INTRODUCING:
NEW ISBA PRESIDENT
CLAYTON C. MILLER

FEATURING:
The Dispossessed: Observations on Indiana’s Eviction Crisis
I love LawPay! I’m not sure why I waited so long to get it set up.

– Law Firm in Ohio

Trusted by more than 150,000 professionals, LawPay is a simple, secure solution that allows you to easily accept credit and eCheck payments online, in person, or through your favorite practice management tools.

- 22% increase in cash flow with online payments
- Vetted and approved by all 50 state bars, 70+ local and specialty bars, the ABA, and the ALA
- 62% of bills sent online are paid in 24 hours

Data based on an average of firm accounts receivables increases using online billing solutions. LawPay is a registered agent of Wells Fargo Bank N.A., Concord, CA and Synovus Bank, Columbus, GA.

Get started at lawpay.com/inbar
866-583-0342

Data based on an average of firm accounts receivables increases using online billing solutions.
THE DISPOSSESSED

The Dispossessed: Observations on Indiana’s Eviction Crisis
By Kent L. Hull

CONTENTS
Opinions expressed by bylined articles are those of the authors and not necessarily those of the ISBA or its members. ©2021 by the Indiana State Bar Association. All rights reserved. Reproduction by any method in whole or in part without permission is prohibited.

OFFICERS

President:
Clayton C. Miller, Indianapolis

President Elect:
Amy Noe Dudas, Richmond

Vice President:
Hon. Tom Felts, Fort Wayne

Secretary:
Mary Louise Dague Buck

Treasurer:
Yvette LaPlante

Counsel to the President:
Terry Tolliver

BOARD OF GOVERNORS

1st District:
Candace Williams, Gary

2nd District:
Zachary Lightner, Auburn

3rd District:
Hon. Cristal Brisco, South Bend

4th District:
Lindsay Lepley, Fort Wayne

5th District:
Cliff Robinson, Rensselaer

6th District:
Scott Smith, Noblesville

7th District:
Emily Storm-Smith, Indianapolis

8th District:
Katie Boren, Evansville

9th District:
Greg Fifer, Jeffersonville

10th District:
Melissa Cunnyngham, Frankfort

11th District:
Colin Flora, Indianapolis

11th District:
Ann Sutton, Indianapolis

11th District:
Jon Laramore, Indianapolis

At Large District:
Renee Ortega, Hammond

At Large District:
Freedom Smith, Indianapolis

Past President:
Michael Tolbert, Gary

House of Delegates Chair:
Holly Harvey, Monroe County

House of Delegates Chair Elect:
Angka Hinshaw, Indianapolis

Young Lawyers Section Chair:
Alyssa Cochran, New Albany

Young Lawyers Section Observer:
Brandon Tate, Indianapolis

RETURN TO THE OFFICE

Return to the office after the global pandemic
By Tara Puckey

RULE 7.3(C)

Rule 7.3(c)’s Office-Address Requirement Should Be Updated
By Donald R. Lundberg

ISBA LEADERS

ISBA leaders honored by state legislation
By ISBA Staff
Cases referred to Klezmer Maudlin will be personally handled by either Randal Klezmer or Nathan Maudlin. We will be thoughtful, responsive and dependable in our service.
I like movies. There's something about the added visual element to storytelling via motion picture that resonates with me, so it's perhaps fitting that I begin my first President's column for Res Gestae with a movie line I quoted in my law school admissions application: “Without law, there is no civilization.” It comes from the 1957 fictional movie The Bridge on the River Kwai and was spoken by one of the main characters, a singularly legalistic British colonel held captive in a Japanese-run prisoner-of-war camp in Burma during World War II.

Based on the novel of the same name (albeit in the author’s native French), the English film won seven Academy Awards, including Best Picture and Best Actor for Alec Guinness’ portrayal of the aforementioned officer, Colonel Nicholson. Although the film’s somewhat un-nuanced portrayal of the captors can be off-putting to 21st century sensibilities, it remains a powerful drama with timeless themes. For example, Colonel Nicholson’s persistent invocation of the Geneva Convention as his basis for opposing the POW camp commandant’s efforts to conscript officers to join the enlisted prisoners in working on construction of a railroad bridge presents a stark juxtaposition of the rule of law in the context of brutal wartime conditions. The colonel pays a physical price for his stubborn adherence to legal principle, although he eventually gains a reprieve for his fellow officers and himself from having to perform manual labor. Some of his other by-the-book justifications, however, such as forbidding escape attempts, raise questions about his judgment. In an analysis of the film in 2010, one reviewer describes Nicholson as having “gone mad with law.” [https://deepfocusreview.com/definitives/the-bridge-on-the-river-kwai/]

By Clayton C. Miller
As a young man some three decades ago hoping to pursue a legal education, I found the statement about the law being an essential underpinning for civil society trenchant, if obvious. Who could dispute the truth that “without law there is no civilization?” Indeed, I worried a bit that invoking the quote in my law school application would come across as unoriginal or even pandering. Whatever their reaction to my application essay, to my great relief the good folks at what would later be renamed the Indiana University Maurer School of Law admitted me anyway. And over the course of my subsequent career – first as a judicial clerk, then a few years as an administrative law judge before entering private practice in 2000 – I have had few occasions to give the quote much further thought, that is until this past year.

The pervasive impacts of the global COVID-19 pandemic coupled with national political turmoil have reinforced as never before the essential primacy of legal precepts and the ordered systems upon which our society depends. Though far from perfect, and susceptible to clashing visions of how we implement self-government, the public and private mechanisms for enacting, enforcing, and interpreting our laws make it possible to live together even in the face of widely disparate priorities and hopes for ourselves, our families, and our communities. Lawmakers and courts have faced particular challenges in the face of new realities wrought by a microscopic virus over the past 18 months. Lawyers, too, have had their lives and practices upended as we’ve been called upon not only to navigate unprecedented social and financial disruption, but also to assist in keeping the lights on and the trains on their tracks, if you’ll forgive the mixed metaphor. By virtue of our training and experience, members of the legal profession, including judges of all stripes, help preserve access to justice and economic arrangements, to say nothing of protecting the integrity of the ballot box, and have thus enabled our society to continue functioning.

Of course, we’re not alone in these efforts, nor are lawyers even necessarily the most important actors in the still unfolding dramas that have recently shaken our national life so profoundly. We’ve also seen prominent but isolated examples from other jurisdictions over the past 12 months of lawyers violating the rules of professional conduct, acting to subvert the rule of law, and fomenting disruption and instability. The related sanction and disciplinary cases working their way through an orderly legal process collectively present a cautionary tale about the limits of zealous advocacy, which one hopes will ultimately prove to be instructive.

It can be tempting to retreat inward during such fraught times, and the increased emphasis on self-care both within our profession and in society generally has been
a welcome trend. But allow me to suggest that members of the legal profession should not shy away from involving themselves in both facilitating our collective return to normal while at the same time crafting a more just and efficient new normal. I’m speaking in broad generalities in the hope each of us can reflect on our own particular area of the law and critically assess how we might seize opportunities to play an active and constructive role in moving the needle in a positive direction for our clients and society. Your Indiana State Bar Association stands ready to assist in such efforts. In the meantime, demand for pro bono assistance has never been higher. Providing legal services, even outside of one’s practice area, can yield great personal satisfaction, to say nothing of the immeasurable value such services can represent to the recipient. I join our Supreme Court in encouraging pro-active efforts within the bar to lend our talents to some of our least fortunate fellow citizens.

