OCT 2023

INDIANA STATE BAR ASSOCIATION

RES GESTÆ

MEMBER JOURNAL

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VOL. 67 NO. 3

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RES GESTÆ

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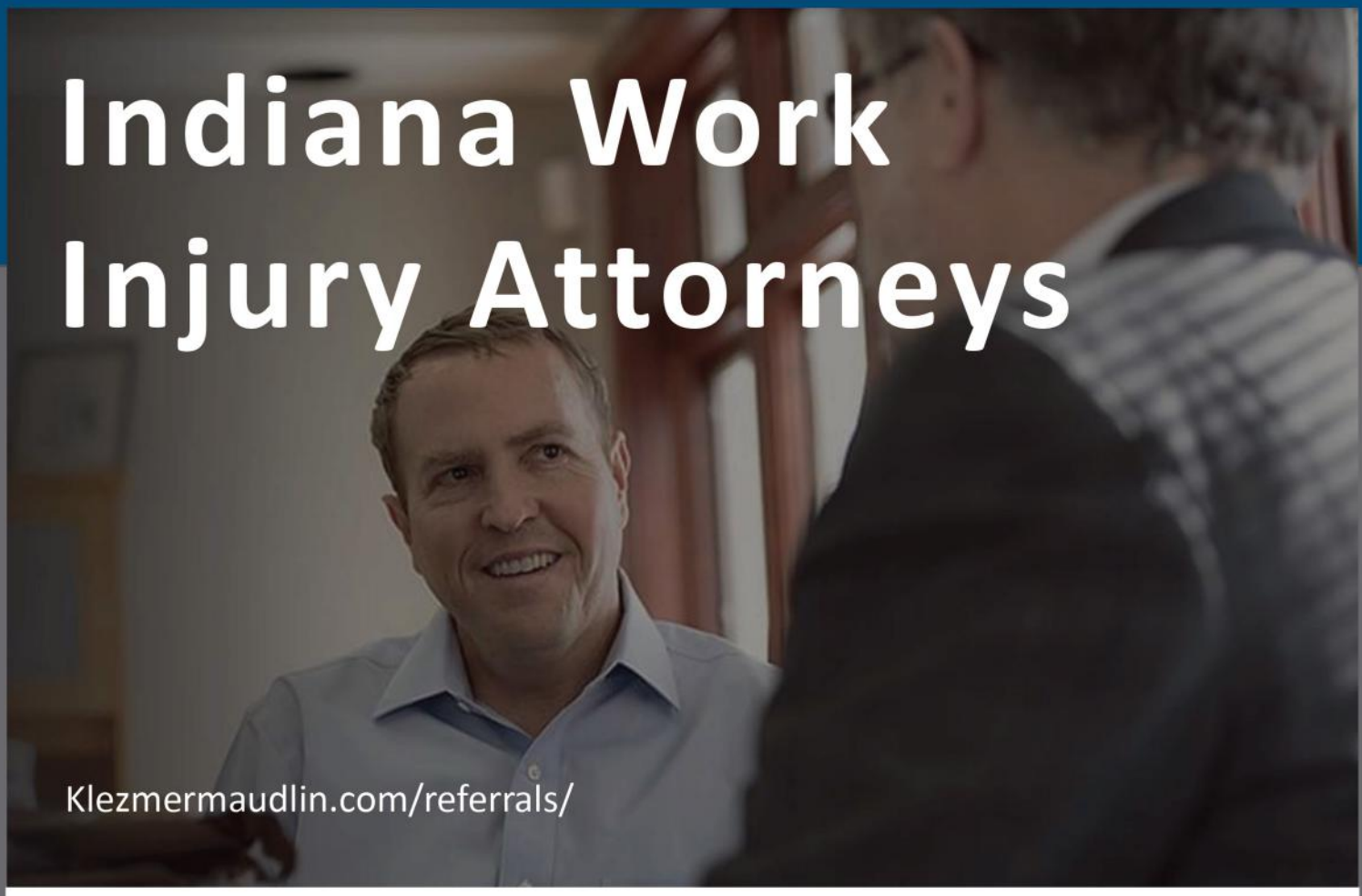

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President's Perspective

JUST CALL ME TOM

By Tom Felts

PRESIDENT'S PERSPECTIVE

It was around 8:15 on a Wednesday night, sometime in mid-July 2021. My wife and I are long-confirmed "early-to-bed, early-to-rise" folks, so we were already in bed watching a movie. My phone started ringing and I noticed the "317" area code although I didn't recognize the number. Thinking it likely was yet another Medicare supplement insurance call, like the many both of us had been receiving, I waited to see if it would go to voicemail. Surprisingly, the caller left a message.

At the next commercial, I took my phone down the hallway and accessed the voicemail message. "Judge Felts, this is Leslie Henderzahs. I apologize for calling so late, but I have some very exciting news and didn't want to wait until tomorrow. If you have a chance, please give me a call back. Thank you." OK. Curiosity piqued. So, I returned the call and asked Leslie about the exciting news. She replied, "I wanted to tell you that you've been elected as the next vice president of the ISBA!" I thanked her, told her it was very unexpected and, as it was late, that I would give her a call the next day. It was only as I was walking back to my room that I realized this was not a call about a one-year board commitment but one which would lead to becoming ISBA president.

It's scary how your life can change in one quick moment. After being in private practice for 10 ½ years with two Fort Wayne law firms, a magistrate judge in the Allen Circuit Court for 13 years, and then Allen Circuit Court judge for 18 years, I had chosen not to run for re-election in 2020. With the blessings of Chief Justice Loretta Rush, Chief Administrative Officer Justin Forkner, and Indiana Office of Court Services (IOCS) Education Director Vicki Davis, I obtained senior judge status and was assigned primarily to the IOCS Judicial Education team, along with various other committees and projects, on a part-time basis. I was still working out and running several times a week. And like many new retirees, I had also taken up pickleball! I was reading a lot, doing some volunteer work, and spending time with my grandchildren. Life was good. I didn't know a lot about what was involved in being ISBA president in terms of time and commitment, but I certainly knew it was a big responsibility and a position for which you had to be "all in" to do it right. Did I want to take that on at this stage of my life?

The more I thought about it the next morning and talked with my wife, the more I began to appreciate the honor the nominating committee had bestowed on me. And if they thought I could do the job, I should say "yes." I called Leslie the next day and told her I needed to get permission from the chief justice (due to my job) and from Judicial Qualifications Counsel Adrienne Meiring, since I believed that no judge had been president before, and I wanted to be sure I was compliant with the Canons of Judicial Conduct. If they said yes, I would accept. They did. I did. And here I am!

"I love the way being a lawyer has organized and aligned my thought process over the years to be able to address situations and solve problems in a logical and methodical way."

I am a Fort Wayne native, and, outside of college at Notre Dame and law school at IU Maurer, I have lived and worked in Fort Wayne my entire life. I am extremely lucky to be married to my wife, Kay, for almost 42 years. She has had a long career as a nurse practitioner, most recently working in palliative care. We have three sons: Erik, a first-grade teacher in Indianapolis; John, a public information officer with the Fort Wayne mayor's office; and David, a part-time public defender with a general law practice in Fort Wayne. We are also blessed with three wonderful grandchildren: Brynn and Collin in Indianapolis, and Jack in Fort Wayne.

I love being a lawyer. I can't think of myself having any other job or profession. I love the way being a lawyer has organized and aligned my thought process over the years to be able to address situations and solve problems in a logical and methodical way. "Thinking like a lawyer," I believe it's called. I loved the opportunity while I was in private practice to help my clients in any number and type of tough situations. I loved the ability to be a problem-solver and to effect change for the better both locally and statewide while on the bench. I have loved being called upon to use my legal training and experience for several civic, religious, and not-for-profit organizations over the years. I love how my legal training and experience has put me in positions of leadership where I truly believe I have made and can continue to make a difference.

