SEPTEMBER 2026

INDIANA STATE BAR ASSOCIATION

RES GESTÆ

MEMBER JOURNAL

FEATURING: 70 YEARS OF *RES GESTAE*

THIS IS YOUR **LAST ISSUE** IF YOU HAVE NOT RENEWED YOUR ISBA MEMBERSHIP

PLUS

VOL. 70 NO. 2

RES GESTÆ

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CONTENTS

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CONTENTS

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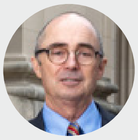

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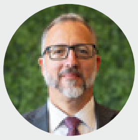

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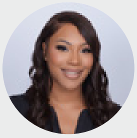

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WITH GRATITUDE AND CONFIDENT HOPE

By John Maley

PRESIDENT'S PERSPECTIVE

> **"Their service likewise advances our vision to serve and advocate on behalf of our members, clients, and the public interest as the independent voice of the legal profession. I offer my personal thanks to all of you for your dedicated servant leadership."**

Writing this final president's column a few days after seeing Rush in concert—44 years since the first time I saw them—the lyrics in the final lines of "The Garden" from *Clockwork Angels* resonate with me:

> *The future disappears into memory*
> *With only a moment between*
> *Forever dwells in that moment*
> *Hope is what remains to be seen*

What a moment. I've enjoyed this year representing this proud and noble Indiana legal profession.

"Per the lyrics 'Hope is what remains to be seen,' I pass the gavel soon with confident hope based on what so many have done so well for so many years, and because of those who will continue to lead and serve going forward."

VOLUNTEER SERVANT LEADERS

Reflecting on the year, I'm filled with gratitude for the countless people who make the Indiana State Bar Association—now 130 years young—so vital and impactful as the largest legal organization in Indiana. Volunteerism is strong among our profession, and our volunteer lawyers, judges, and legal professionals are the backbone of the association's 26 vibrant sections and 25 committees.

Hundreds of volunteers contribute thousands of hours of service to fulfill our mission of improving the administration of justice and promoting public understanding of the legal system. Their service likewise advances our vision to serve and advocate on behalf of our members, clients, and the public interest as the independent voice of the legal profession. I offer my personal thanks to all of you for your dedicated servant leadership.

Scores of additional volunteers serve with distinction in leadership through the Board of Governors and House of Delegates. It has been my great honor and joy to collaborate with fellow board members the last three years. I thank you all, and in particular fellow officers Dawn Rosemond, Katrina Ornelas, and the Hon. Tim Baker, for your wisdom and service.

EXTRAORDINARY STAFF

The good work of the association starts and ends with our dedicated and talented staff. Their creativity, skill, passion, and commitment to excellence enables every program, event, committee, and section to thrive. The quantity and quality of work put out by this small team for our 10,000-plus member association is extraordinary. It's been a privilege and pleasure to collaborate with them all. Thank you, Joe, Ashley, Paje, Kristin, Abigail, Leah, Christine, Sarah, Megan, Rebecca, Leah, and Kim!

CONFIDENT HOPE

Per the lyrics "Hope is what remains to be seen," I pass the gavel soon with confident hope based on what so many have done so well for so many years, and because of those who will continue to lead and serve going forward. Beyond the always impactful contributions of our sections and committees, as well as annual programs such as the Leadership Development Academy and Solo & Small Firm Conference, this year's highlights include:

- Promulgation of the association's Statement on Rule of Law, Independence of Attorneys, and Independence of the Judiciary.
- Our special symposium, *Rule of Law Under Pressure*, that featured Chief Justice Loretta Rush, U.S. District Judge Tanya Walton Pratt, IU McKinney Law Professor Joel Schumm, and ACLU Legal Director Ken Falk.
- Updating and reaffirming the association's Diversity Statement.
- Our special symposium, *Legal Framework Governing Diversity, Equity, and Inclusion*, featuring IU McKinney Law Professor Cynthia Baker and practitioners Kendra Key and Don Smith.
- Launch of the association's Rural Practice Academy after several years of concentrated focus and planning, starting with presidents Tom Felts and Mike Jasaitis.
- Our *America 250: Fairgrounds for Celebration* event in partnership with the Indiana Supreme Court and Indiana Court of Appeals.
- Increased association membership and continued fiscal strength.

Incoming president Derrick Wilson and incoming president-elect Steven David each have decades of distinguished bar leader service and unique and invaluable diverse practice and professional experience. The importance of our association and its vital mission has never been greater, and we enter our next governance year with unbridled confidence and hope for the future.

Quoting again from my favorite band, thanks for entrusting me with "the garden to nurture and protect."

Comments welcome at jmaley@btlaw.com or 317-432-5509(c). Cheers.

ISBA UPDATE

By Res Gestae Editor

TRAVEL ABROAD WITH THE ISBA

Each year, ISBA members can satisfy their CLE requirements while exploring another part of the world through the CLE Abroad program. The program combines legal education, cultural exchange, and travel, giving participants the chance to reflect on how government, history, and the rule of law impact another country's legal system.

ABOUT THE EXPERIENCE

CLE Abroad is a culturally and intellectually immersive travel program that brings together attorneys from Indiana and other bar associations to learn from local leaders. Through lectures; visits to courts, universities, and public offices; and guided tours of key historic sites, participants experience a country's traditions and communities firsthand.

"The CLE trip to Portugal in 2025 was an exceptional experience from start to finish. The program offered an ideal combination of high-quality continuing legal education, meaningful professional networking, and the opportunity to experience Portugal's beautiful destinations and rich culture.

"The CLE sessions were engaging and informative, while the time spent with fellow participants created valuable opportunities to connect, exchange ideas, and build relationships in a relaxed and memorable setting. It was a thoughtfully planned experience that successfully blended professional development with travel and camaraderie.

"I would highly recommend this program to anyone looking for a unique and rewarding way to fulfill CLE requirements while connecting with colleagues and experiencing an extraordinary destination."
— Jackie Pillar, 2025 CLE Abroad Attendee

THIS YEAR'S TRIP

Incoming ISBA President Derrick Wilson invites ISBA members to the next CLE Abroad destination in March 2027: Morocco.

Located at the crossroads of Europe and Africa, Morocco has a rich culture and heritage. Its interplay between centuries-old traditions and modern institutions exemplify the balance our societies navigate between tradition and reform, as well as the careful interplay between law, culture, local identity, and global connection.

Throughout the program, participants will hear from local experts, scholars, and diverse professionals on the Rule of Law, Moroccan legal and political systems, international relations, history, architecture, and religion.

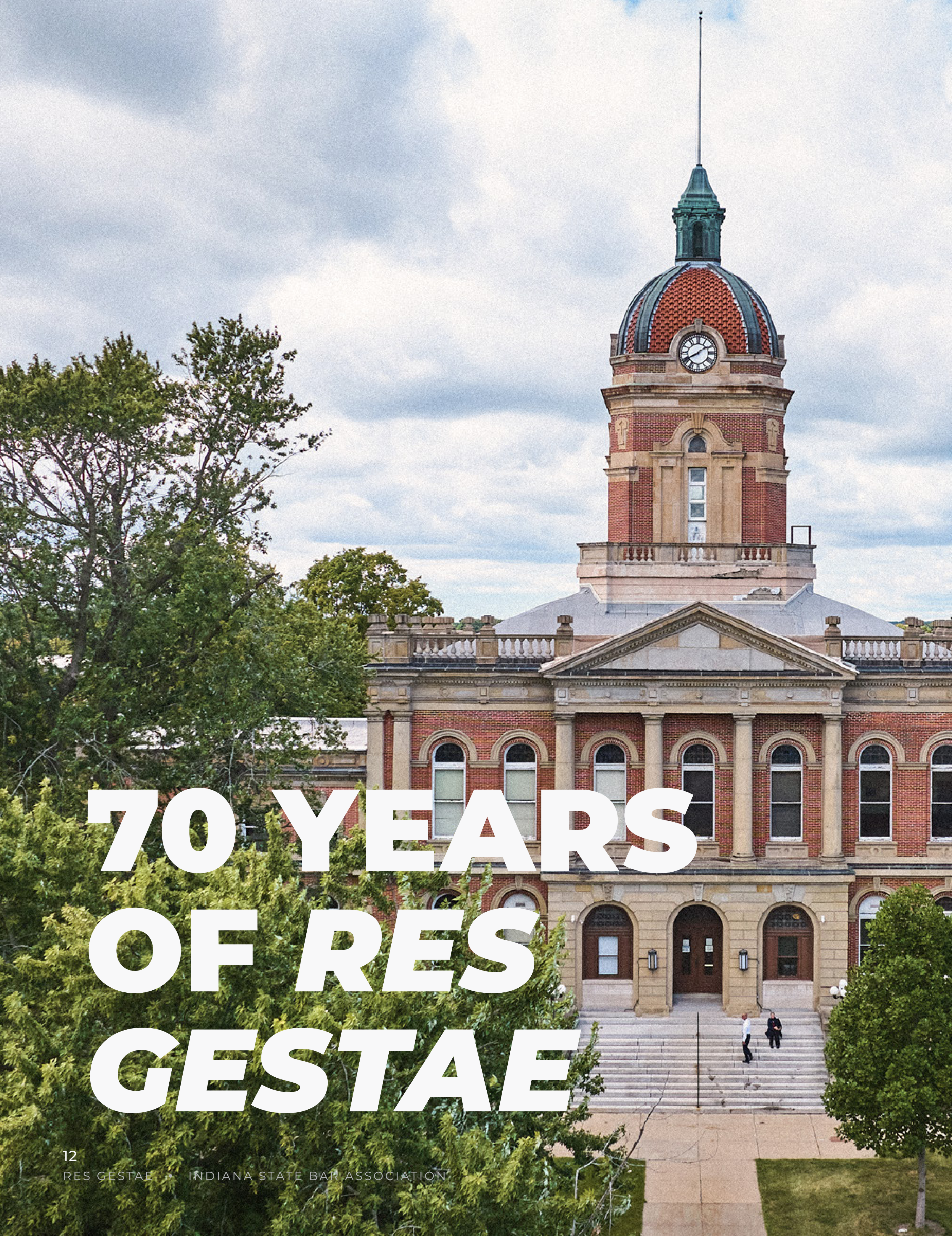
The core trip will run from March 14–20, 2027, with time in Casablanca, Fes, and Rabat. Participants will:

- Try out Moroccan cuisine, including a local winery.
- Explore the cultural center of Fes, including the Medina (the world's largest car-free urban zone, with 9,900 alleyways and 8,000 dead ends), its markets, an open-air leather tannery, and the historic Jewish Quarter.
- Step back into the ancient Berber and Roman ruins of Volubilis.
- Explore the political capital of Morocco, including the Moroccan Parliament, the Andalusian Garden, and the Kasbah of the Oudayas.