As Hoosier lawyers, we are privileged to occupy an essential role in our multi-faceted legal system as well as in broader social structures in our respective communities. And whether you view Colonel Nicholson’s assertion as more of a bromide than a profound insight, allow me to conclude with my own restatement, intended as both paean and call to action: Without lawyers, there is no civilization. May our collective words and deeds continue to serve as a bulwark to civil society.
THE DISPOSSESSED: OBSERVATIONS ON INDIANA’S EVICTION CRISIS
Until the 21st century Indiana courts were, with exceptions, unreceptive to claims and defenses of tenants litigating against landlords. The courts rarely departed from common law and, as late as the 1990s, rejected—with Justice Brent Dickson dissenting—implied warranties of habitability in leases, a doctrine recognized decades earlier by other state and federal courts. The last two decades have seen a gradual change from that tradition and in the present pandemic landlord-tenant law is entwined with constitutional questions of governors and federal agencies acting to limit or prevent evictions.

Indiana’s eviction crisis in 2020 and 2021 is only one housing emergency the state experienced during the 20th and 21st centuries. In Chief Justice Loretta Rush’s January 2020 State of the Judiciary Address, she recounted, “I recently spent a morning in a small claims court. The morning docket included 275 eviction cases. None of the defendants/tenants had legal representation. Not one. They all faced the judge and opposing lawyer alone. That is not the model of a legal system where the poor, disadvantaged, and vulnerable are protected.” She viewed evictions as “a glaring area where we can do better, and it is an area that will have a direct impact on children and families, but we need your help… Our families must have reliable housing.”

If that morning court session recounted by Chief Justice Rush lasted four hours, the average time for each docketed case would have been less than one minute. It is unlikely that all the tenants appeared and those cases would have been defaulted. If only one third of the tenants appeared, the average time for each case would have been about two and one-half minutes.

Some cases may have been simple; tenants were vacating but wanted an agreed date with the landlord. Other cases, however, were likely more complex and required more time. Indiana requires landlords to comply with health and housing codes and keep specified utilities in “good and safe working condition.” Impoverished tenants may not have been able to pay rent if, faced with inadequate heating or plumbing, they used their limited funds to restore those necessities.

**INDIANA—AN EVICTOR STATE**

A 2016 study by the Eviction Lab project of Princeton University listed three Indiana cities—Indianapolis, Ft. Wayne, and South Bend—in the top 20 cities in the United States with the highest eviction rates per 100 rental residents. The lab’s founder, Harvard sociologist Matthew Desmond, won the 2016 Pulitzer Prize for his book, “Evicted: Poverty and Profit in the American City.”
Of the top 20, only Virginia (with six cities) exceeded Indiana’s three, and only North Carolina equaled Indiana’s three. In 2016, Indianapolis ranked 14th, with 11,570 evictions or 31.70 households per day. From March 15, 2020, to Jan. 10, 2021, Indiana courts statewide received 26,561 eviction filings.3

In a preliminary report, South Bend evictions in 2016 jumped to 6.71% per 100 rental homes from 3.08% in 2014; Indianapolis increased to 7.27% from 6.83%. The eviction rates for both cities were more than 90% above the national average, with Indiana’s overall rate of 4.07%, more than double the national average of 1.73%.4 The lab continues to monitor Indianapolis and South Bend. Desmond said studies have shown the best help for families facing evictions is having legal counsel [citing] research done in the South Bronx... that regardless of the merits of the case, families were able to stay in their homes 80% of the time when they were represented by an attorney...If we try to go cheap on the intervention, it doesn’t work... So bundled legal services, a kind of a legal aid table at court, on a case-by-case basis, I’m sure those things can really matter, but statistical studies show if you really want to make a difference and lower the eviction rate, you really need to have a full lawyer.5

A “court watch” project established in northern Indiana by Professors Judith Fox of Notre Dame Law School and Florence Wagman Roisman of Indiana University McKinney School of Law yielded preliminary data from 77 eviction hearings in three counties.6 Sixty of those cases were immediate possession hearings with 48 tenants, 80%, evicted. Three tenants were successful: one whose landlord admitted refusing rent, a second locked out, a third who had moved. In the 60 cases, judges informed only three tenants of their rights to stay eviction pending a final hearing by posting a counter-bond. A judge misinformed one tenant that a counterbond “would be discussed at the final hearing, too late for him to post a bond.”7

The study found the Small Claims Manual, required by court rules, unavailable in hard copy, with some sections “entirely inaccurate,” notably on the landlord’s duty to furnish a habitable property.8 In Elkhart County small claims court,

We witnessed several hearings where the tenant was evicted with virtually no evidence presented. In one instance, the landlord had documentary evidence to present. When the landlord attempted to show the tenant, he was admonished by the judge who demanded, “Give it to me.” The judge looked at it, handed it to his clerk, admitted it into evidence, and then asked the tenant to react to the evidence he was not permitted to view. When the tenant could not, he was evicted.9
FROM THE GREAT DEPRESSION TO SKENZDEL

Indiana residents have endured cycles of dispossession from their homes. In the 1920s and 30s, Indiana had no mortgage foreclosure moratorium, which the U.S. Supreme Court had allowed because the “economic interests of the state may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts.” A 1936 congressional report described Indiana’s “present foreclosure laws, [which] are rather liberal” to buyers because the seller’s remedy was “limited to the property mortgaged,” unless the parties agreed otherwise. A 2008 Federal Reserve study confirmed that analysis.

With that experience, the Indiana Supreme Court considered 
**Skendzel v. Marshall**, in which defaulting land installment contract buyers had paid $21,000 on a $36,000 debt. Rejecting precedent, the court permitted sellers a money judgment, but without the right to keep the property with all payments while avoiding mortgage buyers’ right to redeem. Because a land contract seller’s retention of title or a lien created a de facto mortgage, the court limited traditional forfeiture to cases of “abandoning purchasers” or where the buyer paid a “minimal amount” on the contract, but sought “to retain possession while the vendor is making expenditures for taxes, insurance, and maintenance.” Emphasizing that “[e]quity delights in justice, but that not by halves,” the prescient opinion anticipated the Restatement (Third) of Property (Mortgages)’s principle that a “contract for deed creates a mortgage.”

**EVICTIONS AND POVERTY**

However, Skendzel’s recognition of the “felt necessities of the time” (and of the future) disappeared when the court later considered substandard housing tenancies. By 1970, judges acknowledged poverty in “the other America” described by Michael Harrington. The U.S. Court of Appeals for the District of Columbia held in

**Javins v. First Nat. Realty Corp.** that a “warranty of habitability, measured by” municipal housing regulations “is implied by operation of law into leases” of urban housing, allowing tenants to sue for breach of contract.

Indiana courts struggled with the implied warranty of habitability as they weighed conflicting precedent holding that the “duty of the landlord to repair does not arise out of the relation of landlord and tenant; on the contrary, the relation devolves that duty upon the tenant.” Only the landlord’s explicit agreement created a legal obligation to repair.

In **Johnson v. Scandia Associates**, the Indiana Supreme Court rejected Javins, with Chief Justice Shephard’s majority opinion warning that a “broad definition” of an implied warranty “might cause landlords to increase maintenance of properties” and “purchase additional insurance,” while motivating them to “attempt to pass along increased insurance costs to tenants by raising rents.” Other “potentially adverse social effects” which “would, of course, be borne by society’s poorest renters” included “conversion of some properties from residential uses and outright abandonment of others [which] would shrink the supply of affordable housing...” Chief Justice Randall Shephard acknowledged his market-efficiency approach failed “to consider distributional and moral conditions antecedent to efficiency.” Justice Dickson dissented, willing to impute an implied warranty in leases “as a matter of law.” Justice Theodore Boehm agreed with Dickson, but concurred in result, stating the “remedies for breach of that warranty are essentially along the lines indicated by Restatement (Second) of Property 10.2, and that recovery for personal injuries requires a showing of negligence.”

