* at 454. Finally, in a footnote, the court acknowledged the "very high burden on defendants" in making a *Duren* challenge, including the difficulty to access and collect jury-selection information, and, unlike other race-based challenges, not shifting the burden to the state to establish neutrality. *Id.* at 454 n.3. Because the requirement is grounded in the U.S. Supreme Court's Sixth Amendment precedent, the Indiana Supreme Court was bound by it. *Id.* However, "[d]efendants may be afforded more protection under the Indiana Constitution, but Carr didn't argue such a claim. In any case, his concerns on jury-data collection may be better addressed through policy reform." *Id.* at 454.

SUFFICIENT EVIDENCE OF TORTURE

In *Carter v. State*, 273 N.E.3d 825 (Ind. 2026), another LWOP appeal, the Indiana Supreme Court held (1) the trial court did not abuse its discretion by declining to give a lesser-included jury instruction on reckless homicide and (2) sufficient evidence supported the jury's conclusion that the state proved the statutory torture aggravator. Although the LWOP statute does not define torture, Ind. Code § 35-50-2-9(b)(11), the court has developed two "general guidelines for finding torture." *Carter*, 273 N.E.3d at 832. Torture is "the intentional infliction of a prolonged period of pain or punishment for coercive or sadistic purpose" or "the gratuitous infliction of an injury substantially greater than that required to commit the underlying crime." *Id.*

Although intentional asphyxiation alone is not evidence of torture, the court found "ample evidence to support the conclusion that Carter prolonged and gratuitously amplified [the victim's] pain, all for coercive and sadistic purposes." *Id.* at 833.

ETHICS

By Cari L. Sheehan

WHAT *UNITED STATES V. HEPPNER* MEANS FOR LAWYERS AND CLIENTS

The rapid emergence of generative artificial intelligence (GenAI) has transformed how information is researched, summarized, and drafted across numerous professions. In the legal field, these technologies promise increased efficiency, lower costs, and expanded access to legal information. Yet their use has also created new ethical and evidentiary challenges that courts are only beginning to address. A significant early decision confronting these issues arose in *United States v. Heppner*,[1] where the United States District Court for the Southern District of New York considered whether documents generated by a criminal defendant through a publicly available GenAI chatbot were protected by the attorney-client privilege or the work-product doctrine. In a bench ruling on February 10, 2026, and later explained in a written opinion, Judge Jed S. Rakoff concluded that the GenAI documents were protected by neither doctrine.

The decision has generated widespread attention within the legal profession because it addresses a question of first impression: whether communications with a GenAI system can be treated as confidential communications for purposes of privilege or litigation preparation. The court concluded that they cannot, at least where the GenAI system is a publicly available third-party platform used independently by a litigant rather than under the direction of counsel.

For lawyers and their clients, the ruling provides an early judicial framework for analyzing the ethical and practical risks associated with GenAI. The decision does not prohibit the use of GenAI tools in legal practice. Rather, it clarifies that traditional legal doctrines, particularly attorney-client privilege and work-product protection, apply to GenAI interactions just as they do to communications with any other third party.

This article examines the factual background and reasoning of *Heppner*, explores the decision's implications for attorneys under professional responsibility rules, and considers the broader ethical challenges posed by clients' independent use of GenAI in legal matters.

> **"Because the GenAI system was not a lawyer and had not been engaged by counsel as an agent assisting in the provision of legal advice, the communications fell outside the core definition of attorney-client privilege."**

THE RISE OF GENAI IN LEGAL PRACTICE

GenAI refers to machine-learning systems capable of producing text, analysis, or other content based on user prompts. Systems such as large language models can summarize case law, draft memoranda, and generate potential legal arguments in response to natural language queries. These capabilities have attracted significant interest among lawyers seeking efficiency in research and drafting tasks.

At the same time, the use of GenAI in legal contexts has raised significant concerns regarding confidentiality, accuracy, and professional responsibility. Unlike traditional legal research databases, many consumer-grade GenAI platforms operate through cloud-based services that retain user inputs and outputs for system improvement or other purposes. Consequently, users who input confidential information may inadvertently disclose it to third parties.

Until recently, few judicial decisions addressed the implications of such disclosures. While several courts had sanctioned attorneys for submitting AI-generated filings containing fabricated case citations, the privilege consequences of GenAI communications remained largely unexplored. *United States v. Heppner* represents one of the first federal cases to address this issue directly.

THE FACTS AND PROCEDURAL POSTURE OF *UNITED STATES V. HEPPNER*

The defendant in *Heppner* was a corporate executive charged with securities fraud, wire fraud, conspiracy, and other charges in the Southern District of New York, all arising from an alleged scheme to defraud investors in connection with a financial services company founded and operated by Heppner. During a federal investigation, the defendant used a publicly available GenAI chatbot, Claude, to generate analyses regarding potential legal defenses and litigation strategies.

The defendant produced approximately 31 documents consisting of prompts to the GenAI system and the responses generated by it. These documents contained analyses of potential legal theories and strategic considerations relating to the government's investigation. After creating the materials, the defendant later shared them with his attorneys.

When federal agents executed a search warrant and seized the defendant's electronic devices, the government obtained the AI-generated documents. The defendant subsequently asserted that the materials were protected from disclosure under the attorney-client privilege and the work-product doctrine because they had been created in anticipation of litigation and for the purpose of communicating with counsel.

The government moved for a ruling that the documents were not privileged. Judge Rakoff granted the motion.

THE COURT'S ANALYSIS

Judge Rakoff's reasoning focused on the fundamental elements of attorney-client privilege and work-product protection. The court emphasized that the attorney-client privilege applies only to confidential communications between a client and an attorney (or their agents if essential to the communication) made for the purpose of obtaining legal advice.

The GenAI communications in *Heppner* did not meet this standard. The exchanges were between the defendant and a GenAI platform rather than between the defendant and his counsel. Because the GenAI system was not a lawyer and had not been engaged by counsel as an agent assisting in the provision of legal advice, the communications fell outside the core definition of attorney-client privilege.

The court also concluded that the defendant lacked a reasonable expectation of confidentiality when communicating with the GenAI platform. The chatbot's privacy policy permitted the retention and potential disclosure of user inputs, including their use in training the GenAI system. This policy undermined any claim that the communications were confidential in the sense required for privilege protection.

Finally, the court rejected the defendant's claim that the materials were protected under the work-product doctrine. Although the documents arguably related to anticipated litigation, they were not prepared by or at the direction of counsel. Instead, the defendant created them independently before consulting his attorneys. Under long-standing doctrine, work-product protection typically applies only to materials prepared by attorneys or their agents in anticipation of litigation.

Because neither doctrine applied, the court ruled that the AI-generated materials were discoverable and could be used by the prosecution.

KEY LEGAL PRINCIPLES REINFORCED BY THE DECISION

Despite the novelty of the technology involved, the court's reasoning was grounded in traditional privilege doctrine rather than any new rule specific to artificial intelligence. Several longstanding legal principles guided the court's analysis.

First, privilege requires communication with a lawyer or someone acting as the lawyer's agent. A GenAI system does not meet this definition. The system does not owe fiduciary duties, cannot provide legal advice in a professional capacity, and is not subject to the ethical obligations governing attorneys.

Second, privilege requires confidentiality. When a person voluntarily discloses information to a third party, privilege is generally waived. Communicating confidential legal information to a public GenAI platform may be treated as disclosure to an outside entity.

Third, work-product protection depends on attorney involvement. Documents created independently by a client, even if related to litigation, may fall outside the doctrine unless prepared at the direction of counsel.

"For lawyers, this means that client education has become an essential component of ethical representation in the AI era. Attorneys should advise clients early in the representation not to discuss case details with public AI tools without first consulting counsel."

Thus, the decision did not alter existing law, it simply applied established principles to a new technological context. As several commentators have noted, the ruling demonstrates that GenAI's novelty does not mean that its use is not subject to longstanding legal principles.