Participants can also extend their trip with excursions to Marrakech (March 20–23, 2027) and the Sahara Desert (March 23–27, 2027).

The program includes hotel accommodations, select group meals, guided tours, lectures with academics and cultural ambassadors, ground transportation, admission to all museums and public buildings listed in itinerary, and airport transfers. Airfare, travel insurance, and meals not included in the itinerary are the responsibility of participants. ISBA members and their friends and family members are welcome to attend.

To learn more about the CLE Abroad trip to Morocco, visit www.inbar.org/CLE-Abroad-Morocco or email the CLE Abroad Team at team@cle-abroad.com.



70 YEARS OF *RES GESTAE*

FEATURE

By Res Gestae Staff

The first issue of *Res Gestae* rolled off the printers in 1957, tasked with outlining the "things done; transactions; [and] essential circumstances surrounding" ISBA's members and the legal profession.[1]

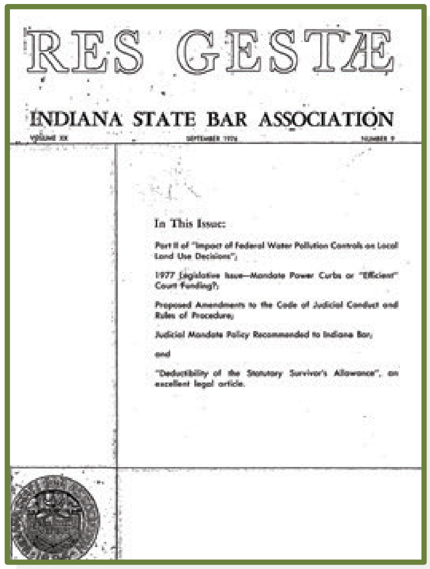
Nearly 70 years later, the journal offers something more than just a record of ISBA's history. It tells the story of a profession constantly grappling with change but still managing to hold true to its principles. A community battling new questions with the same central challenges: public trust, civility, technology, and the future of legal practice.

To honor *Res Gestae*'s 70th volume, we have pulled excerpts from each decade of our archives (the full articles are available at inbar.org/member-insights). We invite you to reflect on some of these questions through the lens of the writers facing them.

VOL. 10, 1966: BUILDING A MODERN BAR

A decade after *Res Gestae* debuted, much of the profession's attention centered on building the institutions that would shape Indiana's legal profession for generations. Members strove to build better connections across the state and improve the profession for the public good:

> Fellow Lawyers:
>
> Approaching the end of my term as President, I would report to you that we have had a year of active and productive work by the Association and its members; that the objectives and efforts to achieve them are well worthwhile, though at times the results are disappointing and frustrating; and that we should persevere in our determination to improve and enhance the profession of law for our own and the public good...
>
> We certainly can point with pride to the developments towards judicial modernization and improvement, which has so long been advocated and promoted by the Association, its officers and committee members, but until now without any positive results. The report and recommendations of the Judicial Study Commission will shortly be before the public, and we will be called on to analyze and thoroughly understand the reports, conclusions and recommendations of the Commission and, to the extent that they have our approval, to defend and promote the Commission's program with the public and in the legislature...



"Lawyers, of course, have a vital interest in any narrowing of areas of law practice which traditionally has been theirs. But that service has existed, not because of the lawyers, but because the legal problems, themselves, have required skilled judgments by persons trained and licensed in the law practice."

We are happy to witness an intensification or revival of the good work which the local city and county bar associations can perform. The establishment of the Conference of Indiana Bar Presidents and Secretaries, which resulted from the creation of a special committee to promote such Conference, has given liaison and coordination to the work carried on separately, spread over the state, by the local associations...

The sections and committees of the Association have developed proposals and have submitted bills for the enactment of corrective or remedial legislation in various areas of the statutory law. Further, our members have participated as advisors to the Department of State Revenue, State Board of Tax Commissioners and Commission on State Tax and Financing Policy for the development of needed amendments in the several state tax laws...

Many other worthwhile Association projects and endeavors are under way, and they will come to your attention as they move forward. Mention should be made of one such project undertaken solely in the public interest. Lawyers in the Probate, Trust and Real Property Section are engaged in a major work of the compilation of the state mental health laws, produced at cost by the Association and financed by the Governor out of his contingency fund...[2]

VOL. 20, 1976: A PROFESSION IN TRANSITION

By the mid-1970s, Indiana grappled with a growing legal profession, the rise of competition, and new questions around the delivery of legal services:

> It is the obligation of the law profession to help find more effective means for service to people with legal problems, which are both large and small. This recommends devices for more uniform and general access to the legal mechanisms and, in some areas of law, the simplifying of the processes.
>
> But there is an over-kill in such moves when certain areas of law are arbitrarily staked out for exclusive counsel by lay amateurs, if there is to be individualized counsel at all. A notable example of this is in the proposed reform of United States bankruptcy law...
>
> Lawyers, of course, have a vital interest in any narrowing of areas of law practice which traditionally has been theirs. But that service has existed, not because of the lawyers, but because the legal problems, themselves, have required skilled judgments by persons trained and licensed in the law practice. The right to independent legal counsel is a right possessed by the client, not by the lawyer, and "mass solutions" to social problems must not be allowed to intrude on that right.
>
> There have been danger signs in other areas of law as well.

Small claims dockets rightly allow simplified procedures in which the lawyer's services may not be required. But statutory prohibitions against lawyers appearing in such courts—as adopted in five states for actions involving $500 or less—have no place under Indiana's system...

Within all this there is the irony of a double standard which, on one hand, urges improved competence for the lawyer in his skills but which, on the other hand, would exclude such a trained professional from certain legal processes.

Changes in the legal practice are certain to continue. But the bar must be vigilant about plans for social experimentation which would create breaches between the lawyer and the client, and which would result in detriment to the interests of the client and the public.[3]

The profession was also asking a question completely opposite what we would hear today: "Are there *too* many lawyers?"[4]

Today there are approximately 400,000 lawyers in the nation and 6,500 in Indiana. In 1975, there were 556 new lawyers admitted to practice in Indiana. At that rate, the lawyer population in Indiana will almost double in 10 years...

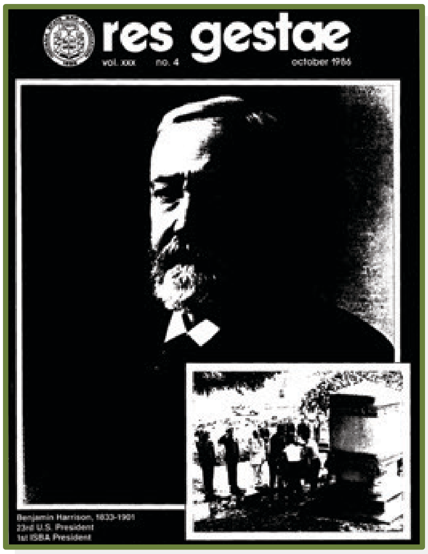
Therefore, the question is, will there be a sufficient market and demand for the services of the present lawyers and those coming along in the near future?

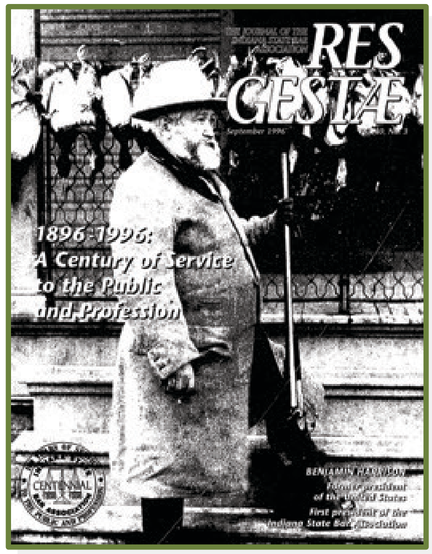
In 1973, the American Bar Association Task Force on Professional Utilization published its report containing the following conclusions:

1. There is no conclusive evidence to indicate that there are now or are likely to be in the foreseeable future more legally trained men and women than can be satisfactorily and productively employed...

2. The existence of a large pool of well-qualified legally trained individuals constitutes a major opportunity and should be viewed as a significant natural resource. The organized bar shares the responsibility for finding ways to utilize this resource...

3. The organized bar and law schools should increase their efforts to provide legal education





> **"Therefore, the question is, will there be a sufficient market and demand for the services of the present lawyers and those coming along in the near future?"**

opportunities to members of minority groups, and law schools should take precautions to assure that the great competition for admission to law school does not result in reducing opportunities for members of such groups...

4. The American Bar Association as well as state and local bar associations and law schools should inform the public that there may not be sufficient positions in the near term in some traditional fields of legal practice or in some geographic areas for all those who may seek such positions and further investigate and publicize the developing areas in traditional practice and otherwise which offer new opportunities...

On December 3, 1975, an article in *The Washington Post* offered the view that there were too many lawyers and too few openings. It quoted a governmental economist as predicting there would be an average of about 20,000 job openings a year for lawyers between 1974 and 1985. In contrast, 31,000 students are being graduated annually from accredited law schools. The article stated that in 1965, there was a seller's market for lawyers but that in 1975, it was a buyer's market. It said that the increase in the number of lawyers in the next decade will make it tougher for young lawyers to get jobs, and that it will take longer and tend to reduce starting salaries.

