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FEATURING:
THE ETHICS
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VOL. 66 NO. 10

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By Cari Sheehan

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ISBA STAFF

Assistant CLE Director:

Christine Cordial • ccordial@inbar.org

Communication Coordinator:

Abigail Hopf • ahopf@inbar.org

Director of CLE:

Kristin Owens • kowens@inbar.org

Director of Communications:

Kelsey Singh • ksingh@inbar.org

Director of Finance & Operations:

Sarah Beck • sbeck@inbar.org

Director of Meetings & Events:

Ashley Higgins • ahiggins@inbar.org

Director of Membership:

Carissa Long • clong@inbar.org

Executive Director:

Joe Skeel • jskeel@inbar.org

Legislative Counsel:

Paje Felts • pfelts@inbar.org

Meetings & Events Coordinator:

Peggy Gotsis • pgotsis@inbar.org

Membership Coordinator:

Julie Gott • jgott@inbar.org

Office Manager:

Kimberly Latimore Martin • klatimore@inbar.org

Receptionist:

Chauncey Lipscomb • clipscomb@inbar.org

Section & Committee Liaison:

Rebecca Smith • rsmith@inbar.org

Section & Committee Liaison:

Megan Mance • mmance@inbar.org

Section & Committee Manager:

Leah Baker • lbaker@inbar.org



INDIANA STATE BAR ASSOCIATION
 201 N. Illinois St., Suite 1225, Indianapolis, IN 46204
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EDITOR / ABIGAIL HOPF ahopf@inbar.org

COPYEDITOR / REBECCA TRIMPE rebeccatheditor@gmail.com

GRAPHIC DESIGN / BURKHART MARKETING PARTNERS info@burkhartmarketing.com

WRITTEN PUBLICATIONS COMMITTEE CO-CHAIRS / JUDGE M. VORHEES & MELISSA KEYES wpc@inbar.org

ADVERTISING / KELSEY SINGH ksingh@inbar.org

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Contributors



Amy Noe Dudas
Attorney
Dudas Law
amy@dudaslaw.com



Cari Sheehan
Assistant Clinical Professor of
Business Ethics and Law
IU Kelley School of Business
clsheeha@iu.edu



Steven Nisi
Law Clerk
Indiana Public Defender's Office
nisis@iu.edu



Adam Mueller
Executive Director
Indiana Justice Project
amueller@injp.org



Fran Quigley
Clinical Professor of Law
IU McKinney School of Law
quigley2@iupui.edu



Stephanie Chey-Sluss
Attorney
Kids' Voice of Indiana
ssluss@kidsvoicein.org



Kaden Alexander
Certified Graduate Legal Intern
Marion County Public Defenders Agency
kaden.alexander2@indy.gov



Jack Kenney
Director of Research & Publications
Indiana Public Defender Council
jkenney@pdc.in.gov



Meg Christensen
Office Managing Partner
Dentons Bingham Greenebaum LLP
margaret.christensen@dentons.com



Katie Jackson
Managing Associate
Dentons Bingham Greenebaum LLP
katie.jackson@dentons.com



Maggie L. Smith
Partner
Frost Brown Todd LLC
msmith@fbtlaw.com



Cameron S. Trachtman
Associate
Frost Brown Todd LLC
ctrachtman@fbtlaw.com

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President's Perspective

TALKIN' 'BOUT MY GENERATION

By Amy Noe Dudas

PRESIDENT'S PERSPECTIVE

At the risk of sounding all “back in the day,” the above reference is to a song released by The Who in 1965, just as the youngest members of the silent generation were attaining what we now recognize as the legal drinking age (it actually wasn't 21 nationwide until 1984) and they and their baby boomer peers were experiencing the British Invasion.

True to form, two of the four founding members of the band, Roger Daltrey and Pete Townshend, are still Alive and Kicking (that's a Simply Red reference for my Gen X friends) and touring at ages 79 and 78, respectively. Like many of their silent generation and boomer peers, they'll basically die at their desks.

I not only want to talk about my generation this month, but about all generations of lawyers, from the silents to the zoomers, how we approach the practice of law, and how that affects our well-being. Finally, I want to urge us older ones to stop and listen to the younger ones, because they have a state of mind that supports a healthier lifestyle. And **DISCLAIMER:** I'll be painting all of us with a broad, overly simple brush, so no offense, OK? I'm just trying to make a point here.