Professor Roisman considered Scandia Associates “a severe setback” from earlier Indiana cases which had recognized an implied warranty of habitability. After Scandia Associates, only a statute, or perhaps an ordinance, could establish warranties.

That statute appeared in the 2002 law defining “[d]uties of landlord at commencement of and during occupancy” and specifying what “landlord[s] shall do.” However, the provision excluded “a contract of sale of a rental unit... if the occupant was the purchaser.”

In **Rainbow Reality Group, Inc. v. Carter**, the court prevented landlords from circumventing the statute by denominating “leases” as “contracts of sale.” An agreement designating the first 24 payments as “rent” was a lease, not a contract “amortiz[ing] payments of principal and interest.” A clause declaring the tenant was “not renting the property” did not alter “the rent-to-buy program’s structure as a lease and then (maybe) a sale.”

Rainbow Reality held the “transaction’s purported form and assigned label do not control its legal status,” reflecting Indiana courts’ refusal to exalt form over substance. Four days after the Supreme Court ruled, the Court of Appeals decided **Husainy v. Granite Management, LLC**, which Professor Fox reads as upholding “a jury verdict allowing a tenant to withhold rent when a landlord had failed to make requested repairs.”

Under her interpretation, Husainy contradicts the doctrine that a landlord’s failure to provide habitable property does not abrogate a tenant’s obligation to pay rent because the

"A jury verdict allowing a tenant to withhold rent when a landlord had failed to make requested repairs."
ISBA LEADERS HONORED BY STATE LEGISLATURE

By ISBA Staff
This Indiana Legislative Session, the Indiana House of Representatives honored four Indiana State Bar Association leaders with House Resolutions:

**Michael E. Tolbert**  
(ISBA President, 20-21)

**Shontrai D. Irving**  
(Counsel to the President, 20-21)

**Renee M. Ortega**  
(Secretary, 20-21)

**James B. Dillon Sr.**  
(Treasurer, 20-21)

Each resolution stated:

Whereas, this is the first time that all four of these positions have been held by persons of color simultaneously; and whereas, This is a "Legal Dream Team" for the State of Indiana.

Each resolution can be read online: [http://184.175.130.101/legislative/2021/resolutions/house](http://184.175.130.101/legislative/2021/resolutions/house)

As the largest legal organization in Indiana, ISBA serves as the voice of the legal profession. It is only when people of color are at the leadership table that their voices can be heard, and ISBA can truly help improve the administration of justice in Indiana.

ISBA has incorporated practices that guarantee people of color have an equal opportunity to be considered for leadership positions, and the Equity & Inclusion pillar within ISBA’s strategic plan will help guide our organization towards addressing inequalities through civil legal aid, policing & prosecuting policy, legislation, and inclusion & mentorship within the legal profession.
DEPOSITIONS OF CHILD WITNESSES


A third case in July, State v. Riggs, No. 20A-CR-2144, 2021 WL 320826, at *1 (Ind. Ct. App. July 29, 2021), reached the same conclusion in addressing somewhat different arguments, concluding (1) the “substantive provisions of
the Child Deposition Statute do not exempt the procedural provisions of the Statute from the general rule that the Indiana Trial Rules supersede conflicting procedural statutes” and (2) “the procedural provisions of the Child Deposition Statute conflict with the trial rules, and therefore the procedural provisions are unenforceable.”

Transfer was sought in Sawyer in July, with amicus briefs also addressing whether the justices should adopt a court rule with language similar to the invalidated statute.

SPLIT ON 7(B) STANDARD CONTINUES

Invoked a few hundred times each year, Appellate Rule 7(B) permits an appellate court to revise a sentence that is “inappropriate in light of the nature of the offense and the character of the offender.”

Davis v. State, No. 21A-CR-52, 2021 WL 2965444, at *3 (Ind. Ct. App. July 15, 2021), acknowledges “a split of opinion on how to apply Appellate Rule 7(B).” The prevailing view allows the appellate court to “review and revise a sentence based only on a consideration of both prongs without requiring the appellant to prove both.” Id. (citing Connor v. State, 58 N.E.3d 215, 219 (Ind. Ct. App. 2016)).

Following Sanders v. State, 71 N.E.3d 839, 843 (Ind. Ct. App. 2017), the majority in Davis held instead that Rule 7(B) “requires the appellant to demonstrate that his sentence is inappropriate in light of the nature of the offense and the character of the offender.” Id. It rejected his 7(B) claim after reviewing both the offense (throwing a bicycle over an interstate overpass during rush hour with intent to do harm) and his character (including a lengthy criminal history). Id. at *4.

Judge Tavitas concurred in result, observing that 7(B) review “must necessarily be made holistically, particularly in instances where the statutory definition of a given crime forecloses entirely a conclusion that the nature of the offense renders the sentence inappropriate.” Id. Indeed, Indiana Supreme Court opinions have relied “primarily—if not entirely—on one factor, while assigning little to no weight to the other,” including a case that “granted a sentence reduction while explicitly recognizing that the petitioner argued only one factor of Rule 7(B).” Id. at *5.

NO DOUBLE JEOPARDY APPEAL AFTER OPEN PLEA

In McDonald v. State, No. 21A-CR-363, 2021 WL 3009701, at *2 (Ind. Ct. App. July 16, 2021), the defendant pleded open to several charges he then sought to challenge on appeal based on double-jeopardy principles. Acknowledging a conflict among panels, McDonald held the claims should instead be brought on post-conviction relief. It relied on broad Indiana Supreme Court guilty plea precedent rather than double-jeopardy specific precedent from the Court of Appeals. Id. at *3 (citing Thompson v. State, 82 N.E.3d 376, 379 (Ind. Ct. App. 2017), trans. denied).

IMPROPER CLOSING ARGUMENT

In Vasquez v. State, No. 20A-CR-2344, 2021 WL 3234926, at *6 (Ind. Ct. App. July 30, 2021), the Court of Appeals considered whether a “trial court abused its discretion by permitting the prosecutor to argue an appellate standard of review to the jury in closing argument.” Specifically, the prosecutor in a child molesting case argued at some length, and over defense counsel’s objection, that “uncorroborated testimony of the victim is sufficient.” Id.

Observing it was “a close call,” the Court of Appeals concluded the argument was improper. The court reasoned:

The prosecutor’s argument repeatedly used the term “uncorroborated,” which [Ludy v. State, 784 N.E.2d 459, 461 (Ind. 2003)] had held may confuse or mislead the jury. Moreover, the argument focused the jury away from how the evidence met the elements required for conviction and toward the appellate standard, which Ludy made clear “is irrelevant to a jury’s function as fact-finder.”

Id. at *7 (internal citations omitted). Nevertheless, the error did not require reversal because the jury instructions “made clear to the jury that the court’s instructions were its best source for controlling law and that counsels’ arguments were not evidence.” Id. at *9.
**Join Our Team**

**BE A PART OF SOMETHING BIGGER**

**WE ARE DIFFERENT**

*Hoosier Hometowns Need Lawyers*

- Indiana has the 10th fewest lawyers per capita in the US
- 59% are concentrated in only 4 counties
- 41% are scattered amongst 88 rural counties

**TOGETHER WE ARE STRONGER**

*By Joining Together, We Remove the Barriers to a Solo or Small Firm*

---

**OUR ATTORNEYS**

**INCREASED REVENUE**

Our attorneys bill 107% more hours per day than the statewide average because they can avoid the administrative headaches of running a practice.