There is no doubt that there is some truth in the claim set forth in that article's view, but I believe that the conclusions of the ABA Task Force previously mentioned are essentially sound. There will be a need for more lawyers in the future[.][5]

VOL. 30, 1986: THE DAWN OF MANDATORY CLE

By the 1980s, the legal community at large was asking how to rebuild and enforce public trust and confidence in the profession:

The profession, while not without problems, is in relatively good condition. We continue to have an image problem, but it has always been so...The long standing alienation of law and laymen stems in large part from the contentious nature of the process and the inescapable result that there is always at least one loser.

Accepting that there are those things we cannot change, the profession is nevertheless pursuing remedies for those ills that can be changed. The ABA Commission on Professionalism has issued its report and the report is ripe with opportunity for state and local associations and individuals to become involved in a very important part of the image problem solution...

The insurance crisis which has served as a shaky platform for tort reforms is beginning to show signs of abating. More and more availability is occurring although prices are still high. While the tort system and lawyers have been cast as the villains in the insurance crisis, consumer group pronouncements are taking critical aim at these assertions...

The professional liability coverage for lawyers continues to improve as to availability. We are advised that carriers are now willing to write professional liability coverage

> in Indiana…and ABA President Thomas has promised a thorough look at all aspects of professional liability coverage during his term.[6]

But perhaps the largest change of the 80s was Indiana's switch to mandatory continuing legal education:

> It is an irony that for lawyers, whose profession seeks order and discipline, "mandatory," has a slightly unpalatable taste when applied to them. Minnesota was the first state to make CLE mandatory, about 1970. There was a noticeable lack of interest from other states to copy, but in recent years a momentum toward mandatory CLE is evident. It is reported that mandatory rules are found today in 23 states and another 10 are considering it.
>
> How has mandatory CLE been received? The reports are that in those states where it has been adopted reception has been quite favorable. In general terms, approval rates have been reported in the range of 80 percent…
>
> [But] [m]andatory CLE is not without critics. I received a handout from a CLE specialist in Chicago who believes that the mandatory requirement is a result of Pharaonic impulses of bar presidents. (Pharaonic? Me? Perhaps he meant Past President Eichhorn.) Wistfully, I recall the arrival of the Uniform Commercial Code. In my county, our local bar has met faithfully every month. At a meeting following the adoption of the UCC, one of the oldest lawyers offered the resolution that we all agree never to cite the Uniform Commercial Code in any trial in Knox County. We all laughed until we noticed he was deadly serious. The logic in that resolution is more apparent each day.
>
> No matter how the burden rests, each must meet the demand for attendance. Pharaonic or not, we are required to stay current.[7]

VOL. 40, 1996: THE TECHNOLOGY REVOLUTION

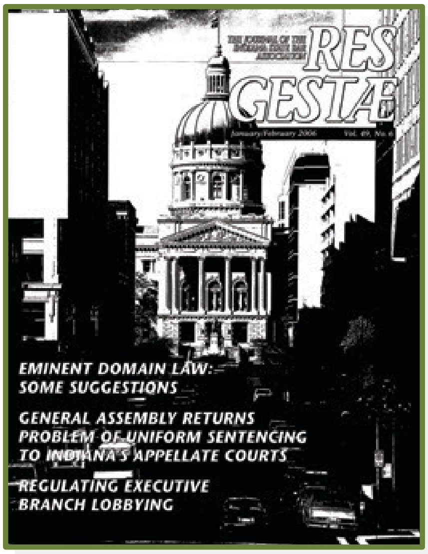
As the ISBA celebrated its centennial, *Res Gestae* writers faced the future of legal practice at a technological scale they couldn't before fathom.

> I remember seeing the movie *2001 – A Space Odyssey* when it was first released some 30 years ago. I was fascinated by Arthur Clarke's imagination and in particular everything the computer HAL could do. Its ability to perform tasks given it orally was exciting to contemplate. Well, we are five years away from the year of the movie, 2001, and voice recognition for our computers is practically here.
>
> This issue of *Res Gestae*, thanks to a lot of work by a lot of people, but primarily Jack Lyle, has effectively captured the flavor of the last 100 years. Wonderful years they have been for us individually and for this organization. There are always fond memories of "the good old days," but I am sure that most of us have a better life than did our ancestors of 100 years ago. What then of our practice in 2096…?
>
> Will we need law offices? Why not work at home? Will we need secretaries at all? Will we need a library? Or dictation equipment? Or a telephone? Probably the answer to all of these questions is no. I suspect that we will have one piece of hardware at home. It will serve as our television, telephone and computer. There will be no keyboard since the entire operation will be voice activated. You will be able to sit at home and dictate whatever you desire…There will be no need for a library for obvious reasons, and the day will come when you won't even need office space to meet a client. Your meetings will all be accomplished by videoconferencing…
>
> What are some of the ramifications of this type of practice? Those who do not maintain their technological skills will be left by the wayside. The equipment costs will be more than offset by decreased real estate and other office-related costs; we'll have more time with our families and provide our clients with improved response time; we will dress more casually and our work atmosphere will be more relaxed…
>
> *Scary*, perhaps; *challenging*, certainly; *exciting*, yes. Is it all manageable? Of course, even though it may frighten some of my generation…[8]

VOL. 50, 2006: PUBLIC CONFIDENCE IN THE COURTS

The 2000s brought another kind of challenge. As political polarization grew and public debate surrounding the courts intensified, Indiana had to face its own questions around judicial independence and the role lawyers play in educating the general public:

> Judicial decisions receive much attention in today's highly charged partisan political environment. Public awareness, discussion and even criticism of such decisions are important to ensure that citizens are informed of controversies decided by courts. At times, however, rational discussion has



"Will we need law offices? Why not work at home? Will we need secretaries at all? Will we need a library? Or dictation equipment? Or a telephone?"

given way to personal attacks on the judges themselves, often when the real objection is to the law. Of course it is easier to attack the judge than to change the law. Such attacks, including accusations of bias and usurpation of authority, can undermine confidence in the judicial system, thereby jeopardizing our democratic form of government.

Vocal critics demand that judges be accountable...Some demean Indiana's retention vote because no appellate court judge has ever been voted out of office. In fact, the merit selection process for our appellate judges has worked well for more than 30 years, providing dedicated public servants who faithfully discharge their duties as judicial officers. Indiana's outstanding Court of Appeals works hard (record numbers of cases were filed and disposed of last year), is efficient (less than three months on average for decision after briefing), and is effective (fewer than 3 percent of its decisions are reversed). Removing an appellate judge from the bench should be an extraordinary event and not a decision made by another branch of government. Compelling reasons should be required to mobilize the voters to turn out a sitting appellate judge.

An independent judiciary must have judges who are fair, impartial, and committed to applying the law to the facts and issues presented for decision, regardless of political considerations or how unpopular or controversial the decision might be. Many people do not understand how courts and judges function. Lawyers are uniquely positioned to inform our fellow citizens that a judge takes an oath to serve as a public official, does not pick the cases he handles, and must decide cases based on the facts presented and the applicable law. Hoosiers will be well served if Indiana lawyers help our families, friends, business colleagues and fellow citizens understand how our judicial system functions...[9]

VOL. 60, 2016: A NEW ERA OF LEGAL PRACTICE

By 2016, the profession was once again wrestling with technological transformation. Online legal service providers, changing client expectations, and rapidly evolving technology prompted writers to ask what values defined the legal profession anyway.

Our legal profession is experiencing many changes and many challenges at this time. There are the client demands of wanting more for less and wanting things faster and cheaper...Changes in technology are upon us, including online research, access to legal forms, and how to find and communicate with clients. Through apps such as Yelp, the Internet is one of the biggest resources of how the public finds lawyers. There are online mediation services, too. Another major change developing in Indiana is e-filing. All of these advances have changed the practice of law.

I believe the biggest challenge to the legal profession is how legal services will be delivered now and in the future. This challenge is due to the changes in society as well

> as people's beliefs and attitudes toward the legal profession. The current legal landscape has nonlawyers assisting in the delivery of legal services; lawyers fee splitting with nonlawyers; allowing the unauthorized practice of law; and allowing nonlawyers to own or operate law firms. The groups that are involved in these types of activities include Avvo, LegalZoom and Rocket Lawyer, to name a few. I believe these groups are undermining the core values of the legal profession. These values include competency, independence of professional judgment, attorney-client privileged communications, protection of confidential client information, loyalty to clients through the avoidance of conflicts of interest and pro bono commitments. We *must* preserve and protect these core values.
>
> These groups are also seeking the liberalization or relaxing of our ethical rules and regulations. As members of the legal profession, lawyers have ethical obligations governing how lawyers serve their clients, the legal system and the public good. These ethical rules delineate the ways that lawyers must behave. Our legal profession shows us the way lawyers should behave and provide legal services. Professionalism distinguishes the practice of law from a business motivated only to maximize profits.
>
> The legal profession must adapt to the changes that are currently confronting us as well as the challenges on the horizon...[10]

CONCLUSION

Looking through 70 years of *Res Gestae*, one thing becomes clear: every generation of lawyers believed it stood at a turning point. Sometimes the concerns were local. Sometimes they reflected national conversations. Some predictions proved accurate, while others remain artifacts of their time.

Together, they illustrate not only how the profession has changed, but also how consistent its core concerns have remained: serving clients well, strengthening the justice system, and preparing lawyers for whatever comes next.

ENDNOTES

1. "It has occurred to us that you may wonder why this publication has the new name *RES GESTAE*. In connection with our job of trying to improve the interest in the publication, we felt the old name, THE BULLETIN, was completely lacking in punch and ingenuity. We finally came to the unanimous conclusion that the present name, *RES GESTAE*, based on the following definition, filled the bill exactly for a state bar association publication.

   RES GESTAE: 'Things done, transactions, essential circumstances surrounding the subject. The circumstances, facts and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character.' Black's Law Dictionary, Third Edition."

   Why "Res Gestae"? 1 *Res Gestae* 10 (1957).
2. Paul N. Rowe, *President's Letter*, 10 *Res Gestae* 1 (1966).
3. Karl J. Stipher, *Social Reforms and Danger Signs for the Law Practice*, 20 *Res Gestae* 365 (1976).
4. Karl J. Stipher, *A Question: Are There Too Many Lawyers?* 20 *Res Gestae* 53 (1976).
5. *Id.*
6. Frederick Eichhorn Jr., *And So It Continues*, 30 *Res Gestae* 157 (1986).
7. Rabb Emison, *A Must to Stay Current*, 30 *Res Gestae* 205 (1986).
8. John D. Proffitt, *2096 – A Cyberspace Odyssey*, 40 *Res Gestae* 4 (1996).
9. James W. Riley Jr., *The Judiciary Must Be Independent*, 49 *Res Gestae* 5 (2006).
10. Mitchell R. Heppenheimer, *A Changing Landscape: What We Face*, 60 *Res Gestae* 5 (2016).

ATTORNEY-CLIENT CONFIDENTIALITY IN INDIANA: A PRACTICAL GUIDE TO INDIANA RULE OF PROFESSIONAL CONDUCT 1.6

By Marc Matheny

Attorney-client confidentiality is a long-standing principle rooted in the confidential relationship between clergy and laypersons and later extended to the legal profession. Today, confidentiality remains a cornerstone of the legal profession. A lawyer must take reasonable steps to protect a client's confidential information. Indiana's duty of confidentiality is broad, extending beyond privileged communications, requiring intentional systems involving people, processes, and technology.[1]

Under the Indiana Rules of Professional Conduct, attorneys and law firms must take reasonable steps to protect a broad range of confidential information. This duty extends beyond privileged communications and may include contract negotiations, litigation strategy, work product, draft documents, legal research, and limited AI prompts. Lawyers are responsible for maintaining safeguards that address common, confidentiality risks.

This guide addresses common, real-world pressure points and safeguards involving clients, courts, family members, employees, vendors, and online activity.

"This duty extends beyond privileged communications and may include contract negotiations, litigation strategy, work product, draft documents, legal research, and limited AI prompts."

CONFIDENTIALITY VERSUS ATTORNEY-CLIENT PRIVILEGE

Rule 1.6 covers "information relating to representation," including many items that may not be privileged or admissible.[2] Examples include business and trade secrets, contract, and marketing information.

- **Evidentiary privilege is narrower**: Indiana's attorney-client privilege protects confidential communications made for the purpose of seeking or providing legal advice.[3]
- **Attorney-client privilege applies in litigation and may be waived**: Attorney-client privilege is commonly asserted in litigation, but it may be challenged or overcome depending on the facts. Lawyers must take reasonable precautions to avoid subject-matter waiver and inadvertent disclosure of client information.[4]
- **The distinction matters**: Confidentiality and privilege are related but separate duties. A lawyer may comply with privilege rules while still violating Rule 1.6, and the reverse may also be true.

Indiana imposes a statutory duty on lawyers to maintain confidentiality when it is privileged communication. As contained in I.C. § 33-43-1-3(5), "An attorney shall… [m]aintain inviolate the confidence and, at every peril to the attorney, to preserve the secrets of the attorney's client." "In sum, the rule is 'that when an attorney is consulted on business within the scope of his profession, the communications on the subject between him and his client should be treated as strictly confidential.'"[5]

Attorney-client privilege is a similar responsibility to the duty of confidentiality, but it is only brought forth in the scope of litigation. "The burden of proof is on the person asserting the privilege to show that the consultation was a professional one."[6] "The attorney-client privilege protects against the disclosure of confidential communications between an attorney and client in the course of the attorney rendering professional legal advice or aid regarding the client's rights and liabilities. IC. 34–46–3–1(1) extends a privilege to '[a]ttorneys, as to confidential communications made to them in the course of their professional business, and as to advice given in such cases.'"[7]

"…The essential prerequisites to the attorney client privilege are the existence of an attorney client relationship and a confidential communication."[8] The key in whether the attorney-client privilege exists is whether there is an actual attorney-client relationship and the factors that determine such a relationship.

The duty of confidentiality continues after the attorney-client relationship ends. Confidentiality obligations may also arise with prospective clients. Each matter is evaluated on its own facts, and those facts often determine whether an ethical violation has occurred. Although Rule 1.6 and Rules 1.8 and 1.9 address different circumstances, the duty of confidentiality remains central in each setting.

Indiana differs from the ABA Model Rule adopted by many states. Indiana takes a broader approach by addressing successor counsel confidentiality in Rule 1.6(c). Indiana adds the following provision:

> In the event of a lawyer's physical or mental disability or the appointment of a guardian or conservator of an attorney's client files, disclosure of a client's name and files is authorized to the extent necessary to carry out the duties of the person managing the lawyer's files…[9]

This modification is a reminder that Indiana has been ahead of the national curve when it comes to attorney surrogacy, sometimes referred to in other jurisdictions as an attorney trust or conservancy. Rule 1.6(c) was added as an acknowledgement of Indiana's position regarding disabled or deceased lawyers. The same standard of confidentiality applies to the surrogate attorney regarding the disabled or deceased lawyer's duty of confidentiality.

WHEN DISCLOSURE IS PERMITTED (OR REQUIRED): PRACTICAL TREATMENT OF RULE 1.6(B) EXCEPTIONS

Without going into great detail, there are situations in which the disclosure of confidential information is permitted or required. Below are some examples of these situations.

- **Preventing reasonably certain death or substantial bodily harm**: If a lawyer reasonably believes through confidential information provided by the client or through information gleaned from the client that there is a reasonable likelihood of death or serious bodily harm the lawyer has the duty to disclose that information by whatever means necessary to prevent the potential death or bodily harm.[10]

- **Preventing crime/fraud using the lawyer's services**: A lawyer must take whatever reasonably necessary steps to prevent clients from using attorney services to cover fraud or criminal activity. This is especially true regarding criminal conduct and white-collar crime, including money laundering. An attorney must take whatever steps he or she "reasonably believes necessary" to disclose such information. The standard of conduct is the "reasonable expectation standard." Further, the confidential information must have a nexus to the lawyer's services.[11]

- **Mitigating/rectifying financial injury from crime/fraud**: Again, when client criminal or fraudulent conduct would cause further financial injury, the duty of disclosure is required to mitigate or rectify financial injury. Reasonableness, timing, and what is considered "substantial" harm are all factors which should be considered.[12]

- **Privilege doctrine parallel: crime–fraud exception (litigation)**: Confidential information in furtherance of a fraud/crime is not privileged confidential client information.[13]

- **Seeking legal ethics advice**: A lawyer may disclose limited confidential information when reasonably necessary to obtain legal ethics advice. When possible, the lawyer should omit identifying details or unique facts that could reveal the client or matter.[14]

- **Self-defense, fee disputes, and responses to allegations**: A lawyer may disclose confidential information when reasonably necessary to defend against a malpractice claim, fee dispute, or allegation of misconduct. Disclosure should be limited to the information necessary and, when possible, confined to the appropriate forum.[15]

ETHICS OF TECHNOLOGY

Technology offers significant benefits to legal practice, but lawyers must implement reasonable safeguards to protect confidential information. Lawyers cannot avoid this duty through

"Reasonableness does not require every available security measure, but it does require office-wide policies and practices that ensure employees, contractors, and third-party service providers are properly supervised and managed."

intentional ignorance of technology. Reasonableness does not require every available security measure, but it does require office-wide policies and practices that ensure employees, contractors, and third-party service providers are properly supervised and managed. An inadvertent or intentional disclosure in an email, public forum, listserv, website, or artificial intelligence platform may breach attorney-client confidentiality or waive attorney-client privilege. Courts and ethics authorities continue to evaluate how client information submitted through tools such as Claude, ChatGPT, and other AI systems may affect confidentiality and privilege. Because AI technology is rapidly evolving, even a routine prompt may disclose protected client information beyond the lawyer's control.

Redaction errors can also create ethical risks by inadvertently disclosing confidential information. One high-profile example occurred in the Paul Manafort case in 2019, when a redaction error revealed confidential and privileged information.

CYBERSECURITY AND DATA BREACHES

Data breaches and cyber threats targeting lawyers present significant professional responsibility and liability risks. As custodians of highly confidential information, law firms are attractive targets for hackers. For firms, the question is not whether an attack will occur, but when. Lawyers must protect client information within the office and online and must take reasonable precautions against cyberattacks and data breaches. In one widely reported case, hackers infiltrated a New York law firm's computer system, reportedly seeking insider-trading information.[16]

No lawyer can eliminate every cyber threat, but reasonable safeguards must be in place. Firewalls, antivirus software, password protection, and appropriate access controls are baseline precautions. Whether additional safeguards, such as two-factor authentication, are reasonable may depend on the firm's size, resources, technology, and risk profile.

RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANCE

Rule 5.3 has expanded in recent years to cover law firm staff, attorneys, and outsourced providers. For example, if you use a remote contract paralegal, you remain responsible for protecting client confidentiality even though the paralegal, clerk, or nonlawyer legal assistance are not your employees. Likewise, if an expert witness or consultant has access to client information, the attorney(s) must supervise that access and take reasonable steps to prevent disclosure.

CONCLUSION

Indiana Rule of Professional Conduct 1.6 requires a lawyer to take reasonable steps to ensure that confidentiality of client information is maintained. Reasonable is the key word. It is not necessary to take extraordinary steps to ensure client confidentiality, but education of the lawyer, staff, or any other legal assistance is the key to ensuring that client confidential information is not compromised.

ENDNOTES

1. Ind. Prof. Cond. R. 1.6(a); Ind. Code § 34-46-3-1(1)).
2. Ind. Prof. Cond. R. 1.6(a); see also Ind. Prof. Cond. R. 1.9(c)(2).
3. Ind. Code § 34-46-3-1(1).
4. Ind. R. Evid. 502(a)–(b).
5. *Colman v. Heidenreich*, 381 N.E.2d 866 (1978), citing *Jenkinson v. State*, 5 Blackf. 465, 466 (1840).
6. *Id.* at 866, 869, citing *McKnew v. Superior Court*, 23 Cal.2d 58 (1943); *McGrede v. Rembert National Bank*, (Tex.Civ. App.1941) 147 S.W.2d 580; C. McCormick, Evidence §§ 87-95 (2d ed. 1972).
7. Attorney/client privilege, 22 Ind. Prac., Civil Trial Practice § 21.13 (2d ed.).
8. *Id.* at n. 1, citing *Zurich American Insurance Company v. Circle Centre Mall, LLC*, 113 N.E.3d 1220 (Ind. Ct. App. 2018).
9. Ind. Prof. Cond. R. 1.6(c).
10. Ind. Prof. Cond. R. 1.6(b)(1).
11. Ind. Prof. Cond. R. 1.6(b)(2).
12. Ind. Prof. Cond. R. 1.6(b)(3).
13. Ind. Prof. Cond. R. 1.6(b)(2) and (3); *See Lahr v. State*, 731 N.E.2d 479 (Ind. Ct. App. 2000).
14. Ind. Prof. Cond. R. 1.6(b)(4).
15. Ind. Prof. Cond. R. 1.6(b)(5).
16. Nicole Hong and Robin Sidel, *Hackers Breach Law Firms, Including Cravath and Weil Gotshall*, Wall St. J. (March 29, 2016), https://www.wsj.com/articles/hackers-breach-cravath-swaine-other-big-law-firms-1459293504.

TOP 5 INDIANA TAX UPDATES FROM THE 2026 LEGISLATIVE SESSION

By the ISBA Tax Section

To help practitioners stay current, the ISBA Tax Section has highlighted five of the most significant tax-related developments from the 2026 legislative session, including updates to income tax, transaction taxes, and more.

ONE BIG BEAUTIFUL BILL CONFORMITY/ DECOUPLING (INCOME TAX)[1]

Indiana generally continues to decouple from several federal income tax provisions for tax years beginning on or after January 1, 2026, including the business interest limitation under IRC § 163(j), bonus depreciation under IRC § 168(k), IRC § 179 expensing, and OBBB depreciation for qualified production property under IRC § 168(n).

With respect to research and experimental (R&E) expense provisions under IRC §§ 174 and 174A, Indiana generally decouples from the federal amortization treatment for foreign R&E expenses under IRC § 174. For foreign R&E expenses incurred in taxable years beginning in 2025 and later, Indiana permits a full deduction in the year the expense is incurred for federal purposes and requires an addback of the later federal amortization deductions. For domestic R&E expenses incurred in taxable years 2025 and later, Indiana generally follows the federal treatment under new IRC § 174A, including the taxpayer's election to either expense those amounts in the year incurred or amortize them.

For individual taxpayers, the bill provides Indiana adjusted gross income deductions for the 2026 tax year corresponding to certain new federal deductions enacted under the OBBB. Specifically, for taxable years beginning after December 31, 2025, and before January 1, 2027, Indiana allows deductions in determining Indiana adjusted gross income for qualified tips under IRC § 224, qualified overtime compensation under IRC § 225, and qualified passenger vehicle loan interest under IRC § 163(h)(4), subject to Indiana-specific limitations and rules.

PENNY PHASE-OUT (TRANSACTION TAXES)[2]

Effective January 1, 2027, Indiana will apply new penny phase-out rounding rules to cash transactions. For cash payments on retail transactions, retailers may elect to round the final cash transaction total, including applicable tax, up, down, or to the nearest nickel. Cash payments of state or local taxes are rounded down to the nearest nickel.

PERSONAL LIABILITY FOR UNPAID TAXES[3]

For "taxes held in trust," which include several Indiana taxes such as sales and use tax, state and local income tax withholding, and financial institutions tax withholding, Indiana has expanded personal liability to a "responsible person" with a "duty to remit." The term "responsible person" may include an employee, contractor, officer, or member of an applicable business entity who has a duty to remit the covered taxes held in trust. A key practitioner concern, among others, is whether the statutory language could be read broadly enough to impose liability on practitioners advising or consulting on the filing or paying of Indiana taxes. Practitioners are working with the Indiana Department of Revenue's Tax Policy team to further clarify the scope of the statutory language.

NOTICES NOW SENT ELECTRONICALLY[4]

Effective March 5, 2026, Indiana expanded the ways in which the Department of Revenue (DOR) may deliver certain taxpayer documents. For tax types already required to be reported and remitted electronically, the DOR may now send correspondence electronically, including through a taxpayer's INTIME account. Other taxpayers may opt into electronic delivery through INTIME rather than by mail, although additional guidance is expected on how taxpayers may make this election.

PROPERTY TAX

HEA 1210[5] contains a number of changes that impact local government taxation. Given there are nearly 100 changes to the law contained in the 418-page bill, they are too voluminous to list here. If you are interested in changes to the law relative to HEA 1210, please take a look at the act.

The ISBA Taxation Section strives to improve the quality of tax practice in Indiana by offering a vast array of activities designed to help members improve the quality of their tax practice. It helps provide various seminars on tax-related items and presentations on topics of interest at its annual meeting. It also reviews all tax measures introduced before the Indiana General Assembly and hosts social functions aimed at honoring those working with the taxing agencies and courts. To learn more about the section, visit www.inbar.org/sections.

ENDNOTES

1. Senate Enrolled Act No. 243, 124th Indiana General Assembly (2026), available at https://iga.in.gov/pdf-documents/124/2026/senate/bills/SB0243/SB0243.05.ENRH.pdf.
2. *Id.* at 1.
3. *Id.* at 95.
4. *Id.* at 96.
5. House Enrolled Act No. 1210, 124th Indiana General Assembly (2026), available at https://iga.in.gov/pdf-documents/124/2026/house/bills/HB1210/HB1210.06.ENRS.pdf.

BRIDGING THE GAP BETWEEN THE ESTATE PLAN AND EXECUTION

By Kate Miller

As attorneys, you spend countless hours helping clients create thoughtful estate plans. You draft wills and trusts, navigate complex family dynamics, and ensure every legal document reflects your clients' wishes.

From a fiduciary's perspective, however, the real work often begins after those documents are signed.

When someone passes away, the estate plan moves from paper to practice. Trustees, personal representatives, financial institutions, and attorneys begin carrying out the client's wishes during one of the most emotional and challenging times a family will experience. In many cases, the legal documents are well written. The challenge isn't the drafting. It's translating those documents into real-life administration while honoring the client's intent.

Over the years, one lesson has become increasingly clear: the strongest estate plans are built not only on sound legal documents, but also on strong relationships, open communication, and collaboration long before administration begins.

THE BEST CONVERSATIONS HAPPEN BEFORE THEY'RE NEEDED

One of the biggest opportunities attorneys have is to move beyond simply documenting a client's wishes and to instead spend time understanding the story behind those decisions.

Every family is different. One child may receive a larger share of the estate. Another may be intentionally excluded. A trust may delay distributions until a beneficiary reaches a certain age or achieves specific milestones. Those decisions are rarely arbitrary.

When a fiduciary is asked to administer a trust years later, the legal language explains *what* should happen, but it doesn't always explain *why*.

That context can make all the difference.

For example, a trustee may know that distributions are discretionary, but understanding that the client was trying to protect a beneficiary struggling with financial responsibility or addiction provides valuable insight into how those provisions should be administered.

While fiduciaries are always bound by the governing documents, understanding the client's intentions helps ensure those wishes are carried out as thoughtfully as they were originally planned.

Sometimes, the most valuable information isn't found in the trust agreement itself. It's shared during conversations among the client, attorney, and fiduciary before the documents are ever signed.

> **"One of the biggest opportunities attorneys have is to move beyond simply documenting a client's wishes and to instead spend time understanding the story behind those decisions."**

ESTATE PLANNING IS A TEAM SPORT

The best outcomes happen when attorneys, financial institutions, CPAs, and fiduciaries view themselves as partners serving the same client.

Each professional brings a different perspective. Attorneys draft the legal framework. Financial institutions safeguard and administer assets. CPAs provide tax guidance. Fiduciaries oversee administration and carry out the client's wishes.

When those professionals communicate early, they often identify questions or administrative challenges that can be addressed before they become problems.

Equally important, collaboration helps everyone establish realistic expectations about their individual roles.

We've all experienced situations where someone unintentionally promises something another professional cannot deliver. One party may believe an estate can be settled within six months without realizing a particular financial institution routinely requires additional documentation. Likewise, a fiduciary should feel comfortable consulting the drafting attorney when questions arise about legal provisions, rather than attempting to interpret those provisions without the attorney's guidance.

Open communication prevents those misunderstandings and creates a better experience for everyone involved, especially the client.

PREPARING CLIENTS FOR THE ROAD AHEAD

One of the most common misconceptions surrounding estate administration is how long it takes.

From a client's perspective, it may seem straightforward. Collect the assets, pay the bills, and distribute what's left.

In reality, administration often involves locating assets, obtaining valuations, satisfying creditor claims, preparing tax filings, transferring real estate, working with multiple financial institutions, and complying with court deadlines. Even relatively simple estates require coordination among many parties, and some steps simply cannot be accelerated.

Today's clients also expect more frequent communication than ever before. They want updates, transparency, and a clear understanding of where things stand.

Attorneys can help prepare families by having honest conversations during the planning process, not after a loved one passes away. Setting realistic expectations early helps reduce frustration later and allows beneficiaries to focus on what matters most instead of wondering why the process is taking longer than anticipated.

ONE DETAIL THAT CAN CHANGE EVERYTHING

If there's one situation that fiduciaries fear most, it's beneficiary designations that no longer match the estate plan.

Clients often assume their will or trust controls every asset. Unfortunately, that's not always the case.

Retirement accounts, life insurance policies, and many payable-on-death or transfer-on-death accounts pass according to the beneficiary designation on file, not according to the estate planning documents.

As retirement assets continue to represent a larger share of many estates, coordinating beneficiary designations has become more important than ever.

Whenever an estate plan is updated, beneficiary designations should be reviewed as well. Marriage, divorce, births, deaths, and other major life events all create opportunities for inconsistencies that may not be discovered until it's too late.

> **"If there's one situation that fiduciaries fear most, it's beneficiary designations that no longer match the estate plan."**

A beautifully drafted estate plan cannot accomplish the client's wishes if beneficiary designations tell a different story.

NEVER UNDERESTIMATE THE HUMAN ELEMENT

Estate administration is about much more than transferring assets.

Families are grieving. Long-standing disagreements often resurface. Sometimes siblings disagree over significant financial decisions. Other times, conflict arises over items with little monetary value but tremendous sentimental importance.

An independent fiduciary can provide an objective voice during these difficult moments.

Because fiduciaries are not family members, they are able to focus on administering the estate according to the governing documents and the client's intent rather than family dynamics or emotions. That impartiality often helps preserve relationships while ensuring the client's wishes remain the guiding priority.

Attorneys play an equally important role by encouraging thoughtful conversations before conflict ever has the opportunity to develop.

When clients are comfortable discussing family dynamics during the planning process, the resulting documents and the administration that follows are often stronger because of it.

PRACTICAL WAYS ATTORNEYS CAN IMPROVE ESTATE ADMINISTRATION

Many of the most effective improvements happen long before estate administration begins. Based on our experience working alongside attorneys throughout Indiana, a few best practices consistently lead to smoother outcomes:

- Invite fiduciaries into planning conversations when trusts or family situations are particularly complex.
- Spend time discussing the client's goals and the reasoning behind important decisions, not just the legal documents themselves.
- Encourage collaboration among attorneys, CPAs, and financial institutions so everyone understands their role before administration begins.
- Review beneficiary designations whenever estate planning documents are updated.
- Prepare clients and beneficiaries for realistic administration timelines.
- Encourage clients to revisit their estate plans regularly as their lives, assets, and family circumstances evolve.

These conversations require a little more time on the front end, but they often save families, and the professionals serving them, significant time and frustration later.

LOOKING BEYOND THE DOCUMENTS

A successful estate plan isn't simply one that is legally sound. It can be carried out efficiently, thoughtfully, and in a way that honors the client's wishes.

For attorneys, that means looking beyond the documents themselves and considering what administration will actually look like years from now. For fiduciaries and financial institutions, it means building trusted relationships with attorneys and clients long before they're called upon to administer an estate.

When legal planning is paired with collaboration, communication, and a shared commitment to serving the client, everyone benefits, especially the families we are entrusted to help.

Ultimately, the goal isn't simply to prepare documents. It's to ensure those documents work exactly as intended when they matter most.

Kate received both a Bachelor of Business Administration in Accounting and a Masters in Science of Accountancy from the University of Notre Dame. Kate serves as a trustee for the University of St. Francis in addition to serving on the board of directors for Erin's House for Grieving Children. Kate previously served on the board of directors for Kate's Kart, Inc. and the YWCA of Northeast Indiana. She is a past recipient of Fort Wayne Business Weekly's Forty Under 40 award and a prior Visionary of the Year candidate for Blood Cancer United.

By Zach Stock

WARRANTS FOR LOCATION HISTORY AND OTHER JUNE CASES

June is a busy month for appellate decisions. The U.S. Supreme Court closed its term with dramatic flair, and one of its decisions is included here. The Indiana Supreme Court decided five criminal cases, and the Court of Appeals published 12 opinions in criminal cases. Space permits discussion of only three opinions from the Indiana Supreme Court and two from the Indiana Court of Appeals.

U.S. SUPREME COURT

YOU HAVE A REASONABLE EXPECTATION OF PRIVACY IN YOUR CELL PHONE'S LOCATION HISTORY; THEREFORE, POLICE NEED A WARRANT BEFORE DEMANDING LOCATION INFORMATION FROM A THIRD-PARTY TECH COMPANY.

Big Brother is watching you. However, he's less of a sinister dictator and more like a multinational corporation, and these companies collect detailed location data of interest to law enforcement.

In *Chatrie v. United States*, the U.S. Supreme Court held that law enforcement officials conduct a search governed by the Fourth Amendment when they obtain location data from a third-party technology company. No. 25-112, 2026 WL 1855568, at *4 (U.S. June 29, 2026). This might sound familiar, as it is well settled that the police cannot place tracking devices or obtain cell-site records without a warrant.[1] But there were at least two interesting wrinkles to *Chatrie*.

First, Google's "Location History is an optional add-on a user must enable by an affirmative act beyond powering up a phone." *Id.* at *15 (quotation omitted). For the government and the dissenting justices, this was significant. *See id.* at *30 (Barrett, J., dissenting) ("Chatrie had no reasonable expectation of privacy in data about his public movements that he voluntarily disclosed to Google."). For the majority, location history could hardly be characterized as optional. *Id.* at 15. More importantly, "[p]retty much everything a person does on a smartphone requires some kind of opt-in." *Id.* at *16. And the court was skeptical that this almost obligatory box-checking could truly signal the wholesale surrender of the most intimate details stored on our devices. *See id.*

Second, there has been a question about the continuing vitality of the reasonable expectation of privacy approach to Fourth Amendment litigation. Many on the court, particularly Justice Gorsuch, argue that courts should ask "whether Location History qualifies as [someone]'s papers or effects, and then…whether the government searched those papers or effects." *Id.* at *20 (Gorsuch, J., concurring). His approach remains the minority view but is still influential and, in the right case, may provide even greater protection for digital privacy. Both sides should be prepared to litigate it.

INDIANA SUPREME COURT

THE STATE IS NOT REQUIRED TO ESTABLISH THE CONSTITUTIONALITY OF POLICE CONDUCT TWICE, EVEN IF THE PRETRIAL LITIGATION AND THE TRIAL WERE PRESIDED OVER BY DIFFERENT JUDICIAL OFFICERS.

When a pretrial motion to suppress is denied, defense counsel must also object at trial to preserve the question for appeal. But must the constitutional question be relitigated?

In *Ramos-Osario v. State*, No. 26S-CR-198, 2026 WL 1814925, at *1 (Ind. June 24, 2026), a majority of the Indiana Supreme Court held that if the state carried its burden to show the evidence was constitutionally obtained during a pretrial hearing, it need not carry that burden again at trial. For the court, "[r]equiring the State to prove constitutional compliance twice doesn't better deter misconduct or preserve integrity than making the State prove compliance once." *Id.* It certainly does not *preclude* the trial court from reevaluating the issue at trial. However, if there is a reconsideration, "the trial judge can consider evidence from both the suppression hearing and trial." *Id.* at *5.

What happens if one judicial officer denied the motion to suppress and another presides over the trial without reviewing the pretrial proceedings? For the majority, this makes no difference, because the exclusionary rule is a "judicially-created remedy calculated to deter police misconduct, not a rule in our Rules of Evidence." *Id.* at *6 (quotations omitted). Thus, on appellate review, a court is not "limited to what the trial judge actually considered. Instead, when reviewing suppression issues, appellate courts, like trial courts, can consider evidence from both the suppression hearing and trial." *Id.*

The dissenting opinion argued the court was unduly expanding appellate review and reducing the contemporaneous objection rule to mere formality. *Id.* at *7-11 (Rush, C.J., dissenting). And, for the dissenting justices, the nature of the exclusionary rule did not justify the result. *Id.* at *10. In their view, this was an "inversion—putting the constitutional cart before the standard-of-review horse." *Id.*

THE AVAILABILITY OF MEANINGFUL REVIEW SAVED A POST HOC SEXUALLY VIOLENT PREDATOR DETERMINATION FROM AN EX POST FACTO CHALLENGE, BUT THE MERE POSSIBILITY OF REVIEW IS NOT ALWAYS ENOUGH.

Many Hoosiers were convicted, sentenced, and discharged from prison long before the legislature enacted a 2007 law labeling them sexually violent predators (SVP).[2] This belated labeling spawned numerous ex post facto challenges, many of which were rejected because of a statutory procedure that permits a person to annually petition the trial court for relief from the SVP label.[3]

At issue in *Wilson v. State* was whether the review procedure was meaningful. Under the statute, a trial court may either reject a petition or appoint experts to evaluate the petitioner. In *Wilson*, the trial court rejected a verified petition supported by exhibits and a motion to correct error. The court reviewed the original criminal case and was "firmly convinced" the petitioner was "still a danger and should be on the registry." No. 26S-CR-197, 2026 WL 1800954, at *2 (Ind. June 23, 2026).

The Indiana Supreme Court affirmed. *Id.* at *3-5. First, the court found that meaningful review was *available*, even if not bestowed. *See id.* at *4. Second, "nothing in the records suggests the trial court relied solely on the unchanging circumstances of [the petitioner]'s 'decades-old offense' that would render meaningless the opportunity for annual reconsideration of his SVP status going forward." *Id.* at *5.

Still, to prevent illusory review, the court held that a hearing with court-appointed experts is required "when the offender makes a prima facie showing that he no longer suffers from a mental abnormality or personality disorder that presents a substantial danger, that is, a serious and well-founded risk, that he will recidivate by committing an SVP-qualifying sex offense." *Id.* at *7 (quotations omitted).

The dissent found concerns about illusory review "unfounded." *Id.* at *9 (Slaughter, J., dissenting). Moreover, concluding that neither the statute nor the constitution compelled the majority's rule, the dissent would have left further clarification to the legislature. *Id.*

A DEFENDANT STILL CANNOT CHALLENGE A CONVICTION FOLLOWING A GUILTY PLEA ON DIRECT APPEAL; HOWEVER, HE CAN MOVE TO WITHDRAW HIS PLEA AND APPEAL A DENIAL OF THAT MOTION.

Blackletter law holds that a defendant who pleads guilty may not challenge his conviction on direct appeal.[4] Instead, a defendant who believes his plea, conviction, or sentence is invalid must pursue a petition for post-conviction relief. And this is true even if double jeopardy principles are violated by the entry of multiple convictions, such as when a judge enters a conviction for murder and felony murder.

The Indiana Supreme Court was asked to revisit these general principles in *Monroe v. State*, No. 26S-CR-208, 2026 WL 1862497 (Ind. June 29, 2026). More specifically, the court was urged to "allow defendants who plead guilty to the charging document without the benefit of any agreement to challenge their conviction on double jeopardy grounds on direct appeal since they have the right to presume that the trial court will follow the law." *Id.* at *2 (quotation omitted). A majority of the court declined the invitation and offered some advice. *Id.*

The Indiana Code provides a mechanism for withdrawing void or voidable guilty pleas and for appealing the denial of a motion to withdraw.[5] Thus, the court counseled litigants that when a trial court mistakenly enters judgment of conviction on a lesser-included offense following a guilty plea, and the defendant did not agree to that through a plea agreement, the defendant should move to withdraw the guilty plea *only as to the lesser-included conviction. Id.*

Justice Goff dissented. In his view, a double-jeopardy claim following a guilty plea should be viable "on direct appeal if the alleged violation arose after entry of the guilty plea, the defendant never agreed to the alleged violation, an appellate court can resolve the claim based on the existing record, and there's no legitimate dispute over the factual basis supporting the conviction." *Id.* at *4 (Goff, J., dissenting).

INDIANA COURT OF APPEALS

TWO DOUBLE JEOPARDY OPINIONS AND TWO DISSENTS ILLUSTRATE THE DELICATE BALANCE BETWEEN PROCEDURAL EFFICIENCY AND CONSTITUTIONAL RIGHTS.

The Fifth and Fourteenth Amendments protect the accused's right to have a trial completed by a particular tribunal.[6] Thus, after a jury is selected and sworn, a defendant can be retried only if there is manifest necessity for a mistrial or the defendant himself freely requests or consents to one.

In *Kelley v. State*, the Court of Appeals decided a mistrial was manifestly necessary due to comments made by the defense during opening argument. No. 25A-CR-1454, 2026 WL 1792911 (Ind. Ct. App. June 23, 2026). Regarding the state's opening witness, counsel cautioned the jury that they would be hearing from "a person who seems to find herself in the center of a lot of violent crime scenes," who was "familiar to the police," and who was "facing a level 5 felony."

To determine whether these comments created a manifest necessity, the court asked whether the mistrial was attributable to the state, whether the trial court adequately considered alternatives, and what burden a retrial would impose. *Id.* at *3-6. For the majority, all three factors weighed in favor of a mistrial. *Id.* at *6.

But it was a close call. Judge Weissmann dissented, finding it "troubling" that "a brief, overreaching but easily curable comment during the defense's opening statement justifie[d] discharging a sworn jury over the defendant's objection." *Id.* at *8. (Weissmann, J., dissenting).

In *White v. State*, No. 25A-CR-959, 2026 WL 1543270 (Ind. Ct. App. June 2, 2026). the issue was whether the defendant implicitly consented to a mistrial. The trouble began when the state failed to produce numerous documents—an omission not discovered until after the first trial began. This caused a several-week recess and the loss of several jurors. When the court could no longer maintain a 12-person jury, the judge held an off-the-record meeting with counsel and suggested a mistrial might be necessary. Counsel apparently said nothing in response to this suggestion, and the next day the judge declared a mistrial.

The court found that counsel's silence and failure to request a trial with fewer than 12 jurors were enough to conclude that the defendant consented to the mistrial. *Id.* at *3-4. But Judge DeBoer, in dissent, believed the case presented a broader constitutional question: "[H]ow does a court balance a defendant's constitutional right against double jeopardy with the procedural right of all parties to have serious criminal cases tried by a twelve-member jury?" *Id.* at *8 (DeBoer, J., dissenting).

For the dissent, the record did not show implied consent. *Id.* at *9-10. The trial court made no contemporaneous record of its decision; therefore, it was necessary to reconstruct what happened from the state's arguments, which did not persuade the dissent that there was a failure to object. *Id.* Thus, the dissent would have moved to an analysis of the manifest necessity. *Id.* at *11.

And on this point, Judge DeBoer proposed a new rule: "[B]efore declaring a mistrial because individual jurors have been dismissed and fewer than twelve remain, a trial judge must adequately explore the option of proceeding with fewer jurors under Jury Rule 16, which can generally be satisfied by giving the defendant an opportunity to express his opinion on how to proceed." *Id.* at *13.

ENDNOTES

1. *United States v. Jones*, 565 U.S. 400 (2012) (tracking devices); *Carpenter v. United States*, 585 U.S. 296 (2018) (cell-site records).
2. *See* Ind. Code § 35-38-1-7.5(b).
3. *Lemmon v. Harris*, 949 N.E.2d 803, 813 (Ind. 2011); *Jensen v. State*, 905 N.E.2d 384, 394 (Ind. 2009); I.C. § 35-38-1-7.5(g).
4. *See Tumulty v. State*, 666 NE.2d 394, 395-396 (Ind. 1996).
5. *See* Ind. Code § 35-35-1-4.
6. *Oregon v. Kennedy*, 456 U.S. 667, 67 1-72 (1982).

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ETHICS

By James J. Bell and Molly E. Broadhead

THE ETHICS NO ONE WARNED YOU ABOUT WHEN YOU DECIDED TO RUN A SMALL FIRM

Running a small firm can be a rewarding experience, but it also can be full of ethical challenges. Here are some of the ethical considerations that no one warned you about when you decided to run a small firm.

1. NO ONE WARNED YOU OF OUR NEW GOOGLE REVIEW CULTURE

We live in a "Google Review Culture" where everyone believes they need to publish how many "stars" they'd give every possible experience. The Google Review Culture will rate a restaurant, a plumber, or an electrician. The legal profession is not immune. Courts, lawyers, and even jails get reviews on a five-star scale. (Seriously. We found that a Central Indiana jail got two-stars. We are shocked that any jail can get that high of a rating.)

With so many potential clients shopping for lawyers online, a negative review can be damaging to your bottom line. What can you do? Very little, unfortunately, because you must protect a client's confidentiality.

Here is what the ABA recommends:[1]

- Request the site host to remove the review. Shockingly, lawyers have told us that Google will occasionally do this.
- Consider not responding. This avoids revealing confidential information. (Nobody likes this suggestion.)
- If the reviewer is not a client or a former client, state that fact in your response. Obviously, if the reviewer is not a client, there is no revelation of confidential information.

"While all lawyers need clients to keep their firms running, not every potential client is worth saying 'yes' to, and you should probably say 'no' more often."

- Ask the reviewer to continue the conversation offline.
- Explain that professional obligations limit your ability to fully respond.

2. NO ONE WARNED YOU THAT THERE ARE SO MANY UNWORTHY CLIENTS

While all lawyers need clients to keep their firms running, not every potential client is worth saying "yes" to, and you should probably say "no" more often.

Obviously, lawyers cannot say "yes" unless they can ethically represent a potential client. This means that you cannot accept a representation of a client unless the representation can be performed competently (that is, you know what you're doing and have time for the matter) and without a conflict of interest.[2]

We would add that you need to make sure that you can get paid before you consider saying "yes." If you are not getting paid, that means you are going to take on too much or that you may cut corners, which can lead to a host of ethical and malpractice problems.

If you can take on the case, then SAY NO if you cannot meet a client's expectations. In our Google Review Culture, an unhappy client grieves and sues. If you are the second, third, or fourth lawyer on the matter, ask why the potential client was dissatisfied with and dismissed their prior counsel. Our guess: The other lawyers could not meet the client's expectations, and you will not be able to do so either.

Other "red flags" a lawyer should consider in determining whether to accept an engagement include whether the potential client: (1) promises you other business down the line (Translation: They do not plan to pay you on this case); (2) thinks this is the only case you should work on; (3) claims to know more law than you (and certainly more than any previous lawyer); (4) has a negative attitude toward the legal system; (5) is motivated by "revenge," "making a statement," or "teaching someone a lesson" (this attitude fades after the first invoice is issued); and (6) is otherwise incompatible with you.

3. NO ONE WARNED YOU WOULD HAVE TO BE TECH SUPPORT OR HR OR THE ACCOUNTING DEPARTMENT…

When we talk about tech, we are talking about protecting confidential information from intruders. We are also talking about keeping up with AI and the efficient management, review, and storage of confidential information. Rule 1.1 states that a lawyer shall be competent, and Comment [6] to this rule states that "[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with the technology relevant to the lawyer's practice*." (Emphasis added.)

Are you no good with tech? You are not the only one. Fortunately, Comment [2] of Rule 1.1 states that "[c]ompetent representation can also be provided through the association of a lawyer of established competence in the field in question." So, if you can't beat 'em, "associate" with them. This goes for tech, HR, accounting, and cases where you might find yourself in a "gray area."

4. NO ONE WARNED YOU THAT SOMETIMES YOU HAVE TO SAY BYE-BYE TO A CLIENT

Remember those unworthy clients we spoke about? The cases you knew deep down were a bad idea to take? If the red flags did not cause you to decline, you may now need to say goodbye.

Of course, there are certain situations in which a lawyer *must* withdraw from the representation of a client. These situations include when (1) the representation will result in a violation of the Rules of Professional Conduct or other law, (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client, or (3) the lawyer is discharged.[3]

There are other situations in which a lawyer *may* withdraw from representing a client. For example, a lawyer may withdraw if "withdrawal can be accomplished without material adverse effect on the interests of the client," or "the client has used the lawyer's services to perpetrate a crime or fraud."[4]

In the context of formal judicial proceedings, an attorney generally cannot withdraw without the court's permission. Rule 1.16(c) states that "[a] lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation." It is important to always check the court's local rules prior to filing a motion to withdraw.