And now, although it's very early, I believe I will love being your ISBA president. What's not to love? In the two years since I've re-engaged with the ISBA while on the leadership track, I have found a wonderful blend of energies and talents from our sections and committees. The committees to which I formerly belonged—Improvements in the Judicial System, State Legislation, and Leadership Development Academy—are going as strong as ever. I intentionally sought out two committees with which I was not very familiar, but thought were "rising stars"—Diversity and Well-Being. I am so happy I did. We have an active and robust Diversity Committee that not only seeks to recognize and celebrate our members from all walks of life and experiences, but also is committed to raising our awareness and anchoring diversity in all aspects of our association. Well-being for lawyers is an area we have only recently begun to appreciate as vital for our continued

"And now, although it's very early, I believe I will love being your ISBA president. What's not to love?"

success, and we have a great group working to help us in that regard. We have an outstanding staff led by a hardworking and talented executive director and many, many great attorney volunteers. It is my hope that, together, we will do great things—and I am confident we will do just that.

One last thing. One of the first questions I was asked when I began this journey was "How would you prefer being addressed?" I recognize that in "formal" settings it may be more appropriate to call me "Judge Felts," but for most of the time, please, just call me Tom. Thank you and let's make it a great year!

ISBA UPDATE

By Res Gestae Editor

SHARE YOUR FEEDBACK: 2023 *RES GESTAE* READERSHIP SURVEY

DEAR *RES GESTAE* READERS:

ISBA staff and the Written Publications Committee strive to make *Res Gestae* as high-value and high-quality a publication as possible. From finding credible and informed writers to covering relevant topics, we want to ensure that your ISBA member journal works for you. We can't do that without your feedback.

So, we're asking you to share your input on what makes (or breaks) your reading experience. We have put together a quick, nine-question survey for you to voice your opinions, offer suggestions, and help drive the future of your member journal. You'll find it inserted into this issue of *Res Gestae* and online at www.inbar.org/RG-survey.

WHY YOUR INPUT MATTERS

Res Gestae is first and foremost *your* journal. As the official publication of the ISBA, we want to publish what will be of most use to you and your practice. Your perspectives help us to better understand the topics that resonate most, the types of articles that are most useful, and the areas in which we can best improve your reading experience.

HOW YOUR FEEDBACK WILL BE USED TO ENHANCE THE JOURNAL

Your feedback isn't just valuable; it's actionable. Here's how ISBA staff and the Written Publications Committee will use your responses:

- **Content**: Your preferences will help us curate content that best aligns with your interests and needs. Whether that be providing more legal analysis, focusing on practical takeaways, or including more case summaries, we want to provide as relevant of content as possible.
- **Quality**: Your honest feedback on *Res Gestae*'s credibility, depth, and readability will help us identify specific areas for improvement.
- **Format**: Your input on the journal's design, organization, and style will inform any

changes we make to the overall look and flow of the journal, so that we can better match your reading habits.

HOW TO PARTICIPATE

The survey is a quick nine questions and should only take a few minutes of your time. Participate in one of two ways:

1. **Print**: If you'd prefer to take the survey by hand, you can fill out the postcard inserted into this issue of *Res Gestae*. Please answer in pen and then either attach a stamp and mail to the Indiana State Bar Association (the address is already printed on the postcard) or scan your responses and email to Abigail Hopf, ahopf@inbar.org. All identifying information will be removed so that results remain anonymous.
2. **Digital**: If you'd prefer to take the survey online, visit www.inbar.org/RG-survey. Answer the nine questions and then click "Submit." Your feedback will be recorded anonymously.

PLEASE SUBMIT ALL RESPONSES BY DECEMBER 1, 2023.

Thank you in advance for taking the time to share your input. Your thoughts matter and we're eager to hear them. If you have any questions or additional feedback, please don't hesitate to contact me at ahopf@inbar.org.

Thank you,

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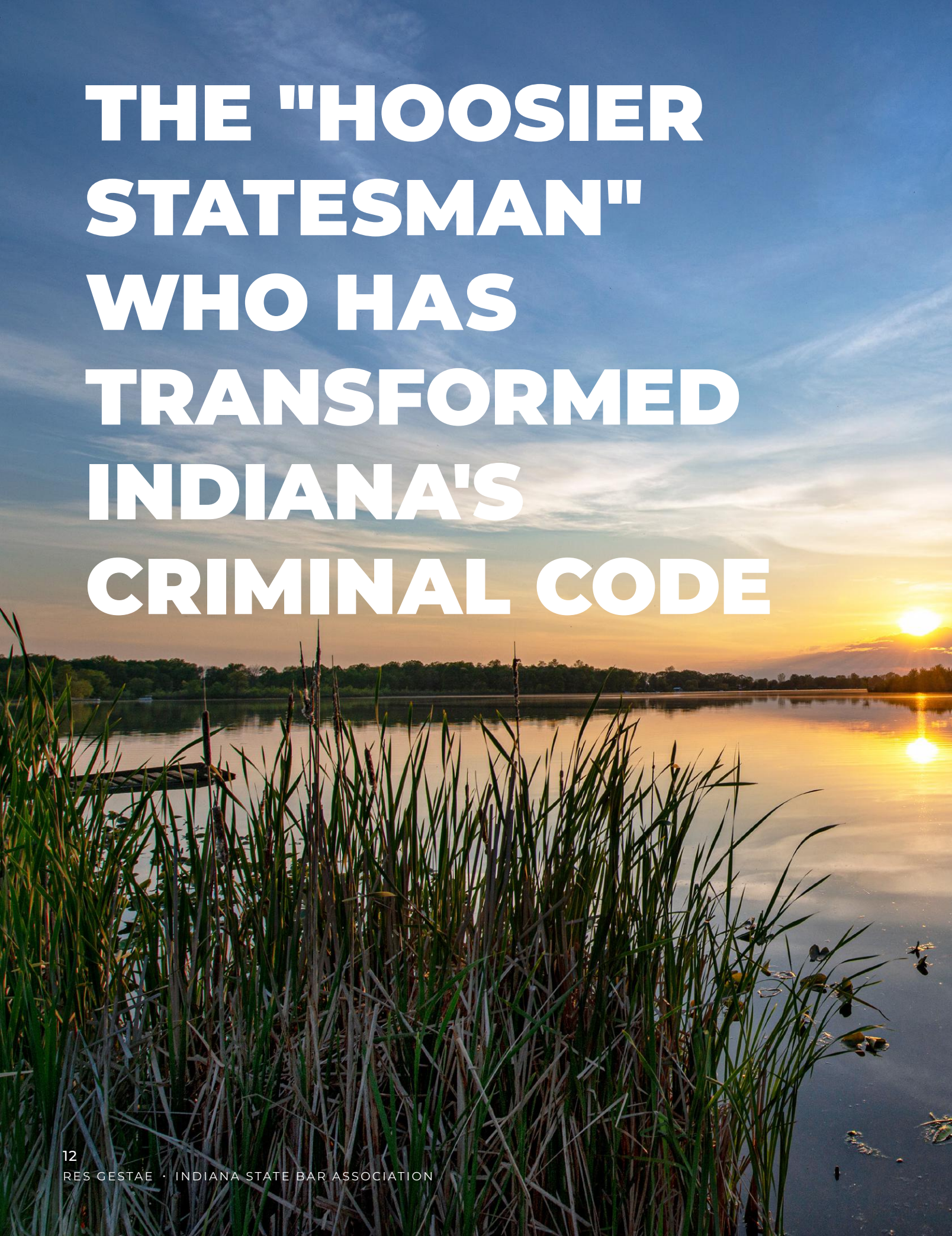

THE "HOOSIER STATESMAN" WHO HAS TRANSFORMED INDIANA'S CRIMINAL CODE

FEATURE

By Andrew Cullen

At the August 4, 2023, meeting of the State Budget Committee (a joint executive/legislative committee that approves significant state expenditures), the Indiana Department of Corrections (DOC) commissioner reported that since 2014, the state's prison population has declined by approximately 3,000 inmates. She received approval to close two DOC facilities and combine them into one.

While there was reasonable debate about this project, the significance of that moment deserves reflection.

In 2014, Indiana completed the first significant overhaul of the state's criminal code in over 30 years. Near the end of his time in office, then-Governor Mitch Daniels was receiving different signals from the DOC. The prison population was ballooning, and stakeholders were questioning why certain individuals who had shown clear signs of rehabilitation were being warehoused year-after-year for non-violent criminal convictions.

From 1977 to 2013, the legislature amended Indiana's criminal code 107 times, creating dozens of crimes and lengthening the prison sentences of existing crimes. Most agreed it was a patchwork of confusing, disproportionate crimes and penalties. Moreover, between 2000 and 2010, Indiana's inmate population increased 47% while the crime rate dropped 8%. Indiana was on an unsustainable path.

"This was the beginning of a pattern. The go-to legislator for big issues that needed careful vetting became Representative Steuerwald."

A MAJOR OVERHAUL

In 2010, at Governor Daniels' request, the General Assembly established a 16-member Criminal Code Evaluation Commission. The group was comprised of lawmakers, judges, and representatives of the state's prosecutors, public defenders, jails, and prisons. The bipartisan group was co-chaired by Representative Matt Pierce (D-Bloomington) and then-Senator Richard Bray (R-Martinsville). The commission labored for over four years to come up with a nearly 400-page legislative draft to completely overhaul Indiana's criminal code.

By the time the commission completed its work, Representative Pierce was no longer chairing the House committee due to a change in majority, and Senator Bray had announced his retirement. All eyes then turned to Representative Greg Steuerwald (R-Avon) to take the baton and attempt to get this monumental alteration in policy through a General Assembly known to be skeptical of making major changes to criminal justice policy.

The legislation (HEA 1006-2014) passed overwhelmingly with nearly zero opposition from stakeholders.

"It is not unusual for his bills—which often cover highly controversial topics—to pass unanimously. He has been known to receive a standing ovation from House members—Democrats and Republicans alike—once his legislation is passed on the floor."

"MAD AT" VS. "AFRAID OF"

This was the beginning of a pattern. The go-to legislator for big issues that needed careful vetting became Representative Steuerwald. A self-described "country lawyer" from Danville, he has represented House District 40 since 2007, rarely receiving any significant electoral challenges. Not known to seek the limelight, Representative Steuerwald has been quietly and methodically tackling big issues of criminal justice for well over a decade. As the majority caucus chair, he is now the third-highest ranking member of the House leadership team, charged with holding together a sometimes-unruly supermajority of 70 state representatives.

"When we're confronted with a controversial issue with multiple layers, I don't hesitate to ask Greg Steuerwald to tackle it," said House Speaker Todd Huston (R-Fishers). "He's a natural bridge builder who seeks the best solutions to challenging issues. He's incredibly successful at bringing the right stakeholders to the table and identifying common ground."

The Indiana State Supreme Court recently published an opinion mentioning Representative Steuerwald's philosophy:

> Adoption of this Rule reflected the state's new smart-on-crime approach to criminal-justice reform—a philosophy, in the words of [Steuerwald], designed to "separate the people we're mad at from the people we're afraid of."[1]

This is a philosophy that Representative Steuerwald has held for some time. After completing a master's degree in criminal justice, he served as a probation officer and then interned in the Hendricks County Prosecutor's Office while in law school. He currently practices law, primarily representing local units of government.

JUST GETTING STARTED

After the success of criminal code reform, Representative Steuerwald didn't take time to smell the roses. Instead, he has consistently focused on at least one major piece of reform in each of his legislative sessions, usually beginning work with stakeholders many months before the legislative session begins to listen and work toward bridging differences in opinion. It is not unusual for his bills—which often cover highly controversial topics—to pass unanimously. He has been known to receive a standing ovation from House members—Democrats and Republicans alike—once his legislation is passed on the floor.

"I and my fellow House Democrats appreciate Representative

"In the most recent legislative session, after nearly eight months of collaboration with judges, prosecutors, public defenders, mental health professionals, and others, he wrote a short bill that has been called a game changer for Indiana's criminal justice system."

Steuerwald's ability to keep legislators focused on facts and solutions when debating issues like criminal justice that can easily become driven by politics," said Representative Pierce. "He carefully considers the views of all the caucuses and stakeholders, which results in overwhelming support for his legislation."

Representative Steuerwald is known as an ardent defender of Section 18 of Indiana's State Constitution, which states: "The penal code shall be founded on the principles of reformation, and not vindictive justice."

Among his many legislative accomplishments, Representative Steuerwald has successfully authored legislation to reform Indiana's expungement law, to create a fund to compensate Hoosiers who were exonerated after being wrongly convicted, and he has made significant changes to the methods used by both state prisons and county jails seeking to rehabilitate inmates—requiring a focus on evidence-based strategies. In 2016, based on projected savings to the DOC from the re-vamped criminal code, Representative Steuerwald authored legislation to allow those savings to be re-invested in local programs to reduce recidivism.

STAYING PROACTIVE

While many communities outside of Indiana have experienced disturbing instances of police misconduct, Representative Steuerwald authored legislation in 2022 to proactively seek to prevent that issue from impacting Indiana. With the full support of the law enforcement community, he amended the Indiana code to require additional training and new policies for law enforcement officers in the areas of de-escalation and use of deadly force.

"When Representative Steuerwald takes on a project, he doesn't stop until he fully understands the issue and gets to a solution that works best," said former Sheriff Steve Luce, now executive director of the Indiana Sheriff's Association. "The law enforcement community is lucky to have him as a champion and a partner, and Indiana is a safer and more just state due to his work."

A FOCUS ON MENTAL HEALTH

In more recent years, Representative Steuerwald has turned his focus to efforts to address Indiana's mental health and addiction crisis. Partnering with a myriad of advocates, he has made changes to state statutes to allow children in correction facilities to receive improved healthcare and to allow mentally ill individuals

to receive treatment in lieu of incarceration when the individual does not present a public safety risk.

In the most recent legislative session, after nearly eight months of collaboration with judges, prosecutors, public defenders, mental health professionals, and others, he wrote a short bill that has been called a game changer for Indiana's criminal justice system. The legislation (also HEA 1006, which has become a tradition for his major reform legislation) became effective in July. The new law establishes the parameters under which a person may be involuntarily committed to a mental health facility in lieu of being placed in a jail. Funding was included in the state budget to allow local communities that wish to establish local mental health referral programs to access state funding. As Indiana continues to invest in improvements to its mental healthcare infrastructure, the liability protections this legislation grants to law enforcement will most certainly give them the option of treating mental illness as an illness instead of a crime.

WHAT'S NEXT?

Audible groans can be heard in the Statehouse hallways when Representative Steuerwald even broaches the topic of retirement. In a legislature with a dwindling number of attorneys with real-life experience in the criminal justice system, his calm demeanor combined with his uncanny ability to explain highly complex areas of law in simple terms make him the type of effective legislator that only comes around a few times in a generation.

So, Representative Steuerwald, what's next? One thing is certain. Hoosiers will be better off because of it.

Andrew Cullen serves as director of public policy and communications for the Indiana Public Defender Commission and as associate faculty at IU O'Neill SPEA. A former staffer of then-Speaker John Gregg and then-U.S. Senator Evan Bayh, he has been involved in criminal justice policy for decades. Indiana House of Representatives staff also contributed to this article.

ENDNOTE

1. *DeWees v. State*, 180 N.E.3d 261, 266 (Ind. 2022) (quoting Tom Davies, *Ind. House Panel Backs Sentencing Laws Overhaul*, Dubois County Herald (Jan. 17, 2013) (quoting Rep. Greg Steuerwald), https://perma.cc/B5WR-DMNQ

CREATURES OF HABIT: SUGGESTIONS TO THOUGHTFULLY EVOLVE AND BECOME AN INCLUSIVE LAW OFFICE

By Angka Hinshaw, Esq.

One of my favorite Indianapolis-based restaurants is Café Patachou. Each visit I order the same dish: the Cuban breakfast, "egg whites only, no sour cream, with Sriracha hot sauce on the side." Anyone who has dined with me there could probably attest that this is my staple dish and the first I would recommend. As humans, we are comfortable with our preferences, which makes it hard to deviate and explore new projects, people, perspectives, or, in my case, food. As lawyers, we find our niche, or perhaps settle on a niche, and that's our area of practice. We become well-versed in that practice area and target a certain industry and clientele. But relying only on what we are comfortable with and not considering new perspectives does not help our legal office or our clients.

DIVERSITY AND INCLUSION

The last three years forced employers, including law firms, to reevaluate their diversity, equity, and inclusion (DEI) efforts. Some employers may have recognized there are no DEI efforts to evaluate. This creates a new opportunity to examine the make-up of their staff and begin a conversation that specifically incorporates diversity and inclusion efforts.

Diversity and inclusion are closely related but not interchangeable. Simply, diversity

is the presence of differences and inclusion is a sense of belonging. Both are needed to create a welcoming work environment: an employer's appreciation of diversity and belonging should not stop at the extension of an offer letter but be folded into the fabric of office culture and values.

Often, employers across many industries, including law firms, are not purposeful with their hiring *and* retention of diverse employees. An emphasis to hire and recruit diverse attorneys may not be coupled with strong efforts to create an inclusive environment in which an attorney feels valued, appreciated, and supported. In essence, there is too much effort on recruiting and hiring diverse attorneys (and other legal staff) while neglecting efforts to create a work environment that values them and their contributions to the office and the firm's clients.

So, how do firms foster belonging? Here are a few suggestions:

- Initiate professional introductions to colleagues and clients
- Offer opportunities to have meaningful collaboration on different projects and grow professionally
- Provide work that allows an attorney to make meaningful and substantive contribution to legal matters
- Provide opportunities to argue motions in court
- Offer a floating holiday each calendar year
- Observe Juneteenth
- Celebrate culture and heritage such as Asian-American Heritage Month and Latino Heritage Month
- Invite attorneys to brainstorm cases with assigned counsel
- Invite attorneys to client meetings
- Encourage visibility and access between clients and attorneys
- As a warm welcome, invite a new attorney to lunch or coffee
- Let's not forget that a friendly "good morning," "good night," or meaningful "how are you" goes a long way

"But relying only on what we are comfortable with and not considering new perspectives does not help our legal office or our clients."

Attorneys who feel respected and appreciated will always be proud of their work and proud of their employer. A law firm that values both diversity and inclusion in its work environment will gain creative approaches and perspectives to resolve issues as well as identify issues that may not have been considered by others in which the demographics of the group are similar or same (such as same race, religion, ethnicity, gender, etc.). Thomson Reuters reported "diversity and inclusion boosts internal operations" by "attracting a wider pool of qualified candidates who seek a law department with a strong commitment to diversity."[1]

It's also important to remember that candidates who value diversity and inclusion are not limited to individuals of marginalized groups but include others who care about the inclusive experiences of people.

SOME CLIENTS CARE ABOUT DEI

Some clients care about the diversity and inclusion efforts that comprise their legal team. They do not want diverse and women attorneys only for the pitch presentations to secure their business, but also want to see diverse and women attorneys actively participating with their legal matters in a meaningful way.

Some firms across the nation (and world) are participating in a rigorous leadership and professional development program called the Mansfield Rule. The program is named after the first U.S. woman attorney—Arabella Mansfield—and has the essence of the NFL's Rooney Rule which requires the teams to interview ethnic minority candidates for head coaching and senior-level positions.

In 2016, the Mansfield Rule was created at the Women in Law Hackathon—an innovative event to pitch ideas for the purpose of advancing women attorneys. It's a collaboration with Stanford Law School, Bloomberg Law, and Diversity Lab. According to Diversity Lab's website, the lab creates an "incubator for innovative ideas and solutions that boost diversity and inclusion in law."[2] The lab uses a rigorous behavioral science-based model that aims for participating law firms to consider at least 30% of underrepresented[3] talent for all leadership roles and the activities

"A law firm that values both diversity and inclusion in its work environment will gain creative approaches and perspectives to resolve issues as well as identify issues that may not have been considered by others in which the demographics of the group are similar or same (such as same race, religion, ethnicity, gender, etc.)."

that lead to leadership using organizational goals and not quotas. The lab emphasizes the key to its success are "[t]he structural elements of the certification process—such as the data collection and reporting, accountability through frequent check-ins/audits, the ongoing collaboration among participants through monthly knowledge sharing forums, and the transparency of publicly certifying."[4] A firm's successful completion of the certification process earns a place on the coveted list of Mansfield certified law firms. Not all law offices are in a position to implement an intense, rigorous professional development program and that's OK. Legal offices can still use tidbits from the program that align with improving the culture of their office and efforts to improve the inclusion of diverse attorneys.

FOOD FOR THOUGHT FOR EXECUTIVE LEADERSHIP

Diversity and inclusion efforts start with executive leaders in the office. Those leaders have the power to hire and retain diverse staff. Power is the recognition and respect for the contributions that diverse attorneys bring to any law practice group. Those contributions bring unique life experiences and ideas to your legal office as well as insightful opinions when identifying, addressing, and resolving legal issues. Obviously, we

"Law firms must consider the next generation of staff and clients. The future includes awareness and accountability of others."

all have different life experiences, but for some lawyers their race, ethnicity, religion, gender, and disability shape their perspectives. Those perspectives not only serve the legal office but also *better* serve clients.

Law firms must consider the next generation of staff and clients. The future includes awareness and accountability of others. Your law firm should not be complacent with the same tried and true breakfast meal but explore the entire menu and devour new cuisine.

ENDNOTES

1. "The business case for diversity and inclusion in a law department," *Thomson Reuters*, https://legal.thomsonreuters.com/en/insights/articles/law-diversity-inclusion
2. "About the Lab," *Diversity Lab*, https://www.diversitylab.com/
3. Women, lawyers of color, LGBTQ+ lawyers, and lawyers with disabilities. *Mansfield Rule 2021*, Diversity Lab, https://www.diversitylab.com/mansfield-rule-4-0/
4. *Mansfield Overview*, Diversity Lab, https://www.diversitylab.com/pilot-projects/mansfield-overview/

LESSONS LEARNED BY CLIENTS' FINANCIAL ASSISTANCE FUND COMMITTEE

By Nicky Mendenhall

Our profession has long struggled to keep the trust of the public. As explained by Abraham Lincoln, "There is a vague popular belief that lawyers are necessarily dishonest. I say vague, because when we consider to what extent confidence and honors are reposed in and conferred upon lawyers by the people, it appears improbable that their impression of dishonesty is very distinct and vivid. Yet the impression is common, almost universal."

As members of the Indiana State Bar Association, we all play a part in restoring and maintaining public trust in the legal profession. From the annual dues each of you pays to the association, two dollars is donated to a fund specifically created to assist those victimized by attorney dishonesty. This fund, the Clients' Financial Assistance Fund (the fund), has existed for decades in Indiana and is overseen by a committee of the association. The attorney members of this committee volunteer their time and skills to administer the fund and oversee the process of distributing compensation from the fund to those who qualify for relief.

Those individuals who have suffered financial loss because of a dishonest act of an Indiana attorney, whether the attorney was acting as an attorney or a fiduciary, are eligible for compensation from the fund. While the committee fielded multiple claims in the years immediately after the global financial crisis of 2008, it has seen fewer applications for assistance in recent years. We hope to make

Indiana residents more aware of the fund's utility as a meaningful backstop for victims of attorney dishonesty in our state.

THE CFAF COMMITTEE

Our committee of volunteer attorneys is small but has tended to be stable. A shared sense of responsibility for helping those who have been victimized, and a responsibility to help meet the goals of the fund, keeps many of us on the committee. We have found the work to be a meaningful way to help others. Dustin DeNeal, the current longest-serving member, has been on the committee continuously since 2007. Many of the other most-active members have been on the committee for approximately a decade. Conversations about the purpose of the fund, the victims we help, and our obligation to safeguard the fund's assets to ensure it remains available for future victims are frequent topics of discussion at committee meetings. Those of us on the committee want to share what we have learned so members of the ISBA understand the importance of and benefits of the fund.

IMPORTANCE OF THE FUND

Although most applications we receive fail to qualify for assistance because there are not dishonest acts at the hand of an attorney, we field multiple requests for assistance each year with evidence of attorney dishonesty. Based on our experience over the years, it is often individuals who are in vulnerable situations who are the most likely to be victimized. Individuals suffering financial difficulties, seeking to file bankruptcy; individuals undergoing criminal prosecution who are terrified of utilizing the services of public defenders; immigrants with limited financial means; individuals suffering from physical or mental disabilities; and others with difficult life circumstances are among the victimized people the association has helped through the fund.

"One attorney can cause substantial harm, negatively impacting many individuals' lives as well as the public's perceptions of our profession."

When we come across someone who has been victimized, it is not uncommon for us to receive multiple complaints about the same attorney. One attorney can cause substantial harm, negatively impacting many individuals' lives as well as the public's perceptions of our profession. Applications to the fund usually coincide with or follow complaints to the Disciplinary Commission.

From what we have seen, the ability of those victimized to obtain recourse against the attorney through their own means is difficult. These victims often do not know how to use the legal system to protect themselves. This lack of knowledge is often why they sought legal counsel in the first place, and their negative experience leaves

"Often, we look at our client relationship and our client's legal issues only through our own lenses and fail to understand how our actions and words may be interpreted by our clients."

them mistrustful of further legal counsel. Many times, the attorneys who cause such widespread harm are themselves in unfortunate financial situations and unable or unwilling to make things right. Sometimes they face criminal prosecution themselves. Although some requests for assistance have been for large sums of money, many requests the committee receives are for small amounts. Yet these small amounts may be equivalent to many weeks or months of these people's income, making that income extremely difficult to replace. Hiring another attorney to pursue their previous attorney is not fathomable when the funds they already lost represent a sizeable portion of their household income. This fund often assists those who would not otherwise obtain relief.

LESSONS BROUGHT BACK TO OUR PRACTICE

It is rewarding when our committee can help those who have suffered losses from a dishonest attorney. But even when we determine someone is not eligible for relief, we have found personal benefits to the work we do on this committee.

Our committee receives many applications from individuals who are simply dissatisfied with the services they received or dissatisfied with the costs of those services. While investigating these applications, we hear the stories of what went wrong with the attorney-client relationship that led to the applicant developing a belief that he

or she had been wronged. Although we do not provide financial assistance to these individuals, as we want to ensure the purpose of the fund is observed, their stories provide us with lessons we bring back to our own practices. For example, we cannot overstate the importance of a written engagement letter and a clear understanding of the scope of engagement.

With many applicants, better communication would have led to a healthier attorney-client relationship. As stated by Fyodor Dostoevsky, "Much unhappiness has come into the world because of bewilderment and things left unsaid." Often, we look at our client relationship and our client's legal issues only through our own lenses and fail to understand how our actions and words may be interpreted by our clients. Even though an attorney may have explained the scope of work, the planned process for meeting objectives, and attempted to carefully set expectations at the beginning of the relationship, we have discovered many situations where these communications may not have been fully understood by the client, or needed to be reiterated or communicated again later, especially as issues change in the legal proceeding. Often, unfortunately, many attorneys fail to clearly communicate details and expectations at the beginning of the relationship, leading to issues throughout the legal representation. Frequently, this stems from the attorney forgetting just how daunting or confusing the legal system can be to someone who does not navigate it every day. Attorneys should take care to remember that concepts which seem basic to them (such as routine continuances) can appear very differently to people who do not litigate regularly.

Setting realistic expectations is not easy. We must act as a teacher in addition to being an attorney, show our client how to utilize our services, and demonstrate our purpose in the attorney-client relationship. The process can create conflict at a time when an attorney is often trying to gain a new client. Rumi, a 13th-century poet and scholar, has pointed out, "All your anxiety is because of your desire for harmony. Seek disharmony, then you will gain peace." Being honest from the beginning with a client about the scope of services and expectations will lead to fewer issues in the future. Ultimately, when you are beginning new legal services, "the best way to take care of the future is to take care of the present moment," a concept Thích Nhất Hạnh would also recommend incorporating into your daily life in general.

Complete agreement with a client is not always possible, but for many of the situations we have witnessed, more communication throughout the representation would have been beneficial. Developing an ability to listen, and an awareness of not only what must be said, but when it must be said, will improve your client relationship. Not only will each person you work with be different, but because each person may develop a changed mindset over time based on the circumstances they are going through, the need for certain types of communication will change. Acceptance of this will lead to better client relationships.

"Our profession needs to be more cautious about promoting unrealistic expectations of attorneys being able to do all things. Not only is this not good for attorneys, creating burnout and issues of retention within our profession, but our clients and the public deserve more from us."

In addition to communication issues, we also have witnessed the problems that can be caused by workload issues and burnout, where an attorney's workload led to them having poor communication with their client and (often legitimate) concerns from the client that legal matters are not moving forward in a timely manner. Our profession needs to be more cautious about promoting unrealistic expectations of attorneys being able to do all things. Not only is this not good for attorneys, creating burnout and issues of retention within our profession, but our clients and the public deserve more from us. Taking on more work than an attorney can possibly complete prevents clients from receiving the quality services they deserve and can lead to negative outcomes. Our profession needs to develop more realistic expectations about work and what people can accomplish without the risk of malpractice.

WHAT YOU CAN DO

How can you help? Those not aware of the existence of this fund will not obtain relief from it. We forget how easily information can be forgotten over time, making it necessary to remind people that this fund exists. You can share information about this fund to your colleagues, friends, family, neighbors, social media, and the public. Remind people the ISBA wants to help those hurt by dishonest attorneys.

Want to do more? Volunteer on the Clients' Financial Assistance Fund Committee. In recent years, the committee has grown smaller, and there is room for new members who want to help. Our committee members investigate the applications from those seeking relief, make recommendations to the committee, and make determinations on awards from the fund (with payments above certain thresholds subject to approval by the whole ISBA Board of Governors). The work is time-consuming but rewarding.

Finally, help promote practices that lead to healthier attorneys in our profession. A truly successful attorney, who can provide the best possible assistance to their client, is one who has balance and strong mental health, and through this, the ability to understand not only what their client has stated they need, but also what needs their client has that were left unstated.

Nicky Mendenhall is an attorney with the Indiana Department of Transportation and co-chair of the Clients' Financial Assistance Fund Committee. Additional contributions and assistance to this article were provided by Rori Goldman, co-chair, and committee members Dustin DeNeal, Aaron Cook, and Adam Decker.

CRIMINAL JUSTICE NOTES

By Joel M. Schumm

JULY CASES ADDRESS RETROACTIVITY, SELF-REPRESENTATION, SENTENCING, AND MORE

After ending its fiscal year with a flurry of opinions in June, the Indiana Supreme Court issued no opinions in criminal cases during July. This column focuses on opinions from the Court of Appeals addressing retroactivity of the permitless carry statute, termination of self-representation, Indiana's intimidation statute, double jeopardy, and reliance on prior acquittals at sentencing.

PERMITLESS CARRY STATUTE IS NOT RETROACTIVE

For decades, carrying a handgun without a license, subject to some exceptions, was a misdemeanor offense. *See* Ind. Code § 35-47-2-1(a) (version effective until June 30, 2022). That changed on July 1, 2022, when the General Assembly amended the statute to remove the license requirement, effectively abolishing the criminal offense. *See* P.L. 175-2002, § 8.

In *Lawrence v. State*, No. 23A-CR-6, 2023 WL 4611921, at *1 (Ind. Ct. App. July 19, 2023), a defendant charged with carrying without a license in 2021 argued unsuccessfully that the 2022 amendment should apply retroactively to him. "Absent explicit language to the contrary, statutes generally do not apply

retroactively. But there is a well-established exception for remedial statutes, that is, statutes intended to cure a defect or mischief in a prior statute." *Id.* at *2. Unlike earlier statutory amendments given retroactive effect, the handgun amendment did not clear up any confusion in a statute or address silence in a statute. *Id.* Rather, "the legislature reversed course on the license requirement, signaling a major change in Indiana's policy on handguns." *Id.*

RIGHT TO SELF-REPRESENTATION TERMINATED FOR ABUSE OF PRO SE STATUS

In *Luke v. State*, No. 23A-CR-50, 2023 WL 4553554, at *3 (Ind. Ct. App. July 17, 2023), the Court of Appeals reiterated that a criminal defendant's abuse of their pro se status is a sufficient basis for a trial court to terminate the right to self-representation. It explained that:

> Luke, acting pro se, filed seven motions in August 2022 followed by more than 400 pages of miscellaneous documents in September. Luke also submitted a witness list with 135 named individuals, including President Biden and other federal and state officials. In his filings, Luke repeatedly made threats, disparaged the trial judge and others, and alleged a federal, state, and local conspiracy against him. The relevance of the 400-plus pages of miscellaneous documents in particular is not clear. What is clear, however, is that Luke's submissions reflect dilatory tactics and an intent to distort the State's Level 4 felony stalking and Level 6 felony invasion of privacy charges against him.

Id.

STATE'S CONCESSION REJECTED; INTIMIDATION CONVICTIONS AFFIRMED

In *Hochstetler v. State*, No. 22A-CR-2154, 2023 WL 4772423 (Ind. Ct. App. July 27, 2023), three Amish bishops were convicted of Class A misdemeanor intimidation based on their communications with a woman who had secured a protective order against her husband after DCS involvement for inappropriate physical discipline of their children. Specifically, the bishops were charged with communicating a threat to the woman to expose her to "hatred, contempt, disgrace, or ridicule, with the intent that [she] engage in conduct against her will, to wit: petition to remove herself from a protective order[.]" *Id.* at *2.

The defendants argued at trial that their threatened speech involved a matter of public or general concern within the Amish community and thus *Brewington v. State*, 7 N.E.3d 946 (Ind. 2014), required the state to prove actual malice. Although the state argued against requiring actual malice in the trial court, "on appeal, without explanation, the State reverse[d] course," urging that the convictions must be reversed because the evidence of actual malice was lacking. *Id.* at *3. Finding no authority requiring it to accept the state's concession,

the Court of Appeals proceeded to "examine the law and the facts before us to determine whether the evidence supports Defendants' convictions." *Id*. "Given the Defendants' pattern of behavior concerning the protective order, the content of their threat, their choice to utter the threat within the confines of E.W.'s home without the presence of their wives, and Defendants' power and position with the church, the State presented sufficient evidence that Defendants" committed intimidation. *Id.* at *6.

NO DOUBLE JEOPARDY VIOLATION: MURDER AND CONSPIRACY TO COMMIT MURDER

Littlefield v. State, No. 22A-CR-2895, 2023 WL 4520964, at *3 (Ind. Ct. App. July 13, 2023), rejected a challenge to dual convictions for murder and conspiracy to commit murder as violative of the double jeopardy test announced in *Wadle v. State*, 151 N.E.3d 227 (Ind. 2020).[1] The Court of Appeals reasoned that "Indiana treats the offense of conspiracy to commit an offense as a separate crime from the underlying offense because the 'agreement itself constitutes the criminal act.'" *Id.* at *4 (quoting *Coleman v. State*, 952 N.E.2d 377, 382 (Ind. Ct. App. 2011)). Moreover, although Indiana Code Section 35-41-5-3 "prohibits convictions for both a conspiracy and an attempt with respect to the same underlying crime," "it does not prohibit convictions for both a crime and a conspiracy to commit the same crime. If the legislature wanted to prohibit convictions for both a crime and a conspiracy to commit that same crime, it surely would have included such language in Section 35-41-5-3." *Id.* (quoting *Garth v. State*, 182 N.E.3d 905, 920 (Ind. Ct. App. 2022), *trans. denied*.).

PRIOR ACQUITTALS CANNOT BE AGGRAVATING CIRCUMSTANCES AT SENTENCING

In *Walden v. State*, No. 22A-CR-2363, 2023 WL 4772426, at *3 (Ind. Ct. App. July 27, 2023), the trial court found as an aggravating circumstance at sentencing that a defendant convicted of child molesting was at high risk to re-offend because "this is the third time he has been charged with similar offenses."

The Court of Appeals relied on *McNew v. State*, 271 Ind. 214, 391 N.E.2d 607, 609, 612 (1979), where a trial court abused its discretion in considering prior acquittal in an unrelated armed robbery charge in

enhancing a defendant's sentence following his conviction for two counts of robbery:

> a judge does not err in considering prior arrests which had not been reduced to conviction in determining what sentence to impose. But he did not properly consider the armed robbery charge which resulted in acquittal. A not guilty judgment is more than a presumption of innocence; it is a finding of innocence. *And the courts of this state*, including this Court, *must give exonerative effect to a not guilty verdict* if anyone is to respect and honor the judgments coming out of our criminal justice system.

Id. at 612 (emphasis added in *Walden*). Likewise, "the trial court's consideration of Walden's charges in two prior child molesting cases that resulted in acquittals as bearing on his likelihood of re-offense could only be relevant if the trial court failed to give exonerative effect to those acquittals." *Walden*, 2023 WL 4772426, at *8.

The case was remanded for resentencing based on the "prominence of Walden's prior acquittals in the trial court's oral and written sentencing statements." *Id.* The majority was not convinced that the trial court would have ordered consecutive sentences if it had not considered this improper factor. Judge Bradford dissented because, "[b]ased on the numerous proper aggravating factors," he was "confident that the trial court would have imposed the same sentence. . ." *Id.* at *9.

INCREASING SENTENCES ON APPEAL?

Although the Indiana Supreme Court issued no opinions in criminal cases during July, its denial of transfer by a 3-2 vote in *Thomas v. State*, 22A-CR-2086 (Ind. Ct. App. Apr. 17, 2023) (mem.), is noteworthy. The panel in *Thomas* affirmed a nearly thirty-three-year sentence for multiple counts of child molesting with a habitual offender enhancement. The majority rejected both the **defendant's** Appellate Rule 7(B) request for a downward revision of the sentence and the **state's** argument for an increase of the sentence. Judge May dissented. Based on the "egregious" nature of the offenses and the defendant's significant criminal history, she would have revised his sentence to sixty-three-and-a-half years as requested by the state. *Id.* at *7.

In *McCullough v. State*, 900 N.E.2d 745 (Ind. 2009), the Indiana Supreme Court held that, when a defendant requests independent review of a sentence, appellate courts have the option either to affirm, reduce, or increase the sentence imposed. Although individual judges have written dissents arguing for an increased sentence, just one Court of Appeals' opinion has increased a sentence, and that increase was swiftly vacated by the Indiana Supreme Court. *See Akard v. State*, 937 N.E.2d 811 (Ind. 2010).

The state argued in *Thomas* that the sentence upheld by the Court of Appeals was "both an outlier and wholly inadequate to address the harm that resulted from Thomas's actions. Further guidance from this Court is necessary to explain when and under what circumstances upward sentence revisions are justified under Rule 7(B)." State's Petition to Transfer at 6, *Thomas v. State*, 22A-CR-2086. Two votes to grant transfer, especially from a memorandum decision that lacks precedential value, signals that the issue of upward appellate revisions will surface again.

ENDNOTE

1. Although the opinion cites "the double jeopardy prohibition under Article 1, Section 14 of the Indiana Constitution, *id.* at *3, *Wadle v. State*, 151 N.E.3d 227 (Ind. 2020), overruled the '**constitutional** tests' for resolving claims of substantive double jeopardy" and adopted "an analytical framework that applies the **statutory** rules of double jeopardy." *Id.* at 235 (emphasis added).

ETHICS

By Meg Christensen and Katie Jackson

WORDS AND THEIR ETHICAL (AND EXPENSIVE) CONSEQUENCES: NAVIGATING PRE-TRIAL AND EXTRAJUDICIAL STATEMENTS

It is tempting to use high-profile cases or a strong social media presence to build your reputation as an attorney. However, in addition to the standard confidentiality and advertising concerns that are frequently discussed in connection with ethics and social media, you must be wary of airing potentially prejudicial details about pending litigation in any public forum. A recent case in Georgia, *Cartagena v Medford*,[1] serves as a cautionary tale for attorneys, highlighting the potential consequences of ethical violations beyond the disciplinary process. In this case, a $1.5 million verdict was overturned due to the plaintiff's attorney's social media posts, raising questions about the delicate balance between an attorney's right to free speech and the need to preserve the integrity of the judicial process. Understanding past case law and recent guidance from the Indiana Supreme Court Disciplinary Commission will help Indiana attorneys navigate the line between protected speech and unethical speech.

"Understanding past case law and recent guidance from the Indiana Supreme Court Disciplinary Commission will help Indiana attorneys navigate the line between protected speech and unethical speech."

A SOCIAL MEDIA SNAFU

In *Cartagena*, a Georgia attorney secured a $1.5 million jury verdict in favor of his client, the plaintiff, who was injured in a car accident caused by another motorist. After the verdict was issued, the defendant filed a motion for a new trial on multiple issues, but the one that proved to be successful in obtaining a new trial was raising concerns about the conduct of the plaintiff's attorney on social media.[2] Specifically, a few days before the trial commenced, the plaintiff's attorney, who has an apparently large social media following, posted a video on TikTok and Instagram. In this video, he discussed what he referred to as the "three lies" that attorneys "actively have to tell the jury" during trials. Although the attorney did not mention the specific case or the parties involved, he did refer to specific facts related to the case and hinted he was preparing his opening statement for a car crash case in Gwinnett County, Georgia, which he explained was taking place the following Monday.

The plaintiff's attorney posted two more videos during the trial, before the jury reached its verdict. In these videos, he openly discussed the case and criticized the defense. The attorney mentioned the defendant had insurance and alleged the defendant's insurance carrier

had paid for "high-priced witnesses." He also discussed the defendant offering to settle the case because she acknowledged being at fault.

The defendant argued the plaintiff's attorney's actions violated the State Bar of Georgia Rule of Professional Conduct 3.6, which specifically addresses pretrial publicity and extrajudicial statements made by attorneys. Ultimately, the judge granted the defendant's motion, pointing to the ethical implications of the attorney's social media activity. Georgia's Rule 3.6(a) states: "A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a person would reasonably believe to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."

In her order granting the defendant's motion for a new trial,[3] the judge grappled with the delicate balance between an attorney's constitutional right to free speech and the duty to safeguard the judicial process's integrity. While acknowledging that attorneys have First Amendment[4] rights, she emphasized the court's responsibility to protect the principles of equity and justice in each case. The judge recognized the attorney's comments went beyond public concern and contained specific details about the case, which could materially prejudice the proceeding.

In her opinion, the judge explained that she did not make this decision lightly. Acknowledging the importance of respecting the jury's verdict, she admitted being "hesitant to overturn" it. However, she clarified the court also has the authority and responsibility to ensure no verdict is contrary to the principles of justice and equity. Considering this responsibility, the judge overturned the $1.5 million jury verdict solely due to the attorney's social media posts.

As this case reverberates throughout legal circles, it serves as a call to Indiana attorneys to review and understand their ethical obligations regarding pretrial and extrajudicial statements, as outlined by Indiana Rule of Professional Conduct 3.6. By doing so, attorneys can avoid a potentially costly mistake and possible disciplinary proceedings.

INDIANA'S RULE 3.6

Indiana's Rule 3.6(a) is substantially similar to Georgia's Rule 3.6. Indiana's Rule 3.6 states: "A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."

INDIANA PRECEDENT

In re Brizzi provides helpful analysis of Rule 3.6. There, the Supreme Court concluded in a lengthy opinion the attorney "violated Indiana Professional Conduct Rules 3.6(a) and 3.8(f) by making public statements as a prosecutor that had a substantial likelihood of materially prejudicing an adjudicative proceeding and a substantial likelihood of heightening public condemnation of the criminal defendants." *In re Brizzi*, 962 N.E.2d 1240, 1241 (Ind. 2012). The court explained it was giving the respondent the "benefit of a broad interpretation of the public record safe harbor" found in Rule 3.6(b)(2), which allows a lawyer to state information contained in the public record. *Id.* at 1249. By interpreting Rule 3.6(b)(2) broadly, the court held media reports and probable cause affidavits could be considered "public records," but going forward, Indiana attorneys would be held to a narrower definition of "public record" which "would refer only to public government records, i.e., the records and papers on file with a government entity to which an ordinary citizen would have lawful access." *Id.* at 1247. Nevertheless, the court held that despite this broad definition, some of respondent's statements "f[e]ll well outside even these parameters, including the statements that respondent would not trade all the money and drugs in the world for the life of one person, let alone seven, that [the defendant] deserved

"By extension, it is clear that publicizing prejudicial information that is either confidential or potentially inadmissible will fall afoul of Rule 3.6."

"While attorneys have the right to express themselves, they must exercise caution when making public statements that touch on ongoing litigation."

the ultimate penalty for this crime, that the evidence was overwhelming, and that it would be a travesty not to seek the death penalty." *Id.* at 1249.

For this misconduct, the Indiana Supreme Court imposed a public reprimand. Interestingly, in imposing this discipline, the court explained "there was little precedent in Indiana or elsewhere defining the limits of Rules 3.6(a) and 3.8(f)" at the time the attorney made the statements, and this fact was considered a mitigating circumstance. Today, it is unlikely the court would find the same as a mitigating circumstance since there is now precedent in Indiana and elsewhere, as well as an advisory opinion from the Indiana Supreme Court Disciplinary Commission.

ADVICE FROM THE COMMISSION

Last year, the commission, seemingly ahead of its time, expanded on the analysis provided in *Brizzi* and issued Advisory Opinion #1–22.[5] The opinion addressed the obligations arising under Rule 3.6 and asked the question: "Can a lawyer's pretrial publicity or extrajudicial comments on social media platforms about a pending legal dispute in which the lawyer is participating (or has participated) have ethical implications?" With respect to Rule 3.6, the commission, citing *Brizzi*, advised: "Rule 3.6(a) does not require that actual prejudice result from the public comments; rather, the proper analysis focuses on the likelihood that a particular statement, at the time it was made, will cause prejudice." In addition, the commission cautioned that attorneys should consider confidentiality obligations and that prosecutors consider Rule 3.8(f) (Special Responsibilities of a Prosecutor).

The commission explained the "purpose of Rule 3.6 is to preserve the impartiality of the justice system by only preventing attorneys from making statements that are likely to affect a party's right to a fair trial by prejudicing the proceedings." Because Rule 3.6 restricts only extrajudicial speech that will have a "substantial likelihood of materially prejudicing" a legal

proceeding, the commission concludes the rule "strikes a balance between protecting the right to a fair trial and safeguarding an attorney's right of free expression, which is almost the exact same conclusion reached in *Cartagena*. Rule 3.6 (b) and (c) provide helpful guidance regarding permissible pre-trial publicity, and subsection (d) outlines statements that carry a rebuttable presumption of having a substantial likelihood of materially prejudicing a case.

Advisory Opinion #1-22 provides five examples of "ethical minefields" illustrating the parameters of Rule 3.6. Salient to this article, ethical minefield #1 explains a hypothetical where an attorney represents a professional athlete who has been charged with sexually assaulting a woman, but the athlete claims it was consensual. The athlete took a polygraph test. The hypothetical attorney then held a press conference where the test results were discussed and concluded the athlete was more credible than the victim. The commission advises these types of statements are not proper and cites Rule 3.6(d)(1) and (d)(3). Rule 3.6(d) explains the following statements will be rebuttably presumed to have a substantial likelihood of materially prejudicing an adjudicative proceeding when it refers to that proceeding and the statement is related to:

> (1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness; and
>
> (3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented.

By disparaging the victim's credibility, as well as referring to the polygraph test, the commission concluded the conduct in ethical minefield #1 has likely violated Rule 3.6. By extension, it is clear that publicizing prejudicial information that is either confidential or potentially inadmissible will fall afoul of Rule 3.6.

CONCLUSION

Cartagena serves as a stark reminder to attorneys everywhere about the ethical implications of their actions beyond the disciplinary process. While attorneys have the right to express themselves, they must exercise caution when making public statements that touch on ongoing litigation. Pretrial publicity and extrajudicial comments can have far-reaching consequences, potentially impacting the fairness of the trial and jeopardizing the parties' rights to a fair proceeding.

Next time you're tempted to improve your social media presence or build your brand through public statements about your client's legal position, consider the confines of Rule 3.6 and avoid trying your client's case in the court of public opinion.

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ENDNOTES

1. *Cartagena v Medford*, Gwinnett County, Georgia Index No. 20C-4779-4.
2. Clients' statements on social media can also affect the outcome of the case. In Florida, a private school had entered into a settlement agreement with its former headmaster to resolve his age discrimination claim. The settlement agreement included a confidentiality provision. The headmaster made the mistake of telling his teenage daughter, who logged onto her Facebook account and posted: "Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT." The school sought and obtained a declaration that the settlement agreement was void because of the plaintiff's violation of the confidentiality provision. https://www.miaminewtimes.com/news/ex-gulliver-prep-headmaster-loses-80k-settlement-because-teen-daughter-bragged-about-it-on-facebook-6555818
3. The judge's order can be found here: https://drive.google.com/file/d/1MnCig3YgoW3G4V-lPwbbrbC0MC7cSbXm/view
4. Although outside the scope of this article, attorney's First Amendment rights are often relevant in advertising as well. *See Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (lifting the ban on attorney advertising and holding that lawyer advertising was protected commercial speech under the First Amendment).
5. Occasionally, the Indiana Supreme Court Disciplinary Commission issues non-binding advisory opinions regarding the application of Indiana's ethics rules to perspective or hypothetical questions. Advisory Opinion #1-22 can be found here: https://www.in.gov/courts/discipline/files/dc-opn-1-22.pdf.

CIVIL LAW UPDATES

By Maggie L. Smith and Cameron S. Trachtman

JULY CASES ADDRESS DECEPTIVE CONSUMER SALES ACT, MORE

The Indiana Court of Appeals issued twelve published civil opinions in July 2023. The Indiana Supreme Court issued one civil opinion during this time.

SUPREME COURT OPINIONS

Majority of Supreme Court Holds That, to Have Standing Under the Indiana Deceptive Consumer Sales Act, a Consumer Must Suffer an Actual Injury that Goes Beyond a Contractor's Procedural Violation of the Law.

After a contractor brought an action against a homeowner alleging he breached their contract for roof repairs, the homeowner filed a putative class action counterclaim, alleging the contractor violated the Indiana Deceptive Consumer Sales Act by violating the Home Improvement Contractors Act.

A majority of the Indiana Supreme Court in *Hoosier Contractors, LLC v. Gardner*, 212 N.E.3d 1234 (Ind. 2023) (Slaughter, writing on behalf of Justices Molter and Massa), held the homeowner lacked standing to bring a claim pursuant to the Indiana Deceptive Consumer Sales Act. In doing so, the Supreme Court noted that "standing under the Indiana Constitution is jurisdictional, it must exist at all stages of litigation—not merely at the outset.... At the pleading stage, a claimant's general factual allegations of injury arising from the defendant's conduct may suffice to satisfy standing.... But such general factual allegations do not suffice at the summary-judgment stage."

The majority explained that the Indiana Deceptive Consumer Sales Act—like the analogous federal consumer-protection statutes—requires the consumer (and every class member) to suffer an actual injury due to reliance on a deceptive act, and that injury must go beyond "a mere procedural violation."

Relying on federal law examples, the court concluded that the consumer's injuries here were the contractor's procedural violations of the Home Improvement Contractors Act. But the court explained that the contractor's "deceptive acts did not hoodwink [the consumer]. He paid [the contractor] nothing and hired a different company to repair his roof for less than [the contractor] would have charged him. A deceptive act that deceives no one injures no one."

Justice Goff, joined by Chief Justice Rush, concurred in the judgment, expressing "I agree with the Court that the Indiana Deceptive Consumer Sales Act requires a plaintiff class to show actual damages were suffered in reliance on a deceptive act. Based on my interpretation of the Act alone, I concur in today's judgment. I write separately, however, to express my concern that the majority's reliance on recent developments in federal standing doctrine could do injury to Indiana law."

COURT OF APPEALS DECISIONS

- *Cain v. William J. Huff II Revocable Trust Declaration Dated June 28, 2011*, 2023 WL 4854843 (Ind. Ct. App. 2023) (Kenworthy, J.) (granting partial summary judgment with regard to the declaratory judgment in favor of landowners with an easement across adjacent property, but remanding back to the trial court for the remaining issues).
- *Bojko v. Anonymous Physician*, 2023 WL 4832748 (Ind. Ct. App. 2023) (Crone, J.) (confirming that the trial court had subject matter jurisdiction to grant a petition filed by a physician and the physician's medical practice which requested that patients who had filed a medical malpractice suit remove non-evidentiary allegations from their submissions to their respective medical review panels).
- *Stout v. Knotts*, 2023 WL 4752487 (Ind. Ct. App. 2023) (Pyle, J.) (reversing and remanding the trial court's denial of Stout's motion to correct error, which was filed after the trial court granted the motion to dismiss filed by Knotts via an unusual procedural process, and additionally assigning a new judge after determining that the trial court judge's decision was based, in part, on gender bias).
- *Crowe v. Drenter*, 2023 WL 4715178 (Ind. Ct. App. 2023) (Brown, J.) (lifting a preliminary injunction entered by the trial court against Crowe, who used an easement across Drenter's property to access the property that her family member was renting and upon which she lived in a mobile home).
- *Priest v. State*, 2023 WL 4631359 (Ind. Ct. App. 2023) (Foley, J.) (affirming the judgment of the trial court for an infraction for the operation of a commercial vehicle with a blood alcohol level of at least 0.04 but less than 0.08 on the basis that the evidence admitted (1) was not hearsay and (2) did comport with the Indiana Administrative Code, despite Priest's arguments to the contrary).
- *H&S Financial, Inc. v. Parnell*, 2023 WL 4630865 (Ind. Ct. App. 2023) (Bailey, J.) (holding that H&S Financial, the alleged assignee of a judgment owned by Absolute Resolution Corporation, did not meet the requirements of Trial Rule 69(E) to prove itself as a plaintiff owning a judgment against a defendant, and was therefore ineligible to conduct proceedings supplemental to enforce a years-old judgment against defendant).
- *Piccadilly Management v. Abney*, 2023 WL 4482345 (Ind. Ct. App. 2023) (May, J.) (while "Indiana Code section 33-34-3-3…indicates interest and attorney's fees are not considered for purposes of the small claim jurisdictional limitations, nothing in that sentence indicates attorney's fees are not permitted to accrue statutory post-judgment interest").
- *AgReliant Genetics, LLC v. Gary Hamstra Farms, Inc.*, 213 N.E.3d 1087 (Ind. Ct. App. 2023) (Tavitas, J.) ("under a theory of promissory estoppel, the Farmers could recover damages based only on their reliance on AgReliant's alleged promises—not the profits they would have realized had they grown seed corn for AgReliant in 2018").
- *Jatinder K. Kansal, M.D., P.C. v. Krieter*, 213 N.E.3d 573 (Ind. Ct. App. 2023) (Vaidik, J.) (whether claim is subject to the Medical Malpractice Act does not revolve around "whether the alleged conduct occurred 'during' the provision of medical services. The question is whether the alleged tortious conduct itself 'involves' the provision of medical services" so where patient alleges she "went to see Dr. Kansal for medical treatment and that at some point during the appointments Dr. Kansal's conduct would transition from examination for medical purposes to groping for sexual purposes. This detour to sexual groping, if it occurred, was not medical care and did not 'involve' medical care").

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