NOVEMBER 2025

INDIANA STATE BAR ASSOCIATION

RES GESTÆ

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INDIANA STATE BAR ASSOCIATION

President's Perspective

PRO BONO IN INDIANA

By John Maley

PRESIDENT'S PERSPECTIVE

As the calendar year nears completion, it's a good time to reflect on what we've done this year to serve those unable to afford legal counsel and what goals we have for 2026. But first, it's helpful to review what is required of us.

INDIANA REQUIREMENTS

All Indiana attorneys have taken a powerful oath related to pro bono services, although not by that specific term. Our Indiana Oath of Attorneys provides in relevant part: "I do solemnly swear or affirm that…I will never reject, from any consideration personal to myself, the cause of the defenseless, the oppressed or those who cannot afford adequate legal assistance; so help me God." Many of you reaffirmed that oath on Law Day this year, during an event that was co-sponsored by the ISBA.

Related, the Preamble to our Indiana Rules of Professional Conduct provides in part:

> A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel.

Further, Indiana Rule of Professional Conduct 6.1 provides:

> A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

Finally, since January 1, 2022, Indiana lawyers must annually report their pro bono hours pursuant to Indiana Rule of Professional Conduct 6.7. The purpose of this requirement is to "encourage and assess the current and future extent of volunteer legal services provided directly to individuals of limited means and to public service or charitable groups or organizations." Per Rule 6.7(c), the reported information is confidential.

HOW ARE WE DOING?

The latest reported data from 2023 is both impressive and concerning. On the positive side, over 8,000 Indiana attorneys reported contributing time and/or money to pro bono

"Almost 400,000 hours of pro bono legal work was provided with no charge, and more than 200,000 pro bono hours were provided at a reduced rate. Over $1.3 million in financial contributions to pro bono organizations were reported."

legal services. Almost 400,000 hours of pro bono legal work was provided with no charge, and more than 200,000 pro bono hours were provided at a reduced rate. Over $1.3 million in financial contributions to pro bono organizations were reported.

Of concern, however, is that 47% of our colleagues reported no contribution of time or money toward pro bono. This excludes the almost 7,000 attorneys unable to provide pro bono legal service due to judicial or governmental positions or inactive status.

WHY PRO BONO MATTERS NOW AS MUCH AS EVER

As most readers know, Indiana is one of many states with a severe shortage of attorneys, particularly in smaller and rural communities. The Indiana Supreme Court created the Commission on Indiana's Legal Future in early 2024, charging it with exploring options for addressing Indiana's attorney shortage and presenting findings and recommendations to the court for future actions. The commission issued its final report in July 2025, noting that as of 2024 Indiana ranked 43rd out of the 50 states in terms of lawyers per capita—at 2.26 lawyers per 1,000 residents. Further, the number of practicing attorneys in the state is only 16,000.

But, as the commission wrote: "these lawyers are predominantly clustered in Indiana's urban areas, including over half in Marion County, where Indianapolis is located, and the surrounding seven donut counties. Thus, some of Indiana's 92 counties have as few as five active attorneys—and that number includes the judge(s) and prosecutor(s), leaving many counties with only one or two lawyers for its residents, businesses, and government."

Further, the commission concluded, "And the problem is not limited to those counties that either qualify as legal deserts or are classified as rural. Even Indiana's more populous urban counties, like Lake County, are suffering from a dire shortage of lawyers. And within Marion County, where a high number of lawyers work for public or government agencies, there are certainly smaller communities whose residents lack access to meaningful legal services."

Meanwhile, the legal landscape grows increasingly complicated with federal, state, and local laws and regulations, combined with a significant poverty rate and a growing elderly population in Indiana. Thus, there is more need for legal assistance across Indiana, but—particularly in rural areas and small cities and towns—there are fewer lawyers to serve.

YOUR ISBA AND PRO BONO

The ISBA supports pro bono in many ways, including through its Pro Bono Committee, which provides pro bono legal clinics, Talk to a Lawyer Today, and the Indiana Pro Bono Academy and Resource Center. This is a "one-stop shop" for Indiana attorneys, paralegals, and staff who provide or who want to provide pro bono or civil legal aid to low-income Hoosiers. This site—www.inbar.org/probonoacademy—offers a variety of pro bono resources, including:

- On-demand CLE programs on topics of interest to pro bono and civil legal aid attorneys;
- Training videos and materials with tips and best practices for doing pro bono; and
- Information about how to find pro bono organizations and opportunities, including Pro Bono Indiana.

WHAT CAN WE EACH DO?

The ways to serve in Indiana are almost limitless. For instance, consider:

- Indiana Free Legal Answers, through which we can anonymously guide someone through simple issues—indiana.freelegalanswers.org;
- Non-representative guidance at our local legal aid provider—such as Whitewater Valley Pro Bono in my hometown of Richmond—or a bar association's Ask a Lawyer or Legal Lines programs through, for instance, IndyBar, the Evansville Bar Association, and the Allen County Bar Association;

"So, let's all reflect on what we've done in 2025 to serve those in need by leveraging our legal skills and find something this year to finish strong."

- Pro bono engagements through your local bar association, such as Lake County Bar's Volunteer Lawyer Program; and
- Pro bono service to state and local public service organizations serving those in need.

Many Indiana lawyers are deeply specialized and might feel unable to provide everyday guidance about everyday personal legal issues that so many Hoosiers confront. But all of us have the ability learn a new area, to listen and problem-solve, and to guide those in need who cannot afford counsel. More tools exist now than ever before to allow each of us to easily learn and serve.

So, let's all reflect on what we've done in 2025 to serve those in need by leveraging our legal skills and find something this year to finish strong. Let's all set a reasonable, attainable goal for 2026 pro bono. Like so many things in our practices, if we don't take a minute to identify and schedule the task, it won't happen.

Finally, for partners and leaders in our law firms, please reinforce our collective support for pro bono, both by our actions and our words. What we do—or don't do—is profoundly noticed by those with whom we work.

And keep an eye out for the results of ISBA's Pro Bono Survey, compiling Indiana practitioners' reasons and motivations for participating in pro bono and outlining some potential next steps the profession could take.

ISBA UPDATE

By Res Gestae Editor

CLE TIPS AND FAQS

It's time to wrap up your CLE requirements for the year. Here's what you need to know to stay on track.

YOUR ANNUAL CLE REQUIREMENTS

Indiana attorneys must complete six hours of approved CLE credit annually, and a total of 36 hours by the end of their three-year educational cycle. Those 36 hours should include at least three hours of ethics and no more than 12 hours of NLS credit.

Newly admitted attorneys must also complete a six-hour Applied Professionalism course within their first three-year cycle. This will include anyone admitted by exam in 2022 or later. (A reminder for new lawyers admitted by exam this year: Your first CLE cycle will not start until January 2026.)

For more details, see Indiana's Admission and Discipline Rule 29 (or Rule 28 for judges). If you have any specific questions about your CLE requirements, contact the Indiana Office of Admissions and Continuing Education (ACE) at www.in.gov/courts/ace or by calling 317-232-2552. ACE mandates and monitors CLE requirements for the state of Indiana.

WAYS TO EARN CLE CREDIT

Still need to make up a few hours? Here are some options available through your ISBA membership:

- **Live CLE Events:** ISBA's sections and committees host virtual and in-person CLE sessions through December. Check out upcoming events at www.inbar.org/upcomingCLE.
- **On-Demand CLE Library:** Access nearly 100 CLE courses at any time at www.inbar.org/ondemand. Topics range from substantive law to ethics and everything in between, and the library is continuously updated with new CLE. Nearly half of the courses are available for free with your ISBA membership, too.
- **Bundle Up Your CLEs:** If you need several hours quickly, check out bundled CLE programs like the Indiana Law Survey replay—a collection of up to 12.0 hrs. CLE/2.0 hrs. Ethics available on-demand at www.inbar.org/ILS25.

ADDITIONAL FAQ

How do I check my CLE hours?

You can access your full CLE transcript on the Indiana Courts Portal at portal.courts.in.gov. Sign in and click "Download your complete CLE history report" on the CLE summary page to see what credit has been reported.

How late can I complete a CLE and still have it count for my 2025 requirements?

You must complete your annual CLE hours by December 31. If you're watching an ISBA on-demand CLE, that means you must have watched the *entire* video and completed the course survey by December 31. As long as you've completed those steps by the date, the CLE will count for your 2025 requirements.

What should I do if a CLE isn't showing up on my transcript?

ISBA reports CLE attendance to ACE within 30 days of program completion. If your attendance hasn't posted after that timeframe, email cle@inbar.org with your name and the CLE you attended.

For non-ISBA CLE, we recommend you reach out to the organization that hosted the CLE to verify your attendance.

How can I verify my attendance for an ISBA on-demand CLE?

If you're watching a CLE on ISBA's on-demand platform, you must watch the entire video *and* complete the post-course survey (where you'll input your Indiana attorney number) to receive credit. Once both are completed, a green check mark will appear besides both elements, marking the course as completed on that date. ISBA will then report your credit to ACE within 30 days.

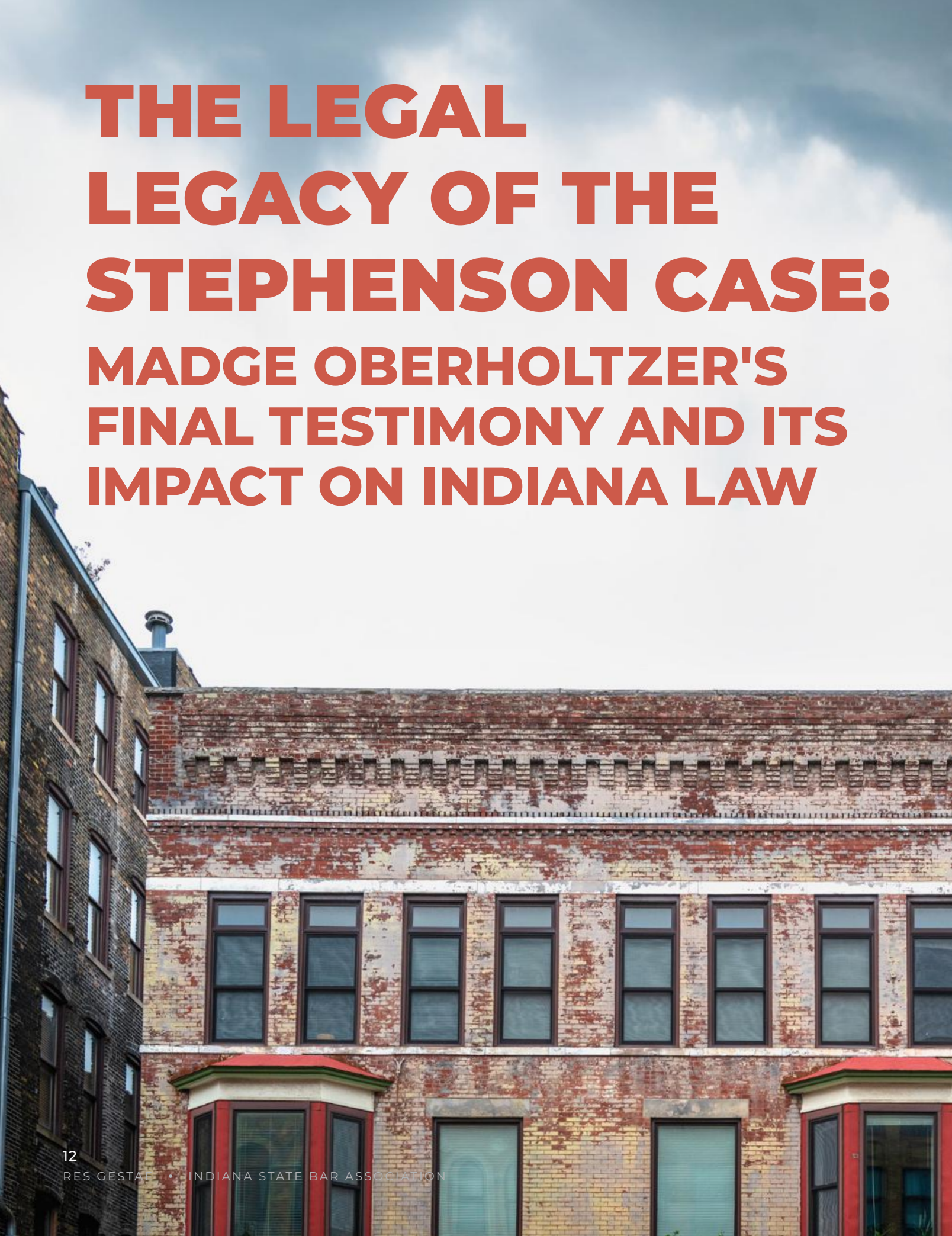
What if I experience issues with ISBA's on-demand platform?

Check out our on-demand FAQ at www.inbar.org/ondemandlibraryhelp for troubleshooting tips. If the problem persists, contact ISBA's CLE team at cle@inbar.org for assistance.

We wish you the best of luck this CLE season! For more information or to explore our CLE courses, visit www.inbar.org/CLE.

THE LEGAL LEGACY OF THE STEPHENSON CASE:

MADGE OBERHOLTZER'S FINAL TESTIMONY AND ITS IMPACT ON INDIANA LAW



FEATURE

By Hon. Frank Sullivan, Jr., and Hon. Marianne L. Vorhees

One hundred years ago, in November 1925, Indiana Ku Klux Klan Grand Dragon David C. Stephenson was sentenced to life in prison for the brutal sexual assault of a young woman who took her own life. It was the beginning of the end of the Klan's domination of Indiana politics; a grim story told in at least three books upon which this article relies: *A Fever in the Heartland* by Timothy Egan, *The Ku Klux Klan in the Heartland* by James H. Madison, and *Notre Dame vs. The Klan* by Todd Tucker.[1]

The Ku Klux Klan was a movement grounded in the principle that a "100% American" was defined by nativity, race, ethnicity, and religion. After a reign of Klan terror in the South immediately following the Civil War was stamped out, a second Klan era emerged in the 1920s and spread throughout the nation, and to no state more than Indiana. Egan writes that crosses burned in the early 1920s "all over [Indiana]. They burned on the lawns of Black families…near Catholic churches and Jewish synagogues." Atop the Klan empire in Indiana, its demagogic "Grand Dragon," D.C. Stephenson, would frequently declare, "I am the law in Indiana."[2] Politicians and even judges throughout the state subscribed to and furthered the Klan's agenda.[3]

Madison, our state's preeminent historian, gives us a crucial admonition on this era. "There has long been a comforting myth," he writes, that the Klan's many followers "were dupes of manipulators."[4] History evidences a different story, Madison says. "Stephenson's leadership is important, but…[r]esponsibility rests not only with a wicked leader but also in the hearts of Klan members in farm communities and cities, social clubs and churches, political offices and businesses."[5] "They knew they were 100 percent Americans and others were not," Madison emphasizes. "The Klan was not a fluke outburst to be dismissed as an unfortunate glitch in American history."[6]

This article, written together by a former trial court judge and a former appellate court judge, makes no attempt to confront the era of Klan dominance of our state in the 1920s, though we commend its study to our readers. Rather, this article takes up a more modest objective thought to be within our competence: a careful look at several issues that were central in Stephenson's

Indiana Historical Society

"The Klan was not a fluke outburst to be dismissed as an unfortunate glitch in American history."

trial and appeal, the admissibility of his victim's dying declarations, and whether her suicide following his assault of her cut off his liability for her murder. This article concludes by paying tribute to Madge Oberholtzer, Stephenson's victim, and two other individuals who courageously confronted the political consensus of the time and helped bring the Klan down.

The facts of Stephenson's crime could not have been more sordid. As lecherous as he was powerful, Stephenson and a henchman named Gentry forced 28-year-old Madge Oberholtzer onto a late-night train from Indianapolis to Chicago on Sunday, March 15, 1925. During the trip, Stephenson brutally sexually assaulted her, including inflicting savage, deep bites to her neck, face, tongue, breasts, legs, and ankles, chewing her flesh and spitting out blood. Apparently unwilling to cross the state line into Illinois, Stephenson and Gentry dressed her and rushed her off the train when it reached Hammond. They checked into the Indiana Hotel there at 6:30 a.m.[7]

Stephenson's chauffeur, a man named DeFriese, arrived mid-morning from Indianapolis with Stephenson's car. While Stephenson was asleep, Oberholtzer persuaded DeFriese to take her to a drug store to get medication and bandages, but in fact she had concluded that her only way out was suicide. She wanted to save her mother from disgrace. At the pharmacy, she bought a box of bichloride of mercury tablets, a highly toxic household disinfectant known to destroy the body's internal organs. Back at the hotel, she laid out 18 tablets of the poison but only managed to swallow six of them before passing out.[8]

Panicking and without a clear plan, Stephenson, Gentry, and DeFriese left Hammond at 5:00 p.m. and drove through the back roads of Indiana back to the state's capital city as Oberholtzer moaned and screamed in excruciating pain. During the trip, she begged Stephenson to procure a physician, but he refused to do so. The men occasionally gave her milk to drink, but she could not keep it down. Arriving an hour before midnight at Stephenson's Irvington mansion, Gentry confined her in the garage's loft overnight.[9]

The next morning, another of Stephenson's henchmen, a man named Klinck, drove Oberholtzer to the home a few blocks away where she lived with her parents. A boarder, Mrs. Shultz, opened the door to the horrifying sight of a young woman, filthy, her clothes ripped, soiled, and bloodied, her hair matted and greasy, her face bruised and purpled, with indented circles on one cheek. "I'm dying, Mrs. Shultz," Oberholtzer moaned and cried.[10]

Dr. John K. Kingsbury was quickly summoned. Surveying her condition, he asked, "How did you get hurt?" "When I'm better I will tell you the whole story," she responded. Concerned about her condition, he pressed her for a reply. She then related to him the story, describing the assault on the train to Hammond, her purchase and taking of the poison, and the harrowing return trip to Indianapolis. She also described her pain and agony during the trip, how she begged Stephenson to procure a physician and of his refusal to do so, of the arrival at Indianapolis about midnight, and of her being held captive in Stephenson's garage until the following morning. "What about the wounds," the physician asked, "particularly the open cuts on your breasts and cheeks? How did he do this? "With his teeth," she said. "I'm going to die," she told him. He did not try to convince her otherwise. Indeed, Dr. Kingsbury knew the odds of her living were not good. The longest anyone had stayed alive after taking a similar dose of the same poison was 25 days, according to the medical literature he had consulted.[11]

Thus started a somber vigil at Oberholtzer's bedside.

Among those coming by every day was the family's attorney, Asa Smith. Oberholtzer told Smith the story of her ordeal, and he knew that without Oberholtzer's testimony, any case against Stephenson would be nearly impossible to make. From her statements, he prepared and had transcribed a dying statement of 3,000 words, which was read to her, to which she made corrections, and which was afterwards again typed and read to her. She approved and signed the statement, saying in it that she had no hope of recovery and that she believed and knew that she was about to die. The document included her oath before a notary public of the truth of the statements made.[12]

Oberholtzer signed the declaration on Saturday night, March 28, not quite two weeks after the attack. On the same day, Dr. Kingsbury told Oberholtzer that she had no chance of recovery. "I understand you, Doctor. I believe you and I am ready to die."[13] But it would not be until Tuesday, April 14, that Oberholtzer died.[14] She had clung to life for 29 days after ingesting the bichloride.

While Oberholtzer lay dying, Marion County Prosecutor William Remy, a rare Indianapolis politician not under Klan control,[15] had secured grand jury indictments of Stephenson, Gentry, and Klinck on assault, kidnapping, and related charges. The men had been arrested but quickly bailed out. After Oberholtzer's death, Remy returned to the grand jury and secured a new indictment for second degree murder. The men were again arrested and held without bail.[16]

In pretrial skirmishing, Stephenson was able to secure a change of venue from Indianapolis to Noblesville, a city dominated by the Klan; where, in 1923, a Klan rally had drawn 12,000 people, more than twice the city's population. The new judge, Fred Hines, refused to release the men on bail.[17] The most consequential evidentiary issue at trial would be the admissibility of the two Oberholtzer dying declarations: the testimony of Dr. Kingsbury and Oberholtzer's own sworn statement prepared with attorney Smith's assistance.

As summer gave way to fall, Judge Hines recused and was replaced by Judge Will M. Sparks of Rushville, who brought the trial to order on October 29. A jury of 12 middle-aged white men had been impaneled—10 farmers, a truck

"The principles enunciated in *Stephenson* remained Indiana law on the dying declaration exception to the hearsay rule until the Indiana Supreme Court adopted the Indiana Rules of Evidence effective January 1, 1994."

driver, and the manager of a small gas company. Remy had assembled a prosecution team that included former Indiana Supreme Court Judge Charles E. Cox, and former Hamilton County state legislator and prosecutor Ralph Kane.[18]

Early in the proceedings, Dr. Kingsbury took the stand. Over objection, he told the whole story as Oberholtzer had told him on the day she was returned home.[19]

The trial was approaching the moment of truth. Would Oberholtzer's dying declaration be admitted? At a morning session on the last day of October, Judge Sparks told the lawyers, "There is no doubt but that the dying declaration should go in."[20] Further, he would allow the entirety of the statement to be read to the jury except for a few paragraphs about her interactions with Stephenson prior to the events at issue—a limitation that was of some benefit to each side. Later that morning, Remy read Oberholtzer's statement—all 3,000 words—to the jury.[21]

The defense pursued two general lines of attack.

As to the law, the defense argued that Oberholtzer alone was responsible for her own death: that she took her life by committing suicide; that her own act in taking the poison was an intervening responsible agent which broke the causal connection between Stephenson's acts and the death; that his acts were not the proximate cause of her death, but instead that the taking of the poison was its proximate cause. "If you find Stephenson guilty of murder," his counsel argued to the jury, "you must first find he forced her to take poison. And there was no evidence like that."[22]

As to the facts, the defense presented a parade of witnesses—most with little credibility—with testimony disparaging Oberholtzer's character, seeking to "chip away" at her innocence

without violating the judge's order that there would be no character attack on the dead.[23] In closing, defense counsel said, "We have done nothing to blacken her character any more than the evidence of what she did during her life serves to blacken her character."[24]

It did not take the jury long. After about five hours of deliberation on November 14, the jury found D.C. Stephenson guilty of murder in the second degree. Gentry and Klinck were acquitted. Two days later, Judge Sparks sentenced Stephenson to life in prison. By the end of the week, he was in the Indiana State Prison in Michigan City.[25]

Though the Stephenson forces quickly and confidently announced that they were appealing the conviction to the Indiana Supreme Court, it would be more than six years until the court—on January 19, 1932—ruled. In the meantime, three of the five seats on the court changed hands: one in the 1926 election and two in the 1930 election. When the vote came, three judges (Judges[26] David Myers, Julius Travis, and Curtis Roll) voted to affirm the conviction; two judges (Judges Clarence Martin and Walter Treanor) voted to reverse. The majority spoke through a lengthy "per curiam" opinion, i.e., it did not bear the name of a single author. Each of the dissenters wrote lengthy opinions of their own.[27]

On the issue of the dying declarations, each of the three opinions took a different position. The majority held that both Dr. Kingsbury's testimony and Olberholtzer's written statement were admissible.[28] Judge Martin's dissent agreed that the Oberholtzer written statement was admissible, but took the position that Kingsbury's was not.[29] Judge Treanor was also of the view that Oberholtzer's written statement was admissible and that Kingsbury's testimony was not, but that the admission of the Kingsbury testimony was harmless error.[30]

For the majority, "The rule of law governing the admission in evidence of unsworn statements as dying declarations [was] very clearly and definitely settled in Indiana."[31] Quoting precedent, the court articulated this rule as follows: "Proof of the fact thus to be settled by the judge is not limited to the declarant's statements alone, but it may be inferred from the general statements, conduct, manner, symptoms, and condition of the declarant, which flow as the reasonable and natural results from the extent and character of his wound, or the state of his illness." "We cannot say that the admission of Dr. Kingsbury's testimony was manifestly erroneous." With that conclusion holding that Dr. Kingsbury's testimony had been properly admitted, the court held without further elaboration that there was no reversible error in admission of Oberholtzer's written statement.[32]

Judge Martin wrote at even greater length in his dissent about the dying declarations, including a discussion of the policy justifications for the exception to the hearsay rule allowing their introduction and consideration. His bottom line was that the majority was correct as to the admissibility of Oberholtzer's

"The outcome of *Stephenson* in Indiana today likely would be different."

written dying declaration, but that Dr. Kingsbury's testimony had been admitted without the necessary foundation being laid.[33]

The principles enunciated in *Stephenson* remained Indiana law on the dying declaration exception to the hearsay rule until the Indiana Supreme Court adopted the Indiana Rules of Evidence effective January 1, 1994.[34]

On the issue of whether Oberholtzer's suicide following Stephenson's assault cut off his liability for her murder, once again the majority and the dissent were split.

The court addressed the following: first, whether Oberholtzer's decision to take poison was an intervening cause breaking the causal connection between Stephenson's acts and her death; and second, whether her decision was the proximate cause of her death.

The majority opinion noted Stephenson had the victim under his "complete and absolute control" for two days. When she took the poison, she did not know what Stephenson might do to her next. To say there was no causal connection between his acts and the death "would be a travesty of justice."[35]

The majority opinion found the evidence sufficient to find Stephenson's sexual assault "rendered the deceased distracted and mentally irresponsible," and her decision to take poison was the "natural and probable consequence of such unlawful and criminal treatment."[36]

Judges Treanor and Martin would have reversed and remanded for a new trial on this issue.[37] Judge Martin wrote that although Stephenson might have been "morally responsible for the death," he was not guilty of the murder because he had not "procured, advised, compelled, assisted, or exercised control over the person performing the act."[38]

One legal scholar has noted the law prior to the *Stephenson* decision was that a victim's actions to take her own life after a physical assault was not a superseding cause that broke the causal connection between the defendant's actions and the victim's death. *Stephenson* was notable because it extended the principle to suicide resulting from *mental* anguish, not limiting responsibility to just *physical* wounds.[39]

On proximate cause, the majority and dissent again disagreed.

After Oberholtzer took the poison on Monday morning, by mid-afternoon defendants knew she was very ill. Rather than seeking medical attention, they returned to Indianapolis by car. They returned Oberholtzer to her home at noon on Tuesday. The state alleged defendants had delayed 24 to 26 hours in seeking treatment for the poisoning.[40]

The medical experts testified the lacerations caused by the bite marks had become infected, leading to

blood poisoning, "which almost certainly hastened her death." She died of toxic nephritis, or kidney inflammation. The poison alone was not enough to kill her. "Stephenson's teeth were fatal."[41]

In light of this testimony, the majority opinion recognized several wrongs could be the proximate cause of the death: the poison, the infection in the wounds inflicted by Stephenson during the assault, the delay in treatment, her imprisonment. The majority held because Stephenson was responsible for all the wrongs, they were not concerned with which one caused her death. Because the result was produced by the combined influence of all the wrongs, and Stephenson was responsible for all the wrongs, how each possible cause influenced the result was immaterial.[42] The result could have been different had the other individuals involved been solely responsible for one of the acts.

The dissenting judges disagreed with the majority's holding on proximate cause. Both dissenters were very troubled with the evidence relating the bite marks and the subsequent infection to the death. Both agreed Stephenson had lacerated the victim's breast, causing an infected wound. But they found insufficient evidence for the jury to conclude the infection entered the lung and had any causal relationship to the death.[43] Judge Martin was even more troubled by the timing of the biting and the poison-taking. If the poison happened first and then the biting and the infection, "a different case would be presented for our consideration."[44]

The *Stephenson* causation issue has received considerable academic attention from the moment that it was decided until today. There was immediate reaction that the decision was not consistent with existing precedent on causation.[45] Over time it has been a source of considerable examination and discussion in many law review articles.[46]

The outcome of *Stephenson* in Indiana today likely would be different. A person who intentionally causes another human being by duress to commit suicide is not guilty of murder but instead of the crime of "causing suicide," a Level 3 felony.[47]

This article's discussion on the trial's significant legal issues concludes with an issue related to a "sidebar" during the trial. Madge's father had been asked what Madge told him had happened on the trip to Hammond. Defendant had objected on the grounds that the state had not laid the foundation for admission as a dying declaration. After having counsel approach the bench and discussing the issue, Judge Sparks overruled the objection with a 700-word explanation—in the jury's presence.

Both dissenters would have reversed and remanded for a new trial solely on the basis that it had been improper for the judge to have given this explanation in the presence of the jury. Judge Martin: It was "highly improper for a court to make a long discourse in the presence of the jury on the law or the theory of the case, which can be, and doubtless was in this case, accepted by the jury as an instruction." The judge should have "expounded to counsel his view of the law" outside the jury's presence.[48]

The majority did not find this to be reversible error but did agree that

"And a third, of course, was Madge Oberholtzer who, though racked with pain and despair, summoned the courage to recount her torture in the detail and form necessary to bring about the incarceration of her predator, and thereby undermine the evil empire over which he presided."

better practice would have been for the court to have had the jury retire during the discussion and ruling. The majority and Judge Martin's "best practice" comments remain sage advice to Indiana trial lawyers and trial judges to this day.

In preparing this article, the authors came to admire a number of figures in this story as heroes.

One was Prosecutor William Remy, the young Marion County Prosecuting Attorney who during the time leading up to these events was the only Republican office holder who had refused to pay homage to D.C. Stephenson and the Klan.[49] Governor William T. McCray had appointed Remy, who had developed a reputation as a "rising young prosecutor," after refusing a $10,000 bribe from the Klan to appoint someone else.[50] During his subsequent career, Remy achieved acclaim for his anti-corruption crusades, also having successfully prosecuted an Indianapolis mayor, six city councilmen, and an Indiana governor for corrupt acts.[51]

Another was Charles Elbridge Cox, a retired Indiana Supreme Court judge, who volunteered his time to assist Remy.[52] Cox served on the court from 1911 to 1917, and by the end of his term was the chief judge. He was described "as an attorney one of the ablest, as a judge recognized by the people of all parties as one of the best jurists who ever sat as a member of the Supreme Court of the state of Indiana."[53]

And a third, of course, was Madge Oberholtzer who, though racked with pain and despair, summoned the courage to recount her torture in the detail and form necessary to bring about the incarceration of her predator, and thereby undermine the evil empire over which he presided.

The D.C. Stephenson trial is one of the most famous in Indiana law. This article only scratches the surface of this terrible chapter in Indiana history. If this piece has piqued your interest, we suggest continued reading!

ENDNOTES

1. Timothy Egan, *A Fever in the Heartland* (Penguin Books 2023) [hereinafter Egan]; James H. Madison, *The Ku Klux Klan in the Heartland* (IU Press 2020) [hereinafter Madison]; and Todd Tucker, *Notre Dame vs. The Klan* (Loyola Press 2018) [hereinafter Tucker].
2. Egan, *supra*, at xvii to xix.
3. One amazing incident in this era occurred in South Bend in May 1924, where the Klan planned a show of strength by parading through the most Catholic city in Indiana. South Bend, of course, was also home to the nation's most prominent Catholic university, and Notre Dame students, in contravention of instructions from the university routed the Klan parade. Tucker, *supra*, at 141-142, 148-157.
4. Madison, *supra*, at 5.
5. *Id.*
6. *Id.*
7. *Stephenson v. State*, 179 N.E. 633, at 641-43 (1932).
8. *Id.* at 643.
9. *Id.* at 644.
10. *Id.*
11. *Id.* at 644-45.
12. *Id.* at 645-46, 657-58.
13. *Id.* at 644.
14. *Id.*
15. Egan, *supra*, at 166-68.
16. *Id.* at 222-24, 231.
17. *Id.* at 238, 256.
18. *Id.* at 256, 259; Allen Safianow, *You Can't Burn History*, Indiana Magazine of History 109, 132 (June 2004).
19. *Stephenson*, 179 N.E. 633 at 640-41.
20. Egan, *supra*, at 274.
21. *Id.* at 274-79.
22. *Id.* at 310.
23. *Id.* at 294.
24. *Id.* at 310.
25. *Id.* at 319-20, 322.
26. In 1925, the members of the Indiana Supreme Court were titled "Judges"; a constitutional amendment adopted in 1970 changed the title to "Justice."
27. The authors have been unable to determine the reason that it took so long for the Indiana Supreme Court to decide Stephenson's direct appeal. Assuming that briefing was completed in January 1926, it was six full years before the court's opinion was handed down in January 1932.

    When the court received the appeal, the five judges on the court were David A. Myers, Julius C. Travis, Louis B. Ewbank, Benjamin M. Willoughby, and Willard B. Gemmill. All were Republicans. Ewbank was succeeded in January 1927 by Clarence R. Martin, also a Republican. Those five Republicans served together until January 1931, when Willoughby and Gemmill were succeeded by Curtis W. Roll and Walter E. Treanor, both Democrats.

    It was, therefore, a court consisting of three Republicans (Myers, Travis, and Martin) and two Democrats (Roll and Treanor) who decided the Stephenson direct appeal. As noted in the text, the vote was bipartisan with Myers, Travis, and Roll voting to affirm, and Martin and Treanor voting to reverse.

    A biographical sketch of Willoughby reports that he "was one of three top candidates in the 1924 election to overcome the oppositional influence of the Klan." Gregory M. Hager, "Benjamin M. Willoughby," in *Justices of the Indiana Supreme Court* 243 (Gugin & St. Clair, eds. 2010). This passage reflects the stranglehold that the Klan had over the Republican Party at the time. Madison, *supra*, at 118. It is unclear whether the other two candidates Hager refers to were also candidates for the Indiana Supreme Court, but both Myers and Travis were elected that year and both ultimately voted to affirm Stephenson's conviction and sentence.

    Martin, who voted to reverse, is reported to have publicly criticized the court several times for its continued delay in deciding the Stephenson case. James E. St. Clair, "Clarence R. Martin," *supra*, at p. 263.

    It is plausible, therefore, that while at least a majority (Myers, Travis, and Willoughby) favored affirmance from the outset, there were at least three Republicans on the court who feared voter retaliation and that it was not until the two Democrats were elected in 1930 that there were three votes to hand down the opinion. On the other hand, the judges did go on the record (unanimously) against Stephenson as early as October 1927, when they rejected a habeas corpus petition. *Stephenson v. Daly*, 158 N.E. 289 (1927). And the election calendar was such that after 1926, a majority of the judges were not at electoral risk for at least four years: in January 1927, four judges (Travis, Willoughby, Gemmill, and Martin) had at least four years remaining on their terms; and in January 1929, three judges (Myers, Travis, and Martin) had at least four years remaining on their terms. So it cannot be said with any certainty that there is a political explanation for the delay.
28. *Stephenson*, 179 N.E. 633 at 641.
29. *Id.* at 657 (Martin, J., dissenting).
30. *Id.* at 667 (Treanor, J., dissenting).
31. *Id.* at 640 (citing *McKee v. State*, 154 N. E. 372 (1926); 21 Cyc. 976, 977; *Watson v. State* (1878) 63 Ind. 548 (1878); *Morgan v. State*, 31 Ind. 193 (1869); *Jones v. State*, 71 Ind. 66 (1880)).
32. *Id.* at 641.
33. *Id.* at 657.
34. Indiana Evidence Rule 804(b)(2) provides, "The following [is] not excluded by the hearsay rule if the declarant is unavailable as a witness[:] A statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death." The new rule seems to expand the rule as applied in *Stephenson*. First, it is no longer necessary to show that the declarant has actually died (the declarant must, however, be unavailable). Second, the exception is no longer limited to homicide prosecutions. Ivan E. Bodensteiner, *Indiana Rules of Evidence*, 27 Ind. L. Rev. 1063, 1087 (1995). In *Bishop v. State*, 40 N.E.3d 935 (2015), the Indiana Court of Appeals held dying declarations as provided by Ind. Evidence Rule 804(b)(2) are excepted from the right of confrontation provided by the Sixth Amendment. The Indiana Supreme Court denied transfer.
35. *Stephenson*, 179 N.E. 633 at 649.
36. *Id.*
37. *Id.* at 666, 654.
38. *Id.* at 654.
39. Audrey Rogers, *Death by Bullying: A Comparative Culpability Proposal*, 35 Pace L. Rev. 357- 60 (2014).
40. *Stephenson*, 179 N.E. 633 at 646-47.
41. Egan, *supra*, at 271, 287.
42. *Stephenson*, 179 N.E. 633 at 638-39.
43. *Id.* at 666-67.
44. *Id.* at 653.
45. Recent Case, *Homicide — Responsibility for Victim's Suicide Following Assault*, 45 Harv. L. Rev. 1261 (1932); Comments, *Criminal Law and Procedure - Homicide - Causal Relation Between Defendant's Unlawful Act and the Death*, 31 Mich. L. Rev. 659 (1933).
46. *See, e.g.*, Scott W. Howe, *Suicide's Shadow: The Evolution of a Ghost Crime*, 90 Mo. L. Rev. 355 n.259 (2025); Guyora Binder and Luis Chiesa, *The Puzzle of Inciting Suicide*, 56 Am. Crim. L. Rev. 65, 100 (2019); Audrey Rogers, *Death by Bullying: A Comparative Culpability Proposal*, *supra*; Vera Bergelsond, *Victims and Perpetrators: An Argument for Comparative Liability in Criminal Law*, 8 Buff. Crim. L. Rev 385, 385 (2005); P.N. Johnson-Lairdd, *Causation, Mental Models, and the Law*, 65 Brook. L. Rev. 67 (1999).
47. Indiana Code §35-42-1-2. Cf. Model Penal Code § 210.5: "A person may be convicted of criminal homicide for causing another to commit suicide only if he purposely causes such suicide by force, duress or deception."
48. *Stephenson*, 179 N.E. 633 at 661.
49. Egan, *supra*, at 257.
50. Tucker, *supra*, at 138.
51. *Time Magazine*, February 28, 1928.
52. Egan, *supra*, at 259.
53. John B. Stoll, *History of the Indiana Democracy*, 1816-1916 874 (1917).