ETHICAL IMPLICATIONS FOR ATTORNEYS

The *Heppner* decision raises several ethical issues relevant to attorneys' use of GenAI, reinforcing the ABA Formal Opinion 512 from July 2024.[2]

Duty of Competence and Technology Awareness

Modern rules of professional conduct increasingly recognize that technological competence is part of the duty of competence. Lawyers must understand the benefits and risks associated with relevant technology. In the context of GenAI, this includes understanding how AI systems store, process, and potentially disclose user inputs.

The *Heppner* ruling highlights the consequences of failing to appreciate these technological risks. If lawyers advise clients to use AI tools without understanding their privacy policies or data retention practices, they may inadvertently expose privileged information.

Duty of Confidentiality

Attorneys have a fundamental duty to protect client confidences. When lawyers themselves use GenAI to draft or analyze documents, they must ensure that confidential information is not disclosed to third-party platforms without adequate safeguards.

Enterprise GenAI systems designed for legal practice may include contractual confidentiality protections and data-isolation measures. By contrast, consumer/public GenAI tools may permit the provider to store or analyze user inputs for training purposes.

The distinction between these systems may determine whether confidential information remains protected.

Duty of Communication with Client

Lawyers must communicate with their clients to ensure they understand the risks and benefits of using GenAI on their case, particularly when the client is using it to talk to the lawyer or generate materials to give to the lawyer. This is similar to how we have to communicate the risk associated with posting about a case on social media, and how a social media post can be discoverable. It is not different when using GenAI.

Counseling clients on this aspect of GenAI is the most challenging implication of *Heppner*. Unlike traditional legal research tools, GenAI systems are widely accessible to the general public. Clients facing legal disputes may be tempted to consult GenAI chatbots to generate legal strategies, analyze evidence, or draft communications before speaking with their lawyers.

The *Heppner* decision demonstrates that such actions can have serious consequences. When clients input legal strategies or confidential information into public AI systems, those communications may be discoverable by opposing parties or government investigators.

Moreover, even if the client later shares the AI-generated materials with counsel, that act does not retroactively create privilege. The privilege analysis focuses on the circumstances at the time the communication occurred.

For lawyers, this means that client education has become an essential component of ethical representation in the AI era. Attorneys should advise clients early in the representation not to discuss case details with public AI tools without first consulting counsel.

PRACTICAL GUIDANCE FOR LAWYERS

In light of *Heppner*, several practical steps can help attorneys mitigate the risks associated with GenAI. First, law firms should adopt clear policies governing the use of AI tools. These policies should address whether attorneys may input confidential information into AI systems and under what conditions.

Second, lawyers should carefully evaluate the privacy policies and data-handling practices of AI providers. Enterprise-level platforms that guarantee data confidentiality may present fewer risks than publicly available consumer tools.

Third, attorneys should incorporate AI guidance into client communications. Engagement letters or initial consultations may include warnings about using AI chatbots to discuss case details.

Finally, lawyers should remain attentive to evolving legal standards. Because the law governing AI and privilege is still developing, future cases may refine or expand the principles articulated in *Heppner*.

BROADER IMPLICATIONS FOR THE LEGAL PROFESSION

The *Heppner* decision represents an early step in the judiciary's effort to adapt traditional legal doctrines to emerging technologies. Although the ruling addressed a specific factual scenario, its reasoning will likely influence courts confronting similar issues in both criminal and civil contexts.

At a broader level, the case illustrates a recurring pattern in legal history: New technologies rarely create entirely new legal doctrines. Instead, courts typically apply established principles to novel factual circumstances.

In this respect, *Heppner* echoes earlier legal debates surrounding email, cloud computing, and digital communications. Each technological shift initially raised concerns about confidentiality and privilege, but courts ultimately resolved these issues through existing legal frameworks.

GenAI appears to be following a similar trajectory.

CONCLUSION

GenAI has the potential to transform the practice of law. Yet its integration into legal workflows must occur within the boundaries of existing ethical and evidentiary rules. The federal court's decision in *United States of America v. Heppner* provides one of the earliest judicial examinations of how those rules apply to AI-generated communications.

Judge Rakoff's ruling makes clear that communications with a public GenAI platform are not automatically protected by attorney-client privilege or the work-product doctrine. Where a litigant independently inputs legal strategy or confidential information into a consumer AI system, those communications may be treated as disclosures to a third party and therefore subject to discovery.

For lawyers, the lesson is straightforward: GenAI must be used with the same caution and professional judgment applied to any other third-party tool. Attorneys must understand the technology they employ, protect client confidentiality, and advise clients regarding the risks associated with unsupervised AI use.

Ultimately, *Heppner* does not represent a rejection of GenAI in the legal profession. Rather, it serves as an early reminder that while technology evolves rapidly, the fundamental principles of legal ethics and privilege remain remarkably constant.

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ENDNOTES

1. *United States of America v. Heppner*, 25-cr-00503-JSR, ruled on Feb. 10, 2026, in the Southern District of New York.
2. ABA Formal Opinion 512, Generative Artificial Intelligence Tools (July 2024), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/ethics-opinions/aba-formal-opinion-512.pdf.

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CIVIL LAW UPDATES

By Dakota Slaughter and Farrah Goodall

FEBRUARY CIVIL CASES CLARIFY INDIANA'S STANDARD OF REVIEW FOR CIVIL COMMITMENTS, ADDRESS THE ITCA, AND MORE

The Indiana Supreme Court issued two civil opinions in February 2026. This article also highlights one civil opinion from the Indiana Court of Appeals.

INDIANA SUPREME COURT

CIVIL COMMITMENT STANDARD OF REVIEW: CLEAR AND CONVINCING EVIDENCE

In *Matter of Civil Commitment of A.D. v. Community Fairbanks Behavioral Health*, 2026 WL 554370 (Ind. 2026), the Indiana Supreme Court clarified Indiana's standard of review for involuntary mental-health commitments: An appellate court will affirm a civil commitment if, considering only the probative evidence and the reasonable inferences supporting it, without weighing evidence or assessing witness credibility, a reasonable trier of fact could find proven by clear and convincing evidence that (1) the individual is mentally ill and either dangerous or gravely disabled; and (2) commitment of that individual is appropriate.

Here, the Court of Appeals had affirmed the commitment (based on the trial court's finding that the individual had bipolar-type schizoaffective disorder and was gravely disabled), but recited language from a line of cases suggesting that an appellate court will affirm a commitment whenever a "reasonable person could have drawn" the trial court's conclusion. The Indiana Supreme Court had expressly disapproved of that language in a prior opinion (*see Commitment of T.K. v. Dep't of Veterans Affs*., 27 N.E.3d 271 (Ind. 2015)), reasoning that it dilutes the statutory burden (*see* Ind. Code § 12-26-2-5 ("The petitioner

is required to prove by clear and convincing evidence…")), which serves as a guardrail protecting due process and liberty interests. The court granted transfer and summarily affirmed the Court of Appeals opinion affirming the commitment order, in all parts except for the improperly cited standard.

ITCA BARS TORT AVENUE IN CONDEMNATION BATTLE

In *Indiana Land Trust #3082 v. Hammond Redevelopment Commission*, 2026 WL 505961 (Ind. 2026), the Indiana Supreme Court held that two provisions of the Indiana Tort Claims Act (ITCA) barred a property owner's abuse of process claim against the City of Hammond, its mayor, the Hammond Redevelopment Commission (commission), and individual commission members (collectively the Hammond defendants) arising from an allegedly pretextual condemnation action in a separate but related case.

The case emerged from a tangled and lengthy procedural history. The landowners operated a fireworks retail business in Hammond. The commission offered to buy the property as part of a proposed project to develop a public street connecting a local neighborhood to an adjacent road. After the landowners rejected the offer, the commission filed a condemnation action. The landowners responded by alleging that the taking was not for any public purpose, but a political sham to benefit the mayor's political donors.

The landowners filed constitutional claims, and an abuse of process claim against the Hammond defendants in a separate action in state court, which the Hammond defendants removed to federal court. The landowners also sought to assert their allegations in counterclaims in the condemnation action, but the trial court denied leave, as the eminent domain statute bars counterclaims in condemnation proceedings (*see* Ind. Code § 32-24-1-8(c)). In the separate removed action, the federal district court dismissed the constitutional claims with prejudice and declined to exercise supplemental jurisdiction over the state-law abuse of process claim, thereby dismissing it without prejudice.

With their allegations dismissed from federal court and procedurally barred from the condemnation action, the landowners re-filed the abuse of process claim back in state court in a separate (now third) action. The Hammond defendants moved to dismiss the claim, contending (among other things) it was an improper collateral attack on the pending condemnation action and that they were entitled to immunity under the ITCA. The trial court granted the motion to dismiss, and the Court of Appeals reversed in a unanimous precedential opinion, concluding that the landowners could raise their claim in a parallel proceeding, and disputed facts precluded ITCA immunity at that stage. The Indiana Supreme Court granted transfer.

The court affirmed the dismissal on ITCA immunity grounds, declining to resolve whether a parallel abuse of process claim may proceed alongside a condemnation action. The court relied on Indiana Code § 34-13-3-5, which immunizes government employees unless their tortious conduct falls clearly outside the scope of their employment, and § 34-13-3-3(a)(6), which immunizes government entities and employees if an alleged loss results from the initiation of a judicial proceeding.

Emphasizing that even tortious acts may fall within the scope of employment, as long as the purpose of the conduct was to an appreciable extent in furtherance of the employer's business, the court held that the mayor and commission members were immune under the ITCA as their alleged conduct (e.g., approving

the condemnation action) reflected the general nature of conduct authorized by statute. The court also held that all Hammond defendants were immune under the ITCA, as the abuse of process claim resulted from the initiation of judicial proceedings with the condemnation action. The court rejected the landowners' argument that the immunity covers only the filing of the complaint (initiation), not continuing litigation, as it would effectively dismantle subsection (6) immunity.

INDIANA COURT OF APPEALS

CONCRETE CHAOS: REPLACEMENT COST OR WINDFALL?

In *Sayre v. Trost*, 2026 WL 377406 (Ind. Ct. App. 2026), a routine home improvement project resurfaced a familiar intersection of contract versus tort law.

A homeowner hired contractors to install a decorative outdoor concrete patio, but after multiple repours, scheduling mishaps, and lingering defects, the finished product never achieved the uniform appearance or workmanship the homeowner expected. The homeowner sued for breach of contract, negligence, and violations of Indiana's Home Improvement Contracts Act. After a bench trial, the trial court, persuaded that only a complete tear out and replacement of the patio could remedy the situation, found for the homeowner on the breach of contract and negligence claims, awarding $19,961 in damages, which included the initial deposit, related repairs, patio removal, and complete patio replacement costs. The contractors appealed based on the tort/contract damages overlap.

The majority affirmed, largely on deferential grounds. Rather than squarely resolving whether the negligence claim was independently viable, the court relied on the general judgment standard—affirming on any basis supported by the evidence—and applied a damages framework from *Orto v. Jackson*, 413 N.E.2d 273 (Ind. Ct. App. 1980), which permits recovery beyond repair costs to include delays, loss of use, property devaluation, and future repair expenses. The majority declined to find a windfall, reasoning that when the homeowner's full losses (e.g., loss of use, a still-incomplete project) were weighed against the award, he was not placed in a better position than proper performance would have afforded him.

Judge Felix dissented on two grounds. First, because the trial court grounded the contractors' tort duty in the contract itself, a tort law remedy should have been unavailable absent a finding that the homeowner's interests had been invaded beyond the contractual failure (and there was no such finding). Second, the damages award constituted a partial windfall: awarding the homeowner both a deposit refund and *replacement cost* essentially left him with a new patio at no net cost—a better outcome than if the contract had been properly performed and the balance paid. Judge Felix would have affirmed on breach of contract, reversed on negligence, and remanded for recalculation of any consequential damages.

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