Again, DO NOT disclose confidential information when withdrawing your appearance. The motion to withdraw will be publicly filed, and your disclosure to the court is limited by the duty of confidentiality. It is best to say the minimum needed to withdraw and reveal no confidential information in the motion. In addition, remember that the court and the public can see what you titled the filed PDF. It is best to title it "Motion to Withdraw" and not something that may come back to haunt you like "Good Riddance to Bad Rubbish.pdf" or "Peace Out Awful Client.pdf."

5. NO ONE WARNED YOU THERE WOULD BE LULLS

For some reason, the phone won't stop ringing, and the lawyer becomes unhappy because he or she is too busy. Then, the phone stops ringing, and the lawyer becomes *really unhappy* with a concern for the future. (Lawyers can be a difficult bunch.)

Our suggestion: Enjoy the lull. The phone shall ring again. Use the time to deepen competence, catch up, and shore up systems. Here's a crazy idea: Get some exercise. (Sorry. That was too much.) Why don't you just go see "The Odyssey?" Please do not use this time to "dabble" into unfamiliar areas of practice. Malpractice thrives when the lawyer is out of his or her lane.

6. LOTS OF PEOPLE ACTUALLY DID WARN YOU THAT COMMUNICATION IS IMPORTANT. THEY WERE RIGHT

Traditionally, the most common reason for a disciplinary grievance has been a lack of communication. Interestingly, Comment 4 to Rule 1.4 (the communication rule) allows you to seek help (once again) in fulfilling this duty. That comment states that when a reasonable request for information is made, prompt compliance with the request is required, "or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected." In addition, Comment 4 states that a client's "telephone calls should be promptly returned or acknowledged."

Clients want to know that you have their back. Clear and prompt communication is the way to show this. At the outset of an engagement, a lawyer should establish ground rules for client communications, including how a client would prefer to communicate and when the client should typically expect to receive a response. Attorneys should promptly and candidly deliver case developments and try to respond to a client's request for information promptly. Finally, attorneys also should make an effort to document what was communicated by them and their clients.

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ENDNOTES

1. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 496 (2021).
2. *See* Indiana Rule of Professional Conduct 1.16, Cmt. 1.
3. *See* Indiana Rule of Professional Conduct Rule 1.16(a).
4. *See* Indiana Rule of Professional Conduct 1.16(b)(1) and (3).

CIVIL LAW UPDATES

By Jane Dall Wilson and Safari Jackson

VOID V. VOIDABLE, UNAPPORTIONED EXCISE TAXES, AND MORE

This article highlights three Indiana Supreme Court opinions issued in June 2026.

ZONING DECISION WAS VOIDABLE, NOT VOID, AND SUBJECT ONLY TO TIMELY JUDICIAL REVIEW.

In a 3-2 opinion in *Franklin T. Wike, et al. v. Grandview Solar Project, LLC*, 281 N.E.3d 529 (Ind. Jun. 24, 2026) (Massa, J.), the Indiana Supreme Court clarified the distinction between void and voidable zoning decisions. The court held that when a board of zoning appeals has general statutory authority to act, its failure to satisfy statutory prerequisites makes its decision voidable, not void *ab initio*, and any challenge must be brought within the statutory period for judicial review.

Grandview Solar Project, LLC (Grandview Solar) sought to develop a large solar farm in Spencer County. The project included land within the town of Grandview (the town), land in the two-mile fringe outside the town's corporate limits, and land beyond that fringe in Spencer County. Indiana Code § 36-7-4-205(d) and (e) permit a municipality to extend zoning authority into the two-mile fringe by providing for that jurisdiction in its comprehensive plan and zoning ordinance. The town's comprehensive plan and zoning ordinance, however, applied only within the town's corporate limits. Even so, the town's Board of Zoning Appeals approved a special exception in 2019 authorizing construction in the two-mile fringe, and no one sought judicial review within the 30-day statutory period.

In 2023, Grandview Solar applied for an improvement location permit so construction could begin, but the town refused to issue the permit despite advice from its attorney that any challenge to the 2019 approval was untimely. Grandview Solar then sued the town, and the parties resolved that litigation through a settlement agreement requiring the town to issue the permit. After that case was dismissed, neighboring landowners filed this declaratory judgment action. They alleged the 2019 special exception approval was void because the town had not lawfully extended its zoning authority into the two-mile fringe, and that the settlement agreement was likewise void because it rested on an invalid approval. The trial court entered summary judgment for the defendants, but the Court of Appeals reversed, concluding that the Board of Zoning Appeals acted *ultra vires* when it approved the special exception without first satisfying the statutory prerequisites for exercising extraterritorial zoning authority. Because the approval was *ultra vires*, the Court of Appeals held it was void *ab initio* and subject to collateral attack despite the expired 30-day review period.

Reversing the Court of Appeals, the Indiana Supreme Court explained that the *ultra vires* doctrine distinguishes between actions taken without any statutory authority and actions involving the improper exercise of authority the government generally possesses. Applying that distinction, the court concluded that the Board of Zoning Appeals had general statutory authority over zoning and special exceptions, and that Indiana law allowed municipalities to exercise jurisdiction in the two-mile fringe when the statutory prerequisites were met. The town's failure to satisfy those prerequisites therefore made the 2019 approval voidable rather than void *ab initio*. Because the landowners did not challenge the approval within the 30-day judicial review period, their declaratory judgment action was an impermissible collateral attack. The court also emphasized that allowing collateral attacks years after zoning approvals became final would undermine the finality and certainty needed for administrative and land-use decisions.

Justice Goff, joined by Chief Justice Rush, dissented, concluding that because the town had not met the statute's requirements for extraterritorial zoning jurisdiction, its 2019 approval was void and subject to collateral attack.

IF A NON-MOVANT APPEALS A BELATED GRANT OF A MOTION TO CORRECT ERROR, THE MOVANT, AS CROSS-APPELLANT, IS NOT LIMITED TO ISSUES RAISED IN THE MOTION TO CORRECT ERROR BUT MAY ARGUE ANY ISSUE PRESERVED AT TRIAL.

In *Stabosz v. Friedman*, 280 N.E.3d 799 (Ind. Jun. 26, 2026) (Molter, J.), the Indiana Supreme Court clarified a narrow but recurring issue: the scope of a cross-appeal when a trial court grants a motion to correct error after the motion has already been deemed denied under Trial Rule 53.3(A) and the non-movant appeals that decision. The court held that, under those circumstances, the movant may cross-appeal any issue preserved in the trial court, not only the issues raised in the motion to correct error.

In the underlying defamation action, after a jury returned a defense verdict, the plaintiff filed a motion to correct error seeking a new trial on five grounds. The trial court did not rule within the time prescribed by Trial Rule 53.3(A), and so the motion was deemed denied. Three days later, however, the trial court belatedly granted the motion and ordered a new trial. After additional motions practice in the trial court, defendant appealed, arguing the belated order was void, and plaintiff cross-appealed, raising both the issues in his motion to correct error and two additional issues preserved during trial. The Court of Appeals vacated the belated order and declined to consider the additional issues, concluding that plaintiff's cross-appeal was limited to the arguments raised in the motion to correct error.

The Supreme Court agreed that the belated order granting the motion to correct error was voidable rather than void but disagreed with the Court of Appeals' limitation on plaintiff's cross-appeal. The court explained that Trial Rule 59 generally permits parties to raise on appeal any issue preserved during trial, and that neither Trial Rule 59 nor the court's prior decisions in *Cavinder Elevators, Inc. v. Hall*, 726 N.E.2d 285 (Ind. 2000), and *HomEq Servicing Corp. v. Baker*, 883 N.E.2d 95 (Ind. 2008), limit a cross-appeal to issues identified in a motion to correct error. The court reasoned that imposing such a limitation would be inconsistent with the Trial Rules and would undermine the fairness and efficiency underlying those prior decisions by requiring parties to file unnecessary protective appeals or include every conceivable appellate issue in a motion to correct error. The court therefore remanded the case for the Court of Appeals to consider the previously unaddressed cross-appeal issues and otherwise summarily affirmed its decision.

UNAPPORTIONED WAGERING EXCISE TAXES ARE NOT SUBJECT TO INDIANA'S CORPORATE INCOME TAX ADD-BACK STATUTE.

In *PENN Entertainment, Inc. (f/k/a Penn National Gaming, Inc.) v. Indiana Department of State Revenue*, ---N.E.3d---, 2026 WL 1863883 (Ind. Jun. 29, 2026) (Molter, J.), the Indiana Supreme Court held that Indiana's corporate income tax add-back statute does not require taxpayers to add back unapportioned wagering excise taxes paid to other states when calculating Indiana adjusted gross income.

PENN Entertainment, Inc. (PENN) operates gaming facilities in multiple states and deducted both state income taxes and wagering excise taxes on its federal tax returns for the 2015 through 2017 tax years. When preparing its Indiana corporate income tax returns, PENN added back its state income tax deductions, as required by Indiana Code § 6-3-1-3.5(b)(3), but did not add back wagering excise taxes it paid to other states that were unapportioned. Following an audit, the Indiana Department of State Revenue determined that the statute required PENN to add back those wagering taxes as well and assessed additional tax. The Indiana Tax Court upheld the department's interpretation.

Reversing the tax court's judgment, the Indiana Supreme Court explained that Indiana's add-back statute is intended to preserve accurate apportionment of income subject to state taxation by requiring taxpayers to restore deductions for taxes based on or measured by income. The court concluded that the statute applies to direct income taxes and their functional equivalents, including taxes that are apportioned like income taxes, but not to unapportioned excise taxes. Because the wagering excise taxes at issue were imposed on intrastate wagering transactions rather than apportioned income, requiring PENN to add them back would extend the statute beyond its text and purpose. The court therefore held that PENN properly excluded the wagering excise taxes from its Indiana add-back calculation and remanded for entry of summary judgment in PENN's favor.

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