25 YEARS OF SERVICE

The following ISBA members were admitted to the bar in 2000. Please join us in congratulating them on 25 years of service to Indiana's legal community!

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INDIANA STATE BAR ASSOCIATION

THE RULE OF LAW: AMERICA'S HOLY GRAIL TO THE WORLD

By Prosper Andre Batinge

This is a condensed version of Mr. Batinge's thoughts on the Rule of Law. For the full article, visit www.inbar.org/holy-grail.

The July/August 2025 edition of *Res Gestae* was dedicated to an important ideal:[1] the Rule of Law. No concept, arguably, is more fundamental to fostering a flourishing polis or the well-being of members of a political community than the Rule of Law ideal.[2] And no concept, less arguably, is America's most valuable and best gift to the world than the Rule of Law. The July/August issue is thus a pertinent reflection on a key universal driver of social progress. The vital views on the Rule of Law by various esteemed contributors should not therefore echo without further laudatory as well as critical comments.

A polis or a political community without the Rule of Law is a polis without soul and spirit. And a polis without soul and spirit is a dead or dying polis, which cannot flourish meaningfully for long and whose members' well-being cannot be guaranteed in the long run.

And to this soul and spirit of a polis, most of the world has often looked to America's shining example for purpose and direction and action. When America thus renews its soul and spirit with solemn and critical sacred sacrament of the Rule of Law,[3] as instantiated in the recent edition of *Res Gestae*, the world, while grateful to America, must remind America that it is lighting a lamp for others in far lands groping in the dark for the light of their common progress, development, and meaning as a people.

"The world, while grateful to America, must remind America that it is lighting a lamp for others in far lands groping in the dark for the light of their common progress, development, and meaning as a people."

50 YEARS
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INDIANA STATE BAR ASSOCIATION

WHAT IS THE RULE OF LAW?

The Rule of Law is a hotly contested ideal. In his widely referenced, canonical piece, "'The Rule of Law' as a Concept in Constitutional Discourse," Professor Richard H. Fallon captures the challenge and failure in defining the Rule of Law: "the precise meaning of the Rule of Law is perhaps less clear than ever before. Many invocations are entirely conclusory, and some appear mutually inconsistent."[4] Professor Fallon further adds that the various definitions of the Rule of Law have been contested.[5] And he calls for a clearer definition of the ideal.

The helpful definitions offered in this Res Gestae edition, I think, with respect, fall short of Professor Fallon's call for an exact definition of the term that is bereft of ambiguities, sparkling with epistemic clarity, and grounded in Socratic soundness. But the contributors largely succeed in signaling the main core desiderata of the Rule of Law ideal.

Core Desiderata of the Rule of Law:

- **Tempering power:** Perhaps, the bellwether of the core desiderata of the Rule of Law is its potential and ability to temper or restrain power.[6]
- **No arbitrariness:** The Rule of Law frowns upon arbitrary laws and arbitrary governmental actions and policies.[7]
- **Predictability:** By enacting laws that are certain and predictable, power is tempered, and laws and actions are not arbitrary.[8]
- **Rule of Law, not rule by man:** Charles G. Geyh rightly invokes the ancient Greek philosophers on this point, reminding us that this core desideratum goes back

to Aristotle who offered one of the best jurisprudences behind it: "we do not allow a man to rule, but the law," because "desire… twists rulers even when they are the best of men."[9]

- **Equality:** Perhaps, the most well-known and widely cited core desideratum of the Rule of Law is the doctrine of equality before the law: the idea that no person is above the law and that the law applies equally to all.
- **Protection of rights and freedoms:** The Rule of Law protects individual rights and freedoms, ensuring that these rights and freedoms are not abused by those in authority and those with power.[10]
- **Access to justice:** The Rule of Law demands access to justice for both folks of lesser means and affluent people. Hence officers of the law are called "to ensure that all people have access to justice, not just those who can afford it."[11]
- **Separation of powers:** The Rule of Law designs, deploys, and animates the wheel around which the spokes of governance spin in progress for the well-being of the people, putting the power of the polis in three co-ordinate branches—the executive, legislature, and the judiciary. Here, and of special importance, it is the judiciary that keeps "the other branches in check through judicial review."[12] The seminal case of *Marbury v. Madison* empowers the courts to define the limits of the other branches by saying what the law is.[13] Learning from the example of America, common law countries like Ghana have constitutionalized *Marbury v. Madison*, even enacting it as an explicitly entrenched constitutional provision.[14]
- **Independent judiciary:** The judiciary is central to upholding the Rule of Law, "requir[ing] a system of courts that are free from undue influence and that can fairly and impartially interpret and apply the law."[15]

GUARDIANS OF THE RULE OF LAW

While the Rule of Law is the anchor of a flourishing polis, it is a fragile and brittle cornerstone: "It took centuries to establish but can be eroded in far less time."[16] Sadly, the sure means of measuring the importance of the Rule of Law is in its absence.[17] Herein lies the significance and importance of the recent Rule of Law edition and the need to continue the conversation.

"If America is great in part because it lights the paths of other nations, as I firmly believe it does, the brightest torch yet for this role is surely its Rule of Law."

For lawyers, judges, and legal officers—primary guardians of the Rule of Law—the duty to defend the Rule of Law is a vocation that involves more than practicing a trade or a profession.[18] The Hon. John Baker acknowledges the challenge of living the vocation as guardians of the Rule of Law: "It's a heavy burden to continue to maintain the rule of law, but it's a vocation that becomes a calling. I encourage you to always think of that higher calling—of maintaining the rule of law…"[19]

Civic engagements are the means of animating and preserving the Rule of Law in Indiana and in the United States. But America must know that it is also the custodian of the Rule of Law of the world. America appears to have a blurred vision of this clear duty:

> We live in a divided time. We live in a time that can be dark and cruel. But we have an alternative to offer to our friends and neighbors. We offer a way of resolving conflict peacefully. We offer a way of living together and mutually benefiting each other—and of benefiting our communities. We offer the rule of law.[20]

It should be unambiguous that the "neighbors" and "friends" referenced *supra* extends beyond the other states in the United States of America to the many nations in the world that look to America's Rule of Law posture for purpose and direction and action.

AMERICA'S BEST GIFT TO THE WORLD

If America is great in part because it lights the paths of other nations, as I firmly believe it does, the brightest torch yet for this role is not its ambitious space adventures; the Russians were the first to go to space. If America is great in part because it lights the paths of other nations, as I firmly believe it does, the brightest torch yet for this role is not its ambitious technological breakthroughs; China has caught up and appears to be leading the pack in tech. If America is great in part because it lights the paths of other nations, as I firmly believe it does, the brightest torch yet for this role is not even its military might; brute force has never solved any

problem meaningfully in our world. If America is great in part because it lights the paths of other nations, as I firmly believe it does, the brightest torch yet for this role is surely its Rule of Law. Even with its flaws, in America the law rules, still. The Rule of Law is America's holy grail. And the Rule of Law is America's best gift to the world.

Globally, the Rule of Law has been declining in the last decade.[21] Reflections and reports in the July/August *Res Gestae* edition are means of reversing this decline. The world is watching how America will, yet again, live up to its clear mandate of restoring public trust in the Rule of Law.

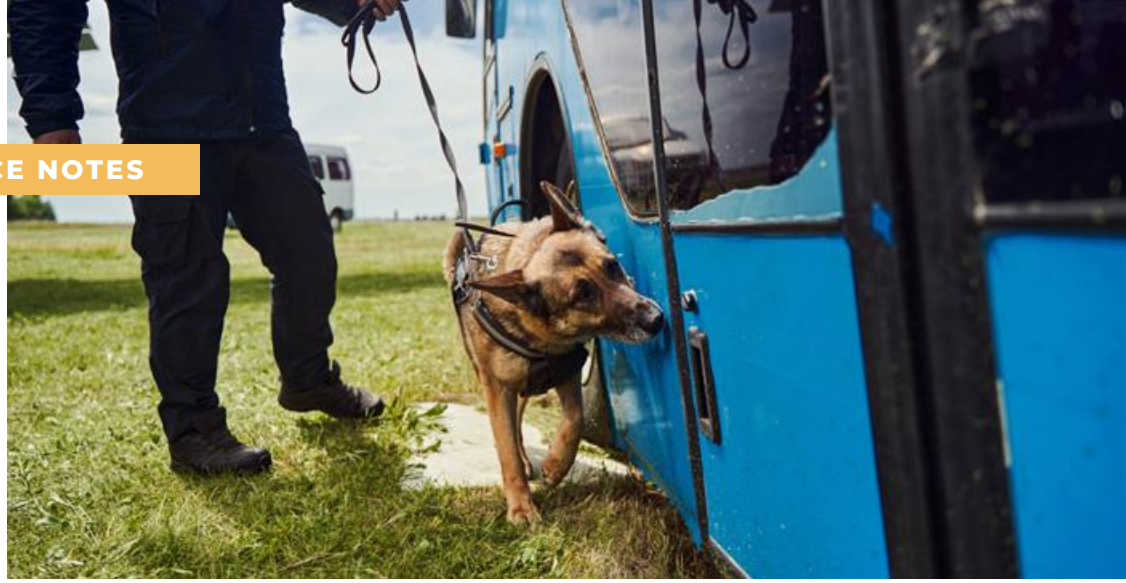
Prosper Andre Batinge, who now teaches law at the University of Ghana School of Law, was a member of the charter class of the then Indiana Tech Law School.

ENDNOTES

1. Res Gestae, *The Rule of Law Starts with Us: A Special Issue on the Legal Profession's Role in Civic Education and Building Public Trust*, vol. 69 no. 1 (July/August 2025).
2. Others, for example, think that America's greatness is it its democracy and benevolence: "I think the thing that separates this country from other countries in particular, is the fact that we're a democratic society. But, more importantly, we are a benevolent society. And I think that once we lose that we're in deep trouble." Steven David, et al., *Wisdom from the Bench: Thoughts on Facing Injustice, Remaining Motivated, and Loving the Rule of Law*, Res Gestae, vol. 69 no. 1, 13, 14 (July/August 2025).
3. Michael Jasaitis, *The Rule of Law: Our Enduring Foundation*, Res Gestae, vol. 69 no. 1, 7, 9 (July/August 2025)("Our association's commitment to these principles is not situational or politically convenient. It is foundational.")
4. Richard Fallon, *'The Rule of Law' as a Concept in Constitutional Discourse*, 97 Colum. L. Rev. 1, 1 (1997).
5. *Id.*
6. Hon. Christopher M. Goff, *The Importance of the Rule of Law*, Res Gestae, vol. 69 no. 1, 10 (July/August 2025)
7. *Supra* n. 3 at 8.
8. *Id.*
9. Charles G. Geyh, *May Judges Talk about the Rule of Law?—Yes with Care*, Res Gestae, vol. 69 no. 1, 24, 27 (July/August 2025).
10. *Supra* n. 6 at 11.
11. *Supra* n. 3 at 8.
12. *Supra* n. 9 at 27.
13. *Id.*
14. Article 125(3) of the 1992 Constitution of Ghana ("The judicial power of Ghana shall be vested in the Judiciary, accordingly, neither the President nor Parliament nor any organ or agency of the President or Parliament shall have or be given final judicial power.")
15. *Supra* n. 6 at 11.
16. *Supra* n. 3 at 7.
17. *Id.* ("As President Eisenhower observed during the first Law Day in 1958: 'The clearest way to show what the rule of law means to us in everyday life is to be reminded of what happens when there is no rule of law.' Having witnessed the horrors of World War II, Eisenhower understood that when legal systems collapse, human dignity inevitably follows.")
18. *Supra* n. 3 at 9. ("Justice David's challenge coin reminds us that this commitment is not optional for members of our profession. We did not choose to become lawyers merely to practice trade. We chose to join a profession dedicated to justice under the law. That choice carries obligations that extend beyond individual success to collective responsibility for maintaining the legal system's integrity.")
19. *Supra* n. 2 at 15.
20. *Supra* n. 6 at 12.
21. The annual World Justice Project Rule of Law Index has been putting out Rule of Law performances and indicators for various countries since 2008. And for more than a decade, the Rule of Law has been receding globally. The latest World Justice Rule of Law scheduled to be released in October 2025 forecasts a general continuous decline in the Rule of Law around the world.

CRIMINAL JUSTICE NOTES

By Zach Stock



AUGUST CASES EXAMINE ADMISSIBILITY OF EVIDENCE FOUND BY DOGS, STANDARD FOR EFFECTIVENESS OF COUNSEL IN JUVENILE PROCEEDINGS

The Court of Appeals decided more cases with a published opinion in August than can be covered in this note—10 in all. Several involved a serious crime, but all had an interesting legal twist, ranging from constitutional issues to matters of statutory construction. Four of those cases are summarized here.

The Supreme Court did not decide any criminal cases, but it issued an order in a juvenile case that is also mentioned in this note. Juvenile defenders and prosecutors should keep the order in the back of their minds when confronting claims of ineffective assistance of counsel in juvenile proceedings.

INDIANA COURT OF APPEALS

A DOG FOLLOWING ITS INSTINCTS MIGHT NOT IMPLICATE THE FOURTH AMENDMENT, BUT HUMAN OFFICERS WHO DIRECT, ENCOURAGE, OR FACILITATE THOSE INSTINCTS CAN CROSS THE LINE

Ideally, police dogs are used in spaces where their handlers have a right to be, such as the side of the highway, an airport terminal,

or a public building. But dogs are unconcerned with property rights, the line between public and private spaces, or the Fourth Amendment. They also have an uncanny ability to intensely focus on a single objective—such as locating contraband—even in developing and chaotic environments.

It is not surprising then that courts have been asked to decide the admissibility of evidence uncovered by a determined dog, heedless of privacy expectations or property rights. Federal courts have found that a "dog's instinctive actions" do not violate the Fourth Amendment. *See, e.g., United States v. Stone*, 866 F.2d 359, 364 (10th Cir. 1989). Of course, "instinctive" means "without assistance, facilitation, or other intentional action by its handler." *United States v. Pierce*, 622 F.3d 209, 214 (3d Cir. 2010).

In *Ocampo v. State*, despite cases suggesting a shift from privacy expectations to property rights,[1] the Court of Appeals adopted the so-called instinctive entry rule used in the federal circuits. No. 24A-CR-2785, 2025 WL 2487081, at *1 (Ind. Ct. App. Aug. 29, 2025). Under this rule, "a K9's instinctive entry into a vehicle does not implicate the Fourth Amendment so long as it is not directed, encouraged, or facilitated by officers." *Id.* In *Ocampo*, the court also found that this rule required suppression of the evidence. *Id.* at *8.

The case involved the typical pretextual traffic stop used as a tactic in a larger interdiction effort. During the stop, officers led a dog around the car to no avail. Thus, when approaching the open passenger's door, the canine handler unleashed the dog, allowing it to continue the sniff inside the vehicle. *Id.* at *2. This was the fatal constitutional mistake. *Id.* at *6. By releasing his dog, the officer "necessarily facilitated the interior vehicle sniff." *Id.* Thus, without probable cause to enter the vehicle, the dog sniff violated the Fourth Amendment. *Id.* at *8.

Interestingly, the state argued that the exclusionary rule did not apply because the search was conducted in reliance on binding precedent.[2] The court rejected this argument because "[n]either the United States Supreme Court nor any Indiana appellate court has ever held that, absent probable cause, officers may permit a K9 to conduct an interior sniff." *Id.* Moreover, in response to the state's urging to use caution in suppressing the evidence, the court observed, "'[T]here is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all.'" *Id.* at *9 (quoting *Arizona v. Hicks*, 480 U.S. 340, 348-49 (1987)).

A DEFENDANT REPRESENTED BY COUNSEL DOES NOT SIT SECOND CHAIR BUT SPEAKS EXCLUSIVELY THROUGH HIS LAWYER

Most lawyers probably share the same opinion about the wisdom of self-representation, but the Sixth Amendment doesn't care. The accused has a constitutional right to defend himself, even if it's a terrible idea. *Faretta v. California*, 422 U.S. 806 (1975). In *Keener v. State*, the court was asked to find that a defendant represented by a public defender could also represent himself by making his own speedy trial objections.

More specifically, the question was whether "the trial court erred by denying his personal objections." No. 24A-CR-1894, 2025 WL 2487044, at *3 (Ind. Ct. App. Aug. 29, 2025) (quotation omitted). The Court of Appeals found the trial court was not required to respond to personal objections because, to hold otherwise, "would effectively create a hybrid representation to which the defendant is not entitled." *Id.* at *3-4 (quotation omitted).

As a result, even though it was clear from the record that the accused personally objected to a trial outside the speedy trial window, the court found that the error (if any) was not preserved without the appointed attorney joining in that objection.

PULLING A GUN ON ONE OFFICER AND FIRING A WEAPON IN THE DIRECTION OF ANOTHER WERE TWO SEPARATE ACTS OF RESISTANCE SUPPORTING CONVICTION ON TWO COUNTS OF RESISTING LAW ENFORCEMENT

The Fifth Amendment commands that no person "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. Among other things, this provision prohibits multiple punishments for the same "offence." *Ex Parte Lange*, 85 U.S. 163, 173 (1873). When a defendant is alleged to have violated the same statute multiple times, the validity of the punishments turns on whether the defendant committed separate acts or was engaged in a continuous course of conduct. *See Braverman v. United States*, 317 U.S. 49, 54 (1942) (observing that a single continuous crime "differs from successive acts which violate a single penal statute and from a single act which violates two statutes.").

The question before the Court of Appeals in *Cupp v. State* was whether resisting law enforcement is a continuing crime or can be broken into separate and distinct acts. No. 24A-CR-2333, 2025 WL 2264992, at *3 (Ind. Ct. App. Aug. 8, 2025). The record clearly established resisting. When two officers approached the defendant to serve an arrest warrant, she evaded one officer by pulling a gun from her purse and the second by firing the weapon in his direction. The majority held these were "separate, volitional choices to resist each officer in distinct encounters." *Id.* at *5. Thus, there were two distinct offenses for which two punishments and a firearm enhancement could be imposed.[3] *Id.*

On this point, Judge May dissented, observing, "Resisting law enforcement is a crime against the State's authority, not against individual officers." *Id.* at *7 (May, J., concurring in part and dissenting in part). Essentially, Judge May saw the facts differently, believing the defendant's flight to be so compressed in time as to be "a single flight [that] should not result in her being convicted of two counts of resisting law enforcement by flight." *Id.* at *7-8.

ALLOWING THE JURY TO HEAR ABOUT THE DEFENDANT'S HOME DETENTION AND GPS MONITORING DURING A ROAD-RAGE MURDER WAS HARMLESS ERROR

Kimbrough v. State involves a prosecution brought by the Marion County Prosecutor's Office for a senseless road rage incident. The primary dispute was whether the defendant was justified in firing multiple shots from his moving vehicle into another moving vehicle in the middle of rush hour traffic on the interstate. The jury didn't think so and convicted the defendant of murder.

On appeal, the defendant argued the trial court committed reversible error when it allowed the state to

elicit evidence that he was on home detention and GPS monitoring at the time of the shooting. The court agreed that the evidence violated Evidence Rule 404(b), as there was little dispute that the defendant was the shooter, thereby reducing the need for GPS evidence to place the defendant at the scene. *Kimbrough v. State*, No. 24A-CR-2348, 2025 WL 2349940, at *9 (Ind. Ct. App. Aug. 14, 2025). However, the court found the error harmless due to the "substantial independent evidence of…guilt." *Id.* at *10.

Judge Bailey would have gone further in the harmless error analysis. He wrote "separately to suggest that rarely, if ever, would a valid self-defense claim be available in a road rage situation like the one before us in this case." *Id.* (Bailey, J., concurring). The suggestion appears to be that most errors in the admission of evidence in similar road rage incidents should be considered harmless whenever the only point of contention is whether the defendant was acting in self-defense.

INDIANA SUPREME COURT

LEAVING "THE LAW WHERE IT IS," THE SUPREME COURT VACATED ITS ORDER GRANTING TRANSFER AND LEFT FOR ANOTHER DAY THE QUESTION OF WHETHER TO ALTER THE STANDARD FOR EFFECTIVE ASSISTANCE OF COUNSEL IN JUVENILE PROCEEDINGS

Those who don't practice in juvenile court might be surprised to know there are two different standards for the effectiveness of counsel in juvenile cases. In disposition modification hearings, the due process test applies, so that a court must consider whether defense counsel's "overall performance was so defective that the court cannot say with confidence that the juvenile court imposed a disposition modification consistent with the best interests of the child." *A.M. v. State*, 134 N.E.3d 361, 368 (Ind. 2019) (quotation omitted). In pre-judgment proceedings, the court applies the familiar *Strickland*[4] formula, i.e., deficient performance and resultant prejudice. *See S.T. v. State*, 764 N.E.2d 632, 635 (Ind. 2002).

In *J.M. v. State*, the Supreme Court had an opportunity to revisit whether to simplify the situation. Chief Justice Rush and Justice Goff would have done so by making the due process test the controlling formula for the effectiveness of counsel in all juvenile proceedings. No. 25S-JV-00087, 2025 WL 2486246, at *6 (Ind. Aug. 27, 2025) (Rush, C.J., dissenting from the denial of transfer). This view, however, does not currently command "majority agreement." *Id.* at *2 (Molter, J., concurring in the denial of transfer). Consequently, Justice Molter—the apparently deciding vote—did not believe it would be clarifying to grant transfer "only to affirm the judgment by splicing together reasoning from multiple justices with no one line of reasoning enjoying majority support." *Id.* at *6. As he wrote, "Better instead to leave the law where it is." *Id.*

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ENDNOTES

1. Compare *United States v. Jones*, 565 U.S. 400 (2012) with *Florida v. Jardines*, 569 U.S. 1 (2013).
2. *See Davis v. United States*, 564 U.S. 229 (2011).
3. The court also decided, in a question of first impression, that a town police officer is a "police officer" for purposes of the enhancement statute. *Cupp*, 2025 WL 2264992, at *7.
4. *Strickland v. Washington*, 466 U.S. 668 (1984).

ETHICS

By James J. Bell and Molly E. Broadhead

THREE THINGS REGARDING ETHICS

In this article, we're highlighting three things that have caught our attention over the past few months. Those topics include (more) on leaving a law firm, ethics and discrimination in the jury selection process, and a concurring opinion from Justice Goff in a rather high-profile disciplinary matter.

TOPIC #1: MORE ON LEAVING A LAW FIRM

In a previous issue, Meg Christensen and Katie Jackson wrote a wonderful article entitled "Switching Team: Ethics of Lawyers Changing Firms." Unfortunately, this is what we planned to write about, so we were somewhat disappointed when we opened that month's issue and found that this idea had been taken. However, we do have one topic we believe can supplement that article: Lawyers who have announced their departure, but have not actually departed their law firm, have to walk a tightrope.

As noted previously, the departing lawyer has a duty to communicate to clients regarding what will happen to their matters moving forward. Specifically, "[a]s a matter of ethics, departing partners have been permitted to inform firm clients with whom they have a professional relationship about their impending withdrawal and new practice, and to remind the client of its freedom to retain counsel of its choice." *Wenzel v. Hopper & Galliher, P.C.*, 779

"This opinion would prohibit a lawyer from following 'a client's directive or accept a jury consultant's advice or AI software's guidance to exercise peremptory challenges if the lawyer knows or reasonably should know that the conduct will constitute unlawful juror discrimination.'"

N.E.2d 30, 47 (Ind. Ct. App. 2002) *quoting Graubard, Mollen, Dannett & Horowitz v. Moskovitz*, 86 N.Y.2d 112, 629 N.Y.S.2d 1009, 653 N.E.2d 1179, 1183-84 (1995).

However, certain communications are off-limits. Even if departing lawyers' hearts and minds are elsewhere, they still have fiduciary duties to their current firms. A departing lawyer's fiduciary duty "includes the duty to abstain from pre-departure 'surreptitious solicitation' of firm clients for personal gain," and the "pre-resignation surreptitious 'solicitation' of firm clients for a partner's personal gain…is actionable." *Id.*

The consequences of breaching a fiduciary duty can be severe. One court's remedy was to disgorge an attorney's compensation paid after the attorney was found to have breached his fiduciary duty. "Disgorging an agent of all compensation received during a period of employment in which the agent was also breaching a fiduciary duty to the principal…is consistent with Indiana precedent[.]" *Wenzel v. Hopper & Galliher*, P.C, 830 N.E.2d 996, 1001 (Ind. Ct. App. 2005). Therefore, departing lawyers need to monitor their conduct to make certain their conduct is consistent with their fiduciary duties.

TOPIC #2: ABA ETHICS OPINION ON DISCRIMINATION IN THE JURY SELECTION PROCESS

On July 9, 2025, the ABA's Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 517 that concluded that a "lawyer who knows or reasonably should know that the lawyer's exercise of peremptory challenges constitutes unlawful discrimination in the jury selection process violates Model Rule 8.4(g)." ABA Comm. on Ethics & Pro. Resp., Formal Op. 517 (2025). This opinion would prohibit a lawyer from following "a client's directive or accept a jury consultant's advice or AI software's guidance to exercise peremptory challenges if the lawyer knows or reasonably should know that the conduct will constitute unlawful juror discrimination." *Id.*

As discussed before in *Res Gestae*, Model Rule 8.4(g) is not the same as our Rule 8.4(g). Indiana's Rule 8.4(g) states that:

> It is professional misconduct for a lawyer to engage in conduct, in a professional capacity, manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status, or similar factors. Legitimate advocacy respecting the foregoing factors does not violate this subsection. *A trial judge's*

"Justice Goff noted that 'our Disciplinary Commission…must be seen as administering attorney discipline without fear or favor.'"

finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.

Ind. Professional Conduct Rule 8.4(g). (Emphasis added.)

On the other hand, Model Rule 8.4(g) does not limit professional misconduct to conduct "in a professional capacity," and it adds the terms "harassment or discrimination" to the rule. It also does not have the specific language regarding peremptory challenges in the rule. Without a change to Indiana Rule of Professional Conduct 8.4(g), it does not appear that Formal Opinion 517 will apply to Indiana attorneys.

TOPIC #3: A NOTABLE CONCURRING OPINION IN A DISCIPLINARY MATTER

Finally, perhaps you've heard that there has been a lot of publicity around *Matter of Rokita*, 262 N.E.3d 823 (Ind. 2025). In that decision, the Indiana Supreme Court discussed the appropriateness of mediation and/or motions to dismiss in a disciplinary matter. Because of the prospect of mediation, by the time of the publication of this article, this matter may have settled. While the Court's discussion of these issues was interesting to disciplinary lawyers like ourselves, the opinion may have been a little "inside baseball" for the everyday practitioner.

What may be of more interest to the masses is what Justice Goff wrote in his concurring opinion. That concurring opinion seemed to echo on-going narratives in the media and our bar associations about confidence in our systems of justice.

After noting that "the political role assumed by many state attorneys general in contemporary America creates tension with licensing obligations that they assume as members of their state's bar," Justice Goff made some observations about public confidence in the disciplinary system. *Id.* at 835 (Goff, J., concurring).

Justice Goff noted that "our Disciplinary Commission… must be seen as administering attorney discipline without fear or favor." *Id.* at 836. To that end, Justice Goff agreed with the rest of the Court to appoint three hearing officers, instead of one hearing officer, in the *Rokita* disciplinary matter. *Id.*

In doing so, Justice Goff once again pointed to his interest in public confidence in the disciplinary process and the fact that no result can be accepted by all:

> Appointing a panel of three distinguished members of the bench and bar to consider this case provides the best available means of reconciling this tension. While their recommendation will not be universally accepted, the deliberative and collaborative process they engage in to reach it will foster confidence in the integrity and independence of our disciplinary process as a whole.

Id at 835.

Justice Goff joined the Court's decision "to direct the hearing officers to determine whether mediation might be appropriate in this case." *Id.* Part of the rationale for this decision was that "the underlying issue is viewed by much of the public in the most absolute and uncompromising terms, any decision made through the adversarial process is destined to be viewed as illegitimate by some." *Id.* at 835.

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CIVIL LAW UPDATES

By Daniel Pulliam and Aidan T. Parker

COURT OF APPEALS DISCUSS ABORTION BAN, BREACH OF CONTRACT

In August 2025, the Indiana Court of Appeals issued 20 published civil opinions. The Indiana Supreme Court did not issue any opinions but granted transfer in four civil cases.

INDIANA COURT OF APPEALS

COURT OF APPEALS REJECTS CASE-SPECIFIC CHALLENGES TO INDIANA'S NEAR-TOTAL ABORTION BAN

The Indiana Court of Appeals held in *Planned Parenthood Great Northwest, Hawai'i, Alaska, Indiana, Kentucky, Inc., et al. v. Members of the Medical Licensing Board of Indiana* that Indiana's abortion law restricting abortion with limited exceptions did not violate Indiana's constitutional rights to liberty and privacy. The court recognized that Article 1, Section 1 of the Indiana Constitution may protect certain personal autonomy interests, but it did not guarantee an unfettered right to abortion.

Indiana law criminalizes abortion except when (1) performed to save the life of or prevent a serious health risk to the pregnant woman; (2) there is a lethal fetal anomaly; or (3) the pregnancy resulted from rape or incest. Article 1, Section 1 of the Indiana

Constitution provides that "all people" are endowed "with certain inalienable rights," including "life, liberty, and the pursuit of happiness."

Under the Indiana Supreme Court earlier decision in *Planned Parenthood of Indiana and Kentucky, Inc. v. Members of the Indiana State Board of Trustees*, there are only limited rights under the Indiana Constitution to access abortion services. By contrast, the General Assembly also has broad authority to regulate abortion in the interest of fetal life and maternal health. The only exceptions the court suggested would be recognized involved the protection of the life and serious health conditions of the pregnant person—and those were already presumably recognized by the statute.

This opinion, issued without oral argument, addressed case-specific circumstances where the life or health of the pregnant woman was at serious risk, but the Court of Appeals found that the abortion law either already allowed an abortion involving those circumstances or the circumstances did not necessitate an abortion to treat those risks. Put otherwise, other medical procedures could address those circumstances not covered by the statute's exceptions.

The court recognized that the physical and mental health conditions identified by the plaintiffs all demonstrated "some measure" of a "serious health risk" as people use the phrase in a colloquial sense. But those risks are limited to the statutory and constitutional uses of the phrase "serious health risk," and thus unless they fit within the statutorily enumerated exceptions, they did not apply.

The court also addressed procedural issues related to standing and justiciability, confirming that the plaintiffs in this case—abortion providers—were proper parties to bring the challenge because they are directly affected by the law.

The decision represents a significant victory for Indiana's restrictive abortion law, affirming the near-total ban to proceed with limited exceptions. That was, according to the opinion, "the balance struck between the unenumerated, reserved right of the people under Article 1, Section 1 and the State's police power under the Indiana Constitution." The case underscores the limited scope of constitutional protection for abortion rights under Indiana law and signals the judiciary's deference to legislative policymaking in this area.

COURT OF APPEALS AFFIRMS DISMISSAL OF SECURITIES FRAUD CLAIMS AGAINST ELANCO

In *Safron Capital Corporation, et al. vs. Elanco Animal Health Incorporated, et al.*, the Court of Appeals affirmed a trial court's dismissal of allegations that company executives made materially false or misleading statements regarding the company's financial condition and business operations. The plaintiffs alleged that Elanco failed to disclose material changes in a distribution strategy involving a segment of its business, which reduced the number of distributors from eight to four and lowered distributor inventory. Plaintiffs claimed this change of strategy resulted in reduced sales and earnings.

Because the plaintiffs alleged securities fraud, a heightened pleading requirement necessitated particularity of alleged misstatements and facts supporting scienter. To allege scienter, the plaintiffs needed to plausibly suggest that the defendants acted with an intent to deceive or a reckless disregard for the truth. The court also considered whether a reasonable investor would consider the alleged statements to be material and whether plaintiffs sufficiently established reliance on those statements.

Plaintiffs claimed Elanco's offering documents failed to mention the distribution changes. But business disclosures were mostly focused on historic data and general statements of strategy and not specific plans or changes. And risk disclosures addressed general risks of customer and distributor consolidation, not the specific distributor reduction at issue.

The court found that the distribution changes and related risks were not material as a matter of law; reasonable investors would not have found these changes significant in light of the full offering documents. The business disclosures accurately reported historical facts and general strategies, which did not become misleading because of the undisclosed changes. The court also rejected plaintiffs' reliance on post-offering analyst statements as impermissible hindsight.

PROPERTY OWNER'S BREACH OF CONTRACT CLAIMS AGAINST MUNICIPALITY FOR FAILING TO PROVIDE WATER FOR A FIRE SUPPRESSION SYSTEM ALLOWED TO PROCEED TO TRIAL

In *City of South Bend, Indiana vs. Victor C. Cao, et al.*, the Court of Appeals held that a municipality did not have sovereign immunity under the facts taken most favorably to the plaintiffs, who alleged a failure to provide water for a sprinkler system resulted in a warehouse's destruction.

It was undisputed that the plaintiff submitted written applications, and paid a deposit, for water intended for the warehouse's fire suppression system. Thus, because there was at least a dispute of fact regarding whether a contract existed between the municipality and the plaintiff, a trial was necessary to determine whether the municipality breached that contract.

Furthermore, the undisputed facts did not establish that the claim constituted a tort—as opposed to a breach of contract—entitling the municipality to dismissal on common law immunity and whether the municipality was entitled to sovereign immunity. Common law immunity recognizes that municipalities are not liable to property owners for fire destruction even if that fire destruction resulted from poor water supply to fight the fire. But here the plaintiff alleged, and have evidence of, a contractual relationship for access to the water for fire suppression.

Judge Vaidik concurred in part and dissented on the basis that although there was evidence of a contract, the property owner couldn't prevail on the element of breach because there was no showing that the municipality violated the utility rules and regulations.

COURT OF APPEALS REJECTS UNCONSTITUTIONAL SEARCH CHALLENGE TO TOWN OFFICIAL ENTERING A GARAGE TO NOTIFY THE HOMEOWNER OF A PURPORTED ZONING VIOLATION

In *Kathryn M. Jasionowski, et al. v. Town of Whitestown, et al.*, the Court of Appeals held that a town official's entry into a garage during business hours to assess an alleged zoning violation did not violate the Fourth Amendment. The garage housed an HVAC business on a residential property. The township official entered during business hours and identified zoning violations. The trial court found for the town and ordered the owner to pay $10,000 in fines and $30,000 in attorneys' fees.

The court's finding turned on the homeowner's failure to establish a reasonable expectation of privacy in the garage because it was held out as a business location, advertised online, and openly received deliveries. The door was unlocked, and the entry was limited to the entryway. Furthermore, the official did not "search" the premises but sought to communicate about impending legal action. Thus, because the public, and thus the town official, was tacitly authorized to enter the unlocked garage during business hours, there was no Fourth Amendment violation.

Because the business was not a permitted use under local ordinance, and there was no designation of evidence that the use of the property in its nonconforming condition was grandfathered into law, the zoning ordinance violation was affirmed. But the Court of Appeals did reverse the order granting $30,000 in attorneys' fees because the statutory provision did not authorize attorneys' fees for ordinance violations.

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