**DECREASED EXPENSES**

Expenses cost less when overhead is spread across more locations and attorneys.

---

**About The Firm**

Sprunger & Sprunger is a rapidly growing law firm with locations across Central and Northeast Indiana. We are unique in that we bring the resources of a bigger firm to rural communities, allowing Attorneys the same opportunities for growth, advancement and development that you would have at a big firm, but with the feel of a local firm.

**Thinking About Retiring?**

Many lawyers in small town Indiana want to retire, but have too many questions. By partnering together, we can be the answer.

**Let’s Talk**

We would love to talk about you and/or your firm’s future. Email our Managing Partner, cory@sprungerandspruner.com or call him at (260) 589-2338.

---

*Visit this link to learn more: sprungerandsprunger.com/join*
THE ETHICS OF SPEAKING TO REPRESENTED PEOPLE:
RULE 4.2 UNPACKED

Rule 4.2 of the Indiana Rules of Professional Conduct provides that “In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law or a court order.” (emphasis added.) As seemingly simple as that is, we often receive questions about whether an attorney can speak to certain witnesses and every now and then, an Indiana lawyer is disciplined for violating Rule 4.2. In this article, we hope to unpack the terms of Rule 4.2 and provide further guidance to attorneys on how to protect themselves from a 4.2 violation.

1. “CONSENT OF THE OTHER LAWYER”

Who can consent to an attorney speaking to a represented person? The rule makes it clear that it is only the represented party's lawyer who can consent. As simple as this sounds, however, lawyers sometimes make mistakes on this one, so let’s address some of the questions that might come up.

What if the represented party starts the communication with the lawyer? That doesn’t matter. Comment [3] states the “Rule applies even though the represented person initiates . . . the communication.” Therefore, the “he started it” excuse doesn’t work with parents or disciplinary authorities either.

What if the represented party wants to talk to you and the represented party waives his or her right to counsel, under oath, after being “Mirandized” by you? That
doesn't matter. Comment [3] states the “Rule applies even though the represented person . . . consents to the communication.” Therefore, you still need the consent of the witness's attorney.

In one disciplinary matter, the husband and wife were both charged with drug-related crimes and husband’s attorney scheduled wife’s deposition. *In re S.L.*, 894 N.E.2d 983, 983 (Ind. 2008). The wife’s attorney advised her client not to attend, but the wife really wanted to exonerate her husband. After warnings from her counsel and opposing counsel, the wife was nevertheless deposed and the husband’s attorney elicited incriminating testimony from her. The court noted, “One purpose of Rule 4.2 is to prevent lawyers from taking advantage of uncounseled laypersons.” *Id.* at 984. Even if the represented party “waives” his or her right to speak without counsel, an attorney’s consent is still needed under Rule 4.2.

2. **“SUBJECT OF THE REPRESENTATION”**

In a recent disciplinary opinion, the Indiana Supreme Court gave guidance on what constitutes the “subject of representation” and what conduct violates Rule 4.2. *In re P.M.*, 166 N.E.3d 345 (Ind. 2021). In *P.M.*, the respondent represented husband in post-dissolution litigation about his marriage to his first wife. Second wife’s deposition was scheduled in another matter relating to criminal charges from a domestic dispute. Respondent knew that second wife was represented by counsel in the dissolution matter, but the respondent did not inform the second wife’s attorney about the deposition, thinking the “subject of the representation” was the criminal case. However, the dissolution matter and the criminal matter overlapped. “At the deposition Respondent . . . elicited incriminating testimony from Second Wife and testimony about subjects relevant to the dissolution case, and Respondent later contacted the prosecutor and provided her with a copy of Second Wife’s deposition.” *In re P.M.*, 166 N.E.3d at 346.

The court rejected respondent’s argument the “matter” referenced in Rule 4.2 should be read narrowly to mean only the specific lawsuit in which the deposition was taken. In doing so, the court stated:

Respondent’s interpretation . . . runs directly contrary to the purpose of the Rule, which . . . is aimed at protection of the rights of a represented person with respect to the subject of the representation . . . This need is equally important whether the representation involves the same proceeding, a different proceeding, multiple proceedings, or no proceeding at all.

*Id.*

Before you speak to a represented person, you need to consider what “subject” you will discuss. For example, if you are a family lawyer who thinks a potential personal injury settlement affects a marital estate, then you need the consent of the personal injury lawyer to speak to that witness. Don’t fall into the trap of thinking you are working under one cause number and the personal injury lawyer is working under another. Cause numbers don’t matter. Based on *P.M.*, if you know a witness is represented on the subject matter you wish to discuss, you need the consent of the witness’s counsel.

3. **CAN YOU GIVE A SECOND OPINION TO A REPRESENTED PERSON?**

What if a represented party is unhappy with his or her lawyer and asks you for a second opinion? Do you need the consent of the
represented party’s lawyer to have that discussion? Comment [4] to Rule 4.2 answers this question by stating “Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter.” (Rule 4.2, Cmt. 4). So, if someone is unhappy with their current counsel and you are not already involved in that litigation (like representing another party), you are permitted to consult with him or her as a prospective client.

4. YOUR CLIENT CAN TALK TO A REPRESENTED PERSON – BUT BE CAREFUL

Represented parties are, of course, permitted to speak directly to each other. What can a lawyer’s role be in this situation?

Comment 4 to Rule 4.2 provides in pertinent part, “[p]arties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make.” However, be careful. There are limits to what role you can play when you are “advising” in this fashion. Comment 4 also states a “lawyer may not make a communication prohibited by this Rule through the acts of another.” So where does the “advisor role” end and unethical communications “through the acts of another” begin?

One lawyer received a private reprimand for violating Rule 4.2 by giving his client (the witness’s employer) an affidavit the attorney wanted a witness (the client’s employee) to sign in support of the client’s motion. Here’s the catch: the witness was represented by counsel on the subject matter of the affidavit. In re Anonymous, 819 N.E.2d 376 (Ind. 2004). “[E]ven though his client may not have been acting as the respondent’s agent in obtaining the signature on the affidavit, the respondent ratified his client’s direct contact with the employee by failing to take steps to intervene when the client presented the affidavit for signature, by failing to take steps to contact employee’s counsel while he was waiting for him to sign the affidavit, by thereafter taking control of the affidavit once it was signed, and by filing the document with the federal court.” Id. at 379. Based on this, while you can advise on communications between parties, you cannot have parties make communications for you.

Remember the purpose of Rule 4.2 is to protect a represented person “against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounseled disclosure of information relating to the representation.” (Rule 4.2, Cmt. 1). The Indiana Supreme Court also noted “[i]t is, . . . easy to imagine other contexts where the need for Prof. Cond. R. 4.2’s protections would be crucial; for example . . . where a lawyer tries to by-pass opposing counsel and negotiate a settlement directly with the adverse party, or where
a lawyer attempts to persuade the adverse party to disclose privileged information.” In re L.U., 768 N.E.2d 449, 451 (Ind. 2002). Clearly there is a line between “advising your client” about communications and making prohibited communications. Unfortunately, in our opinion, that line is not plainly marked.

**5. WHEN IN DOUBT, SEEK CONSENT OR GUIDANCE FROM A COURT**

These situations make for uncertainties. If you are unsure whether a witness is represented, simply ask the witness before you start speaking to them and if they are represented, pick up the phone and ask for counsel’s consent. If you get the consent you need, follow up in writing and continue speaking with the witness.

But what if you can’t get a consent you feel entitled to? Comment 6 to Rule 4.2 provides, “A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order.” So, if you cannot obtain consent, take the step of addressing the issue with the court to make certain you have the protection of a court order when you go to speak to a witness.

**KEY TAKEAWAYS**

A represented person cannot consent to speaking with you. Only the represented person’s lawyer can do that.

Subject matters, not cause numbers, control whether the person is represented for purposes of Rule 4.2. If you know someone is represented by counsel on the subject matter to be discussed, then you need that counsel’s permission to talk to the party.

A represented party can, however, consult with you for a second opinion – provided you do not represent anyone else in the same matter.

Parties can talk directly and you may counsel your client about those communications. But be careful.

When in doubt about speaking to a witness, get permission either from the witness’s counsel or the court.

---

Decide the fate of professional baseball player Shoeless Joe Jackson!

The Verdict brings together local judges, lawyers, and corporate citizens to retry some of the most famous cases in history! This year, The Verdict tackles a sports scandal involving the Chicago White Sox that led to eight players being banned from professional baseball. Guests serve as official mock trial participants, representing all sides of the law, while museum actors are key witnesses in the case—creating a courtroom drama sure to keep everyone entertained!

1.0 Indiana CLE Credit (pending)

**Nov. 20, 2021 6:30–9:30 p.m.**

childrensmuseum.org/verdict
"These situations make for uncertainties. If you are unsure whether a witness is represented, simply ask the witness before you start speaking to them and if they are represented, pick up the phone and ask for counsel’s consent."
RETURN TO THE OFFICE AFTER THE GLOBAL PANDEMIC

By Tara Puckey

In 2020, nearly everyone saw their personal and professional lives disrupted by COVID-19. That’s old news. What isn’t old — at least not yet — are the discussions around a return to the office, to pre-pandemic “normal,” if you will. But what is “normal” anymore? With staffs scattered to the wind, working from kitchen tables and coffee shops, coworking with their furry friends, tossing in a load of laundry now and then, how does any organization evaluate the critical things needed to bring people back into their brick and mortar office?

First, let’s address the elephant in the room: The pandemic isn’t over. We’re all taking an extended ride on the “COVID coaster” and while we all desperately want to get off, we’re all stuck here together, navigating every turn and loop and downhill terror that comes our way. But don’t despair. This just leads us to the first key to a successful return to the office.

**KEEPING PEOPLE SAFE IS CRITICAL, AND THIS MEANS CONSTANT CHANGE AND FLEXIBILITY**

Set up Google alerts for changes to local, state, and federal guidance around COVID and indoor workspaces. These can change daily, so don’t neglect to get information frequently and from a variety of sources.

Evaluate the individual comfort level of each employee. Do they live with an immunocompromised family member? Are
they high risk? Make sure you know their concerns so you’re at the ready to address them individually and as a team.

Consider creating levels of response early in your return so it’s clear to everyone what the expectations and procedures are when things change. For example, if the county “level” is orange, staff is expected to wear masks unless seated at their desk and social distance as much as possible.

What we all learned from 2020 was how quickly things can change. One minute we’re in our offices chugging away at documents and files and the next minute we’re home. For what feels like forever. The vast majority of workers and business owners were unprepared for the drastic shift from office to remote work and, because of that, true challenges emerged that made it difficult for day-to-day operations to continue smoothly. Files couldn’t be accessed, papers sat on networked printers unclaimed and office phones rang and rang and rang. Which leads us to the next item on our “getting back to the office successfully” list.

PREPARE, PREPARE, PREPARE. THEN PREPARE SOME MORE

Because things change quickly, make sure once you’ve returned, one of your top priorities is preparing for more time out of the office, whether it’s pandemic related or for another reason. We should always be overprepared, right?

Make sure files are accessible from a shared location, not just on someone’s desktop or paper only (gasp!). Find a solution you can quickly implement for phones (Google Voice, for example, or call forwarding) and make sure your team knows how to use it. Think through each element of operations to ensure you have plans for how to do it all outside the office walls.

Develop some pieces and parts (or a full plan, which would be even better) of crisis communication. Know who you need to tell that you’re out of the office – like clients, vendors, etc. – and what they’ll need to know to get in contact with you.

A favorite saying of 2020 (OK, a favorite saying of mine) referred to giving people “grace and space.” With all the challenges of squeezing in a home office where there was none before, of homeschooling, of everyone cooped up with a serious itch to escape back into social norms, we all opened up a bit more. (Let’s be honest, sometimes there’s just no way to hide that Zoom bomb of the kids waking up at 2 p.m. on a Thursday.) In all the chaos, we were reminded that behind our professional exterior, we’re all just people trying to balance all the elements of our lives. With that in mind, I hope you’ll really take stock in this last piece of advice.

GIVE MORE GRACE AND SPACE THAN EVER BEFORE. WE ALL DESERVE IT.

While getting back in the office makes a lot of sense for many businesses,
don’t forget it’s a shock to the system for nearly every employee, manager, and vendor. After spending months and months in their own safe space, you’re asking them to come back to a group setting. Not only can it be unsettling from a safety perspective, but everyone needs to retrain their brain on how to be social and interact with others (and it’s exhausting!). Make sure you’re checking in on your team.

Consider some flexibility you may not have offered before. Over the last 12- to 18-months, more working adults spent significantly increased time with their families, all while getting the work done. It’s possible to create systems, schedules, and procedures that allow people to flourish both at home and at work. Try them out!

Don’t – absolutely, positively, in all seriousness – do things the way you did them pre-pandemic because “that’s just the way we did things.” Innovation was shining brightly throughout the pandemic because that’s all there was for us to do, so don’t stifle it. Rethink things, ask “why,” look outside the box for solutions to problems you never tackled before. Be different.

In the end, there’s no right or wrong way to return to the office. But without **flexibility, empathy, and innovation**, it’s going to be exceptionally more difficult on both you and your team. Speaking of team, remember the best way to bring about acceptance of change is for people to believe they helped build something, that they had a voice. The four walls of an office, after all, are just a building. The people that fill it are really what make it something special.
In July 2021, the Indiana Supreme Court issued no civil opinions and granted transfer in two civil cases. The Indiana Court of Appeals issued 12 published civil opinions.

**SUPREME COURT TRANSFER GRANTS**

*Clark County REMC v. Reis*, 167 N.E.3d 333 (Ind.Ct.App. 2021) (Vaidik, J.), *transfer granted July 19, 2021* (involving action brought by former members of board of directors against county rural electric membership corporation claiming breach of contract due to current board of director's decision to revoke policy granting health-insurance benefits to certain former directors).

OTHER COURT OF APPEALS DECISIONS

Health and Hospital Corporation of Marion County v. Dial, 2021 WL 3234929 (Ind.Ct.App. 2021) (May. J.) (as a matter of first impression, “A proposed complaint before the IDOI is not void ab initio simply because it was filed in the name of a deceased individual as administrator of the estate of a deceased alleged victim of malpractice... We are not convinced that the medical review process requires that a proposed complaint be filed by a living person as administrator of the estate of a deceased victim of alleged medical malpractice... The central issue for the medical review panel was whether [the care for Husband] fell below the applicable standard of care. The identity of the administrator of [the] estate is not relevant to that question.”)

Blackwell v. Superior Safe Rooms LLC, 2021 WL 2820988, at *9 (Ind.App., 2021) (Bailey, J.) (“[T]he findings and the record do not support the trial court’s conclusions that Garnishee Defendants did not use Superior as a shield to liability and that they perpetrated no injustice... Blackwell established that Superior’s corporate form was so ignored, controlled, or manipulated that it was merely the instrumentality of Garnishee Defendants.”)

Hoppe v. Safeco Insurance Company of Indiana, 2021 WL 3137195 (Ind. Ct.App. 2021) (Kirsch, J.) (“We note that Indiana courts have not addressed the meaning of the Policy language ‘premises not owned by you which you have the right or privilege to use arising from the [residence premises]’... If we were to find that the location of the accident in this case, a parking lot for a local business a distance away from the residence premises, was an insured location, then that would mean that any business parking lot near the Knolls’ residence in which their golf cart was driven would be an insured location. Clearly, Safeco did not intend for the Policy to give the Knolls coverage for the golf cart except upon an insured location as set forth in the Policy.”)

Holsten v. Faur, 2021 WL 2836637, at *4 (Ind.Ct.App. 2021) (Weismann, J.) (“Where a proposed complaint alleges negligence generally, it can be presumed that the [Medical Review Panel] MRP had notice of, and considered, all theories of negligence relating to the evidence before it... However, where a complaint alleges only specific theories of negligence, the MRP may reasonably rely upon those allegations in issuing its opinion... [Here, the] sepsis theory was not encompassed by the allegations of Linda’s proposed complaint and, therefore, was not presented to the MRP. Accordingly, the trial court lacked subject matter jurisdiction to adjudicate that portion of Linda’s medical malpractice claim.”)

The full texts of all the Indiana appellate court decisions, including those issued not-for-publication, are available via Casemaker at www.inbar.org or the Indiana Courts website at www.in.gov/judiciary/opinions. A more in-depth version of this article is available at inbar.org.
Thanks to my *Res Gestae* friends for being kind enough to allow me to get something off my chest in this mini-Ethics Curbstone reappearance.

My purpose is to suggest there is one advertising requirement in the Rules of Professional Conduct that should be abandoned because it gives little helpful guidance to lawyers, has been enforced once under odd circumstances, and seems to add nothing to what lawyers can be expected to do anyway. But first, a little context.

Lawyers have different feelings about advertising and its regulation. Few abstain entirely. After all, to simply maintain a firm website is to indulge in some form of advertising. Others don’t like it but advertise defensively; their competitors advertise so they feel they must, too. An increasingly large number of lawyers embrace advertising and other forms of marketing with gusto.

Diverse approaches to advertising are all OK so long as they comply with applicable
rules. But there's the rub: the rules. You know, the ones that beginning with the number 7 in the Rules of Professional Conduct.

The Rules of Professional Conduct serve two primary purposes. First and foremost, they give guidance to lawyers so they can do things right and stay out of trouble. Second, they are the substantive standards against which lawyer conduct is measured for professional discipline purposes. If a rule fails to give clear guidance in furtherance of the first purpose, it isn't doing its job. If a rule that fails to give clear guidance is enforced through professional discipline, it violates the due process principle of fair notice.

Moreover, because lawyer advertising regulation implicates free expression, albeit for a commercial purpose, the government cannot restrict it without having a pretty darned good reason. This is roughly the standard the Supreme Court set for First Amendment protection of commercial speech in Central Hudson Gas and Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980).

There has been a bit of a break in the Disciplinary Commission's enforcement of the lawyer advertising rules. Yet, not unlike poor Damocles, who didn't know when the sword that was suspended perilously above his head would plunge into him, most conscientious lawyers live with some fear they will be the next respondent in the advertising-rules-enforcement barrel.

Ah, you say, the solution is simple: stay far clear of the line and don't court trouble. Easy to say, but that assumes the line is visible. Moreover, in a regulated industry, the regulated should not have to forego creative marketing opportunities in an uncertain landscape out of fear an aggressive regulator will try to tag them off base, especially when competitors seem to be getting away with the same thing. In a regulatory regime like we have in Indiana where enforcement is more by test case than by comprehensive enforcement, competitors who use similar advertising methods often learn about what the rules mean at a respondent's expense.

That's a fairly long-winded windup to this pitch: There is an advertising regulation whose time has come and gone. The Supreme Court should put it out of our misery. I am referring to the provision in Indiana Rule of Professional Conduct 7.2(c) stating, “Any communication subject to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.” That section also includes a requirement that a lawyer keep a copy of all advertising for six years. I have no quibble with that. This rule took effect on January 1, 2011. Before that, there was no office-address requirement.

The American Bar Association has somewhat different requirement in
Model Rule of Professional Conduct 8.2(d): “Any communication made under this Rule must include the name and contact information of at least one lawyer or law firm responsible for its content.” (My emphasis.) Unlike Indiana’s counterpart, the ABA rule has a helpful comment: “This Rule requires that any communication about a lawyer or law firm’s services include the name of, and contact information for, the lawyer or law firm. Contact information includes a website address, a telephone number, an email address or a physical office location.” Model Rule of Professional Conduct 8.2, cmt. 12.

The Indiana office-address requirement is flawed on many levels. Let’s start by considering what an office address is. Is it a physical address? During the COVID era, lawyers quickly realized they could conduct business effectively without a bricks and mortar location, this included establishing attorney-client relationships with clients they never meet in person. Are those lawyers not permitted to advertise? Or if they conduct their practices from a home office where they do not interact with clients, must they publicize that address? How about lawyers who use a temporary physical location, such a co-working space or a borrowed conference room, for face-to-face meetings but don’t otherwise have a fixed address at that location? What is their office address?

Is a website address an office address? After all, a website is easy to access and will virtually always give other law firm contact information, often including physical office address. What about a telephone number? A telephone number is arguably the most reliable indicator of the lawyer’s location at a given time—a telephone number is often essentially the address of the cell phone the lawyer constantly has on her person. The ABA, unlike Indiana, says these are acceptable forms of contact information.

The rule also seems to assume a lawyer or law firm will have one office address. But there are many law firms that have several. Must all office addresses be listed? There are some firms with enough Indiana offices that listing their addresses would alone devour most of the precious advertising space.

This provision sweeps broadly. It states outright that it applies to any communication subject to Rule 7.2, which is “any public communication partly or entirely intended or expected to promote the purchase or use of the professional services of a lawyer, law firm, or any employee of either involving the practice of law or law-related services.” Prof. Cond. R. 7.2(a). So those freebie pens you bought to hand out or the Little League uniforms for the team your law firm sponsors? If your firm’s name is on them, you’d better make sure they also include your office address.

Alright, so the blackletter rule is, shall we say, a bit vague. Filling in the gaps is a function of the
the investigative prowess of the Disciplinary Commission to assume its staff doesn’t know how to access the on-line roll of attorneys to find a lawyer’s contact information?

The reaction of many readers might be, so what. But those of us who make a living counseling lawyers on how to comply with the Rules of Professional Conduct stumble when it comes to this language in Rule 7.2(c). An option we don’t have is to tell our clients to not worry about it; whatever you do, you probably won’t get caught.

Rules governing lawyer conduct should not be simultaneously so inscrutable and so unnecessary. It’s time for the office-address requirement of Rule 7.2(c) to go. Our Supreme Court should instead amend the rule to align with ABA Model Rule 8.2(d).

“Would any lawyer in her right mind pay hard-earned money for advertising yet fail to give information about how to contact the lawyer?”

when you annually register you provide your contact information to the Clerk of the Supreme Court. Even if a lawyer would inexplicably choose to advertise without informing the public how to contact the lawyer, doesn’t it denigrate

firm or lawyer standing behind the advertisement in case it fails to comply with the other rules that govern lawyer advertising. But think about it for a moment. Would any lawyer in her right mind pay hard-earned money for advertising yet fail to give information about how to contact the lawyer? Also, recall the investigative prowess of the Disciplinary Commission to assume its staff doesn’t know how to access the on-line roll of attorneys to find a lawyer’s contact information?

The reaction of many readers might be, so what. But those of us who make a living counseling lawyers on how to comply with the Rules of Professional Conduct stumble when it comes to this language in Rule 7.2(c). An option we don’t have is to tell our clients to not worry about it; whatever you do, you probably won’t get caught.

Rules governing lawyer conduct should not be simultaneously so inscrutable and so unnecessary. It’s time for the office-address requirement of Rule 7.2(c) to go. Our Supreme Court should instead amend the rule to align with ABA Model Rule 8.2(d).

Enough of the focus on the fundamental unhelpfulness of this rule. Let’s instead consider why an office address ought to be required at all so long as the identity of the advertising lawyer or law firm is known, as is required by the rule. One assumes the rule’s purpose is to allow our profession’s regulator, the Disciplinary Commission, to know the identity and location of the law firm or lawyer standing behind the advertisement in case it fails to comply with the other rules that govern lawyer advertising. But think about it for a moment. Would any lawyer in her right mind pay hard-earned money for advertising yet fail to give information about how to contact the lawyer? Also, recall the investigative prowess of the Disciplinary Commission to assume its staff doesn’t know how to access the on-line roll of attorneys to find a lawyer’s contact information?

The reaction of many readers might be, so what. But those of us who make a living counseling lawyers on how to comply with the Rules of Professional Conduct stumble when it comes to this language in Rule 7.2(c). An option we don’t have is to tell our clients to not worry about it; whatever you do, you probably won’t get caught.

Rules governing lawyer conduct should not be simultaneously so inscrutable and so unnecessary. It’s time for the office-address requirement of Rule 7.2(c) to go. Our Supreme Court should instead amend the rule to align with ABA Model Rule 8.2(d).
Continued from page 13

respective duties—covenants—are independent. Yet, the tenant’s appellate brief stated the tenant “made all” rent payments. The opinion lists no answer raising an affirmative defense and states the “jury found against [landlord] on its breach of contract claim...[, in favor of [tenant] on his breach of covenant claim and... in favor of [tenant] on his statutory claim.” It is uncertain if the decision permits rent withholding.

THE DANGEROUS PRESENT

In the coronavirus emergency, the consequences of eviction became uniquely serious. If impoverished tenants found alternate housing only in such congregate settings as homeless shelters, they risked COVID-19 infection. This public health crisis obliterated abstractions about “market-efficiency” in rental housing and the condescending platitude that “[o]ne who, ‘with open eyes,’ rents a hovel cannot later expect and sue for the Waldorf Astoria.”

During the mortgage foreclosure collapse earlier in this century, New York Times business journalist Joe Nocera described “market-efficiency” as an “ivory tower view” which “reflected an idealized market that simply doesn’t exist.” Judge Richard A. Posner, often associated with market-efficiency theories, observed that “rational maximization” by businesspeople and consumers, “all pursuing their self-interest more or less intelligently within a framework of property and contractual rights, can set the stage of an economic catastrophe.”

Judge Posner addressed the mortgage foreclosure episode, but his characterization of that event as “an economic catastrophe” describes pandemic evictions. Tenants alone did not suffer; landlords owning mortgaged property or facing property tax bills lost the rental income necessary to meet those obligations.

In 2020-21, regular landlord-tenant legal processes stopped in Indiana when the governor declared a moratorium on many evictions, reinforced by a directive from the federal Centers for Disease Control. These actions, together with orders from the Indiana Supreme Court, suspended many eviction hearings and exempted federal emergency stimulus payments to individual debtors from attachment and garnishment. The court has refused to extend its order on stimulus payments, which are now subject to levy.

These strong measures to prevent evictions elicited correlative responses. In 2021 the General Assembly overrode the governor’s veto of a bill limiting the power of local governmental units to regulate important aspects of landlord-tenant relations. It also enacted, and overrode a veto of, separate legislation limiting the governor’s power to act alone in an emergency, which would require reconvening the General Assembly if a governor issued executive orders similar to those stopping evictions. The 2021 legislative session seemed to ignore the principle of judicial deference by Indiana courts to the “interpretation of a statute by an administrative agency charged with the duty of enforcing the statute” which is “entitled to great weight, unless this interpretation would be inconsistent with the statute itself.”

In Scandia Associates, the Indiana Supreme Court majority rejected Javins, perhaps reluctant to appear judicially activist. Justice Dickson, writing that the warranty is implied by law, was perhaps persuaded by the logic and the policy of Javins reflected the approach of Skendzel, which no Indiana General Assembly has overturned.

Before Javins, a unanimous Wisconsin Supreme Court justified an implied warranty of habitability by stating, “The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliché, caveat emptor. Permitting landlords to rent ‘tumbledown’ houses is at least a contributing cause of such problems as urban blight, juvenile delinquency and high property taxes for conscientious landowners.”

The Scandia Associates tenant lost because her lease did not “show that Scandia expressly warranted the apartment’s habitability...” The majority posited the risk of “adverse social effects...borne by society’s poorest renters” if the court imposed an implied warranty. However, market-efficient ideology had not, as Posner acknowledged, prevented the mortgage foreclosure “economic catastrophe.” The evictions endured by Indiana tenants have caused not only “adverse social effects” for them, but clearly contributed to the full “economic catastrophe” experienced in the state.
THE NEED FOR CHANGE

The court proceedings recounted in 2020 by Chief Justice Rush demonstrate the deficiencies of current eviction practices. By court rule, the Indiana Supreme Court should implement these changes:

1. No immediate possession hearing should be scheduled until those cases with complex issues are identified and scheduled separately with adequate hearing time.

2. A pretrial conference should precede any case with a counterclaim before setting of an immediate possession hearing.

3. The court should establish a procedure for tenants to pay rent into escrow if tenants allege that leased property is not habitable, and, if appropriate, allow tenants to use the escrowed funds to pay for repairs.

The court can implement the preceding three steps quickly and invite public comment or suggestions for additional steps. It should also establish a commission with two assignments. First, consider the need for separate procedural rules in landlord-tenant cases, comparable to those established for Commercial Court. Second, evaluate proposals for appointing counsel for tenants in appropriate cases. More than three decades ago, Massachusetts housing attorney Andrew Scherer wrote that unrepresented tenants cannot usually understand a technical eviction proceeding and the “wide variety of procedural and substantive legal requirements,” a view reinforced by Matthew Desmond of the Eviction Lab.

In 2016, the United States District Court for the Southern District of Indiana provided in Local Rule 87(a), “If the court determines that a litigant is unable to afford representation, the court may recruit counsel to represent an indigent litigant using the Voluntary Panel or the Obligatory Panel.” Recruiting and encouraging counsel would be consistent with Indiana Code of Judicial Conduct 2.6, requiring judges to “accord to every person who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard according to law,” with the comment that “Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed.” For lawyers, Rule of Professional Conduct 6.1 states they “should render public interest legal service.” The Indiana Supreme Court allows inactive or retired attorneys to undertake limited pro bono practice through a pro bono or other legal assistance organization under Admission and Disciplinary Rule 6.2.

As this article went to press, the Indianapolis Star reported, “In the first week of June, the state had nearly 600 eviction filings, totaling more than 46,000 since the start of the pandemic, according to the data from Princeton Eviction Lab.” Second, the CDC extended the eviction moratorium through July 31.

Finally, as the U.S. Supreme Court closed its 2020-21 term, it rejected a request by landlords challenging the authority of the CDC to issue an eviction moratorium. Over the dissent of four Justices, the court refused to vacate the stay issued by a district court in the District of Columbia which, while
holding that the CDC had exceeded its authority, nevertheless stayed the ruling pending appeal and allowed the moratorium to remain in force.\textsuperscript{60}

Indiana courts and lawyers must recognize the consequences of eviction cases. After the decision in \textit{Gideon v. Wainwright},\textsuperscript{61} requiring appointment of counsel for indigent defendants in criminal cases, Attorney General Robert F. Kennedy said, “We have secured the acquittal of an indigent person—
but only to abandon him to eviction notices, wage attachments, repossession of goods and termination of welfare benefits.”\textsuperscript{62} A “civil Gideon” right in eviction cases may seem impractical, but in 2021 it has become a necessity.\textsuperscript{63}

Kent Hull, a retired adjunct professor at Notre Dame law school, litigated poverty and civil rights cases in state and federal trial and appellate courts for more than four decades.

\textbf{FOOTNOTES}

2. Id.
3. Id. Code § 32-31-8-5.
5. Id.
6. Marilyn Odendahl, “New Indiana case code tracking evictions as data shows impact of moratoriums,” 
7. Id.
8. Id.
10. Id.
11. Id., 187.
13. Id. at 437.
15. Wheelock, supra note 12, at ____.
17. Id. at 240–41.
18. Id. at 650.
19. \textit{Restatement (Third) of Property (Mortgages) } § 3.4(b) (1997).
20. Oliver Wendell Holmes, Jr., \textit{The Common Law} 1 (1881).
21. \textit{The Other America} (1962).
25. Id. at 29.
26. Id. at 30 (footnote omitted).
27. Id.
28. Id. at 34.
29. Id. at 32.
32. Id.
34. 131 N.E.3d 168 (Ind. 2019).
35. Id. at 173.
36. Id.
37. Id.
40. Fox, supra note 8, at 183.
42. Appellant’s Br., 2019 WL 8228207, at 12.
43. 132 N.E.3d at 490.
48. In re Indiana Supreme Court to Engage in Emergency Rulemaking to Protect CARES Act Stimulus Payments from Attachment or Garnishment from Creditors, 142 N.E.3d 907 (Ind. 2020); the court’s order refusing to extend is at https://www.in.gov/courts/files/order-other-2021-205-MS-258.pdf (March 19, 2021).
49. Senate Enrolled Act 148.
50. Id.
52. Pines v. Persson, 111 N.W.2d 409, 413 (Wis. 1961).
53. Scandia Associates, 717 N.E.2d at 32.
54. Id. at 30.
EMPLOYMENT OPPORTUNITIES

INJURY - WRONGFUL DEATH, LITIGATION ATTORNEY. Would you like to be part of an injury and wrongful death law firm that is currently ranked #1 for doing the most injury jury trials for the past 21 years (Indiana Jury Verdict Reporter). We have left a trail of great verdicts throughout Indiana. We currently have 12 lawyers, and we are seeking 2 more lawyers. You must have high organizational skills, a strong desire to make the insurance companies pay 100% of all the money that is legally owed to our clients, be an aggressive litigator, self motivated. You must hate tiny settlement checks and you must love fighting for justice on behalf of our clients. It is common for justice to be hiding at the courthouse. Non-smoking environment. Excellent salary and benefits, including 401K, health insurance, and many other benefits. Ken Nunn Law Office: 104 S. Franklin Road, Bloomington, IN 47404. All replies strictly confidential. taping@kennunn.com

INFORMATION WANTED

JIM SCHNEIDER, TAX IRS audits and investigations, appeals. Tax Court, payroll tax and trust fund penalty cases, non-filers and back tax returns, records reconstruction, payment plans, penalty abatement, liens and levies. Schneider@CPAttorney.com. 317-844-1305. Over 40 years in practice.

INDIANAPOLIS IMMIGRATION attorney seeks professional or co-counsel positions with Indiana attorneys in the practice of immigration law. Over 25 years’ experience in immigration. Will handle adjustment of status, change of status, labor certificates and other matters. Also, will attend interviews at Indianapolis Immigration Office. Thomas R. Ruge. Lewis & Kappes. P.C. 317-639-1210. SMiller@lewis-kappes.com

CALIFORNIA LAWYER since 1966. AV rated. Member ISBA. Father and brother practiced in Marion. Enjoys interacting with Indiana lawyers. Handles transactions, ancillary probates and litigation in CA and federal courts. Law Offices of John R. Browne III, a Professional Corporation, 2121 N. California Blvd. Ste. 875. Walnut Creek, CA 94596; 415-421-6700; johnrbrowne@sbcglobal.net; www.jbrownelaw.com

WORKER’S COMPENSATION Indianapolis attorney Charles A. Carlock seeks referrals on Worker’s Compensation cases statewide. Tele., 317-573-5282 or 844-415-1461.


INDIANAPOLIS PLAINTIFF’S LITIGATION FIRM WILSON KEHOE WININGHAM, LLC is seeking an associate attorney with 2-4 years of experience to handle medical malpractice and personal injury cases, with emphasis on medical malpractice. Responsibilities would include investigation and evaluation of new cases, consultations with nurses and physicians during the evaluation process, taking depositions, involvement in motion practice and discovery, participating in mediations, preparing cases for settlement and trial, participation in trials. Past litigation experience required, preferably in medical malpractice. Please email resume, salary requirements, and any additional supporting information to Eric Strickler at estrickler@wkw.com.

SPECIAL SERVICES

ARROW FIDUCIARY SERVICES is now taking new clients. We focus on being your appointed Independent - Attorney-in-Fact - Guardian, - Trustee, and - Executor. Please contact Kate Borkowski, JD, at Arrow Fiduciary Services. Kate@ArrowFiduciaryServices.com; 317-840-

LEGAL SERVICES CORPORATION

THE LEGAL SERVICES CORPORATION (LSC) announces the availability of grant funds to provide civil legal services to eligible clients during calendar year 2022. In accordance with LSC’s multiyear funding policy, grants are available for only specified service areas. The list of service areas for which grants are available, and the service area descriptions are available at hwww.lsc.gov/grants-grantee-resources/our-grant-programs/basic-field-grant/lsc-service-areas. The Request for Proposals (RFP), which includes instructions for preparing the grant proposal, will be published at www.lsc.gov/grants-grantee-resources/our-grant-programs/basic-field-grant on or around April 15, 2021. Applicants must file a Pre-application and the grant application through GrantEase: LSC’s grants management system.

Please visit www.lsc.gov/grants-grantee-resources/our-grant-programs/basic-field-grant for filing dates, applicant eligibility, submission requirements, and updates regarding the LSC grants process. Please email inquiries pertaining to the LSC grants process to LSCGrants@lsc.gov.

MISCELLANEOUS

RETIRED LAWYERS. Law office for sale or for rent near Louisville. Call 812-885-2291, email LeatherburyLawOffice@gmail.com.
Indiana Social Security Lawyers

Fleschner, Stark, Tanoos & Newlin

201 Ohio Street, Terre Haute, IN 47807
1-800-618-4878 • www.FleschnerLaw.com
e-mail: Lawyer@FleschnerLaw.com

Referrals Accepted
It’s Here!

Group Health Insurance for the members of the Indiana State Bar Association and their firms

Call Ritman today and hit the ground running with this long-awaited opportunity! Helping your firm with your Group Health Insurance needs would make us happier than a pig in — well, you know.