As I've discussed in prior columns, we lawyers tend to have a strong sense of

professional identity and place a lot of weight on what we do for a living in terms of how the world sees us and how we see the world. Our work requires that we communicate effectively, analyze and synthesize information efficiently, solve problems by distinguishing between the big picture and immediate issues, manage a heavy workload with aplomb, and work independently. To achieve this, we are rigorously trained in research, critical thinking, issue spotting, and the basic foundations of law in law school. At some point, we're expected to pick up self-awareness, civility, curiosity, emotional intelligence, and adaptability.

At the risk of being overly stereotypical (these traits are supported by research but certainly don't apply across the board), we are inflexible, prefer intellectual over emotional interactions, are impatient and skeptical, and pride ourselves on being autonomous. And in many instances, these traits are helpful to much of what we're supposed to do in our practices. They aren't, however, particularly helpful to us finding meaning and purpose as human beings.

In the 2017 “The Path to Lawyer Well-Being: Practical Recommendations for Positive Change,” the National Task Force on Lawyer Well-Being deemed the state of lawyers' mental and emotional health to



be at a critical breaking point. In 2016, an American Bar Association study found between 21% and 36% of lawyers qualified as problem drinkers. In addition, 28% struggled with depression, 19% struggled with anxiety, and 23% struggled with stress. An earlier study from 2016 found 25% of law students were considered at risk for alcoholism.

The oldest among us, members of the silent generation (the youngest of them is 78 this year), set the tone for the practice of law as we know it. Baby boomers (who in 2023 are between the ages 59 and 77) have largely followed suit. They value loyalty and a strong work ethic, expecting everyone to maintain a traditional work schedule and then some. Many of them were sure to get to the office before their bosses, so they could be seen getting in early, and they worked until after their kids had dinner, or perhaps even went to bed. And they wore suits to work. Every. Single. Day.

These sturdy reliable heavyweights never *shared how anything made them feel*...damn it. They expected the rest of us to pull ourselves up by our bootstraps, as they did, and

genuinely believed anyone could achieve anything if they worked hard enough. Or, put another way, if you didn't succeed at something, you didn't try. By the 1970s, both moms and dads were going to work pretty routinely, so their Gen X kids rode the bus home from school, let themselves in with the key hidden under the doormat, and pretended to

the decade's attitude. My peers and I went to law school based largely on the promise of high salaries and affluent lifestyles and followed our elders into firms that expected us to bill more hours than we were awake, woo clients at alcohol-heavy events, and support partners in their retirement as they sat at their desks reading the newspaper.

"Lawyers of the millennial and zoomer generations get it, but existing law firm culture doesn't quite align with their life-work philosophy."

practice piano. If you fell down, you were told to rub some dirt on it and walk it off. And by golly, *don't cry*.

Gen X came of age in the 1980s, for the most part, when rock music became synthesized and MTV showed heavily produced music videos. The Aqua Net we doused over our big hair poked a hole right through the ozone layer, and Michael Douglas's "greed is good," speech from the Oliver Stone movie *Wall Street* pretty much summed up

Up until the millennial generation, the practice of law looked a lot like the values and traits of the generations ahead of them: fiercely autonomous, working seven-day weeks, having little to no outside interests, and never retiring. "Though our profession prioritizes individualism and self-sufficiency, we all contribute to, and are affected by, the collective legal culture."¹ Framing well-being as a component of our ethical duty of competence, the Task Force includes in its definition



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of well-being emotional health, occupational pursuits, creative or intellectual endeavors, a sense of spirituality or greater purpose in life, physical health, and social connections with others. Lawyers of the millennial and zoomer generations get it, but existing law firm culture doesn't quite align with their life-work philosophy. That means older lawyers don't understand them, and younger lawyers hate their jobs, not because of the work they're doing, but because of the seemingly unbending culture we can't seem to shake.

Our millennial and zoomer colleagues recognize the importance of flexibility so each individual

works in their own most efficient way and of time off just for the sake of time off to rest one's brain, body, and psyche. They'll take less money to work at a place that shares their socially progressive values and allows them to flex. And I can about guarantee you they will absolutely refuse to die at their desks. They're on track to be happier, healthier human beings, if only we Gen Xers and boomers will listen and perhaps try it. We might like it.

So, my aging friends (and I count myself among you), listen to those young pups when they say "no, thanks" to the after-hours networking event to have dinner with their kids and take a walk with

their spouse. Try not to look cross-eyed at your new associate when she tells you she's spending the weekend learning how to basket-weave instead of reading the latest SCOTUS opinions. Maybe ask to tag along (to basket-weaving, not dinner with your associate's kids) or find something wholly *different* to try to rest your brain. You might come back to the office having slept better, feeling renewed, and ready to serve. ☯

FOOTNOTE:

1. National Task Force on Lawyer Well-Being. The Path to Lawyer Well-Being: Practical Recommendations for Positive Change, 2017, p. 9.

By *Res Gestae* Editor



ONE OF THE STATE BAR'S BEST KEPT SECRETS: THE U.S. SUPREME COURT SWEARING-IN CEREMONY

“The last time I was in Washington D.C., I was 13 years old with my father attempting to impress upon me the importance of the monuments and institutions we were visiting. Who could have imagined the next time I was in our nation’s capital, some 50 years later, I would be standing in the front row of the galley of the United States Supreme Court, with 8 of my Indiana colleagues, our right arms raised, being sworn in before all 9 justices?”

“A day no lawyer expects or could ever forget.

“Treated as honored guests from the moment we arrived and faced the imposing statue of Chief Justice John

Marshall (remember to rub his toe for good luck!), we waited in an elegant conference room before portraits of John Jay and others to be addressed by the Clerk of the Court as to the day's protocol and procedure. Once the entire galley of the Supreme Court was seated for the day's oral argument, we were led in to our special seats—just feet from the justices.

“To be honest, I was initially disappointed to learn we would be hearing about the Indian Child Welfare Act, rather than a hot political topic, like gun rights, abortion, or election issues. How short-sighted I was! It was an epic states’ rights versus federal interests battle that engaged the Court for over three hours, with every justice grilling counsel. Justice Thomas demanded each counsel justify standing before proceeding; Justices Barrett and Kavanaugh tag-teamed counsel; Justice Sotomayor elicited a wry smile from Chief Roberts when she scolded him to ‘allow counsel to finish his response’! One can only be impressed at the depth and breadth of required preparation for the honor of appearing in this forum. Every day there is an important day in American history.

“My sincere thanks to the ISBA for making this a possibility, and I encourage all attorneys to take advantage of this opportunity at some point in their career.”

—Greg Shelley, Bose McKinney & Evans, attendee at the 2022 U.S. Supreme Court group swearing-in ceremony (you can read his full reflection on our Community Corner blog).

THE U.S. SUPREME COURT GROUP SWEARING-IN CEREMONY

Each year, the ISBA arranges a group swearing-in ceremony before the U.S. Supreme Court for Hoosier attorneys. This full-day experience brings ISBA members together in the heart of Washington D.C., where they can explore the city, be admitted into the U.S. Supreme Court, and even watch an oral argument before the highest judicial institution in the country.

The next ceremony is scheduled for **Wednesday, November 29, 2023**. The full experience includes breakfast, a group photo, a tour of the Supreme Court building, and the chance to observe an oral argument before the Court.

Space is limited to the first 12 ISBA members. Members are allowed to bring one guest with them.

Each attorney is encouraged to make their own travel and hotel arrangements. The ISBA cannot be held responsible for any cost you may incur in arranging for travel to the ceremony if the Court denies or

delays your application or cancels the ceremony.

HOW TO APPLY

To claim one of the 12 spots, or to be added to the waiting list, please visit inbar.org/GroupAdmissions. Register at the top of the webpage to secure your spot. Then download both the Supreme Court's Application for Admission to Practice (available on the webpage) and your certificate of good standing from the Indiana Supreme Court (available through the Indiana Courts Portal). Mail both the completed application and the certificate to the ISBA, Attn: Julie Gott, 201 N. Illinois St., Suite 1225, Indianapolis, IN 46204 by September 8, 2023.

The cost for each applicant is \$400. If you'd like to bring a guest, please add an additional \$75. Spots are available on a first-come, first-served basis.

Applications must be submitted by **September 8, 2023**. If you have any questions, please contact Julie Gott at jgott@inbar.org. ☎



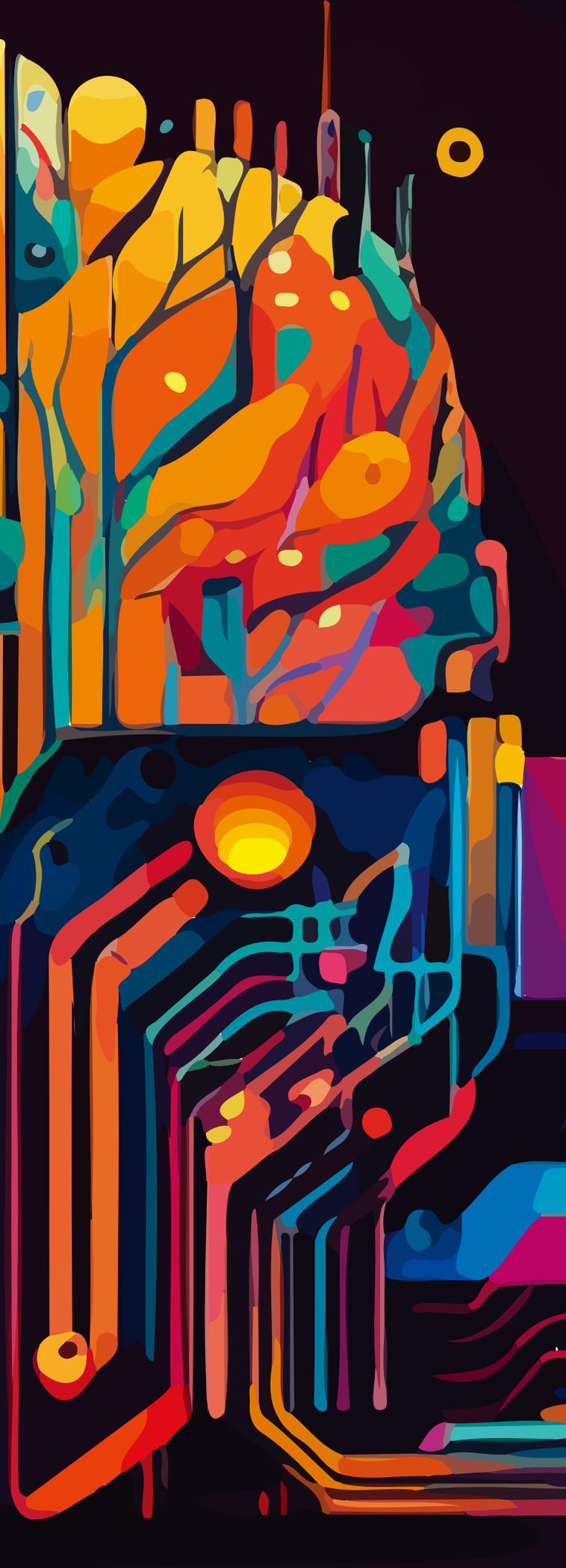
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THE ETHICS OF CHATGPT





FEATURE

By Cari Sheehan

ChatGPT is a language model developed by OpenAI. It is designed to respond to text-based, natural language queries in conversational language. It is part of artificial intelligence known as the natural language process (NLP) and designed to teach computers to understand, speak, and interpret human language. ChatGPT was released in November 2022 and is the cutting-edge of artificial intelligence and technology, but it is not without its flaws and risks, particularly in connection with its use in the legal profession.

ChatGPT can be accessed through openai.com and used for free after setting up an account. There is also a subscription service one can purchase for faster access and processing when there is high volume and usage. Once logged into ChatGPT, a person inputs any question or query into the open text box. ChatGPT will generate a conversational response to the query within seconds. ChatGPT tries to predict word use based on other sources to which it has access. It does not “think” like a human-being.

Multiple queries can be run through ChatGPT. There is no set query formula. ChatGPT has the capabilities to answer follow up questions, admit its mistakes, and challenge incorrect premises. In addition, ChatGPT has been taught to decline any search requests that it deems inappropriate or unsafe. However, it will sometimes respond to harmful instructions or exhibit biased behavior. It will also sometimes provide false negatives or positives. It is not 100% accurate.

Some examples of queries could include: (1) non-legal requests such as “who are the actors in the movie *Batman*,” (2) legal requests such as “provide me with a list of legal case citations regarding search and seizure,” or (3) other requests such as generating lists, instructions, documents, memorandum, motions, responses, research (legal and non-legal), letters, and/or other documents. The queries are limitless so long as a person does not query inappropriate content.

However, the question becomes whether a lawyer “should” utilize ChatGPT (in its current form) for legal documents, work, and research. The short answer is “NO,” not without substantial risk. ChatGPT was

not solely designed for the legal profession and is currently not integrated into legal technology products. It was designed for the public who are not bound by a lawyer's rules and ethical standards. ChatGPT does not have the required safeguards and protections needed to uphold a lawyer's ethical obligations.

Over time there is potential for new and improved versions of ChatGPT to be released and/or integrated

into current legal technology. If this occurs there is no doubt it will change the way legal work and research is conducted. However, the current version of ChatGPT is risky and should be utilized with extreme caution.

INDIANA RULES OF PROFESSIONAL CONDUCT 1.1

Rule 1.1 indicates lawyers must provide competent representation to

a client.¹ This means a lawyer must have the requisite legal knowledge, skill, thoroughness, and preparation necessary to effectively represent a client. This includes staying competent in the risks associated with technology relevant to legal practice.² ChatGPT is relevant technology to legal practice.³

The goal of ChatGPT is to save people time in research and writing. This is great in theory for the legal profession, but it poses many risks. ChatGPT does not inform the user from where it is obtaining the information. It does not guarantee the accuracy or completeness of the information, and specifically warns of this danger on its main query screen. ChatGPT is only as good as the data it has available from which to draw responses. Its database is the content on the internet, which has been proven to not be the most reliable. For instance, when ChatGPT is queried to "provide case citations for violations of Rule of Professional Conduct 1," it generates four cases.⁴ Three out of the four cases contained incorrect case names and/or citations.⁵ The general information provided with the case citations was a good starting point, but not detailed enough to generate a full brief on the topic. Substantial edits needed to be made to use what ChatGPT generated in a legal setting.

ChatGPT is further limited in content. It has scant knowledge of the world and events after 2021. This is a prime reason for the lack of accuracy or completeness of the responses produced. This is also a risky limitation for lawyers when conducting research or requesting a document draft. Lawyers need the most up-to-date information because cases may be overturned or new law produced. If ChatGPT does not

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possess the most relevant information, its use can be harmful to a lawyer (and clients) utilizing it because a winning argument could be in data

Rule 1.5 is instructive regarding fees, however, it does not provide a definitive answer regarding technology like ChatGPT. Rule 1.5

Lawyers should also remember not to overcharge clients if they charge for time spent on ChatGPT. ChatGPT generates faster responses and drafts than a lawyer independently researching and drafting the document itself. Lawyers should only bill for the actual time it took ChatGPT to generate a response. For instance, consider a lawyer who normally takes 6-8 hours to draft a brief (research and writing), but another lawyer used ChatGPT which only took 30 seconds for it to draft the brief and 10 minutes for the lawyer to edit it. The lawyer can only charge for the 10 minutes and 30 seconds that it took using ChatGPT to compose the brief. Lawyers cannot charge what "it would have cost" if ChatGPT was not utilized.

"ChatGPT does not have the required safeguards and protections needed to uphold a lawyer's ethical obligations."

missing from ChatGPT. Lawyers must double check all information generated by ChatGPT.

INDIANA RULES OF PROFESSIONAL CONDUCT 1.4 AND 1.5

Rule 1.4 provides lawyers shall promptly inform clients of any decision or circumstances needing the client's consent and/or input.⁶ Lawyers also have the duty to keep clients reasonably informed of the status of the matter, and to consult with clients regarding the means a lawyer uses to accomplish the client's objectives.⁷ This means lawyers need to inform their clients when they are utilizing ChatGPT and the circumstances in which it is being used.

However, informing a client about using ChatGPT is easier said than done. Would you want to tell a client that you did not draft the legal document for which you charged the client, but that you instead entered the question into ChatGPT and it drafted the document? This question raises further questions, such as: Can a lawyer charge a client for using ChatGPT? Should the cost of using ChatGPT to draft legal documents be the same as if the lawyer drafted the brief itself?

outlines criteria for lawyers to use when determining a reasonable fee for services.⁸ Lawyers should use the criteria to decide if they want (or can) charge a client for time utilizing ChatGPT.

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ChatGPT has the potential to significantly lower lawyer fees and costs for which the client is responsible because it will reduce a lawyer's working hours. This is great for clients, but it could have negative effects. For instance, if lawyer fees and costs are lower, more people could bring claims and flood the court system. Courts could see more frivolous claims being filed, or just more volume.

This could also have a negative impact on lawyers regarding compensation and work volume. If a lawyer works on a contingency-fee basis or has a flat-fee volume-based practice, ChatGPT may be beneficial to help reduce the amount of time the lawyer spends on each case. This could allow contingency fee and flat-fee volume-based lawyers to take on more cases and potentially make more money. However, with more

Lawyers also may choose to create a policy regarding ChatGPT and its use, or non-use, in a firm. If a firm chooses a blatant prohibition against using ChatGPT, it may run the risk of prejudicing its clients (if ChatGPT could be helpful to a client's case). Over time, and as the technology grows, if a firm has a blatant prohibition to ChatGPT, a firm may lose clients that want their lawyers to utilize ChatGPT. Communication with clients is the key to success and hopefully avoiding ethical violations.¹¹

INDIANA RULES OF PROFESSIONAL CONDUCT 1.6

Rule 1.6 provides that lawyers shall not reveal information relating to the representation of a client unless the client gives informed consent.¹² A lawyer must also take reasonable steps to prevent the disclosure of

generated the following response:

As an AI language model, I do not have the ability to practice law or provide legal advice, and I am not subject to the American Bar Association's Model Rules of Professional Conduct, including Rule 1.6 which concerns confidentiality of information. However, as an AI language model, I am designed to protect the privacy and confidentiality of users' information and data. I use various techniques to ensure that user data and information are kept secure and confidential. Nonetheless, it is important for users to remember that they are responsible for protecting their own confidential information and should use discretion when sharing sensitive information online.

ChatGPT is designed to be dependent upon data gained from other inquiries to improve its performance and accuracy. ChatGPT utilizes the data from other inquiries to generate responses to new inquiries, and in many cases, it generates content that is similar or identical to former or existing content. As such, there is no guarantee ChatGPT will not use a lawyer's queried information to generate a response, potentially even verbatim, to another user. This could be a breach of client confidentiality. There is no fool-proof way to maintain client confidentiality while using ChatGPT.

INDIANA RULES OF PROFESSIONAL CONDUCT 8.1(A), (D), AND (G)

Rule 8.4 has been referred to as the "kitchen sink" rule. It is the rule that encompasses almost every misconduct a lawyer can engage in and is generally included in most disciplinary complaints. The

"There is no fool-proof way to maintain client confidentiality while using ChatGPT."

cases comes the potential for other ethical violations such as diligence,⁹ communication,¹⁰ and several others. Lawyers must find a balance.

If a lawyer is compensated on an hourly rate, ChatGPT may not be beneficial because the lawyer may only charge for the time using it, and not what "it would have cost." Lawyers compensated on a billable hour may raise their rates to compensate for the loss of income or switch to a different compensation structure.

confidential information.¹³ Client confidentiality is broad. It includes anything reasonably related to the representation; for instance, discovery, witness statements, strategy, arguments, research, investigative materials, and more.

ChatGPT has no confidentiality guarantee. ChatGPT even recognizes it is not responsible for protecting confidential information. When ChatGPT was queried "Professional Rule of Conduct 1.6 and ChatGPT" it



rule provides that lawyers may be brought up on ethical violations for general professional misconduct, such as violating or assisting others to violate the Rules of Professional Conduct, anything that is prejudicial to the administration of justice, and lawyer bias/discrimination.¹⁴

Encouraging others to use ChatGPT (when the lawyer cannot) is a violation of the Rules of Professional Conduct, and the lawyer may be in violation of Rule 8.4(a). Lawyers must remember they cannot encourage or engage others to perform acts that they as lawyers are prohibited from performing due to the Rules of Professional Conduct.

Lawyers must not blindly rely on ChatGPT, particularly regarding documents that will be filed with the court or used in a legal proceeding due to concerns of accuracy and completeness of the information generated. The use of inaccurate or incomplete data can hinder the legal process and harm the client in violation of Rule 8.4(d). Lawyers need to fully understand the ChatGPT platform prior to deciding whether to utilize it in legal practice.

ChatGPT provides on its main query

screen that it may occasionally produce harmful instructions or biased content. In Indiana, lawyers are prohibited under Rule 8.4(g) from engaging in conduct that is harassment or discrimination based on race, sex, religion, national origin, ethnicity, disability, age, sex, orientation, gender identity, marital status, or socioeconomic status in conduct related to the practice of law.¹⁵ Technology like ChatGPT can fuel biases and stereotypes contained in the database utilized to generate responses (e.g. only males can be police officers, etc.). Even with the best safeguards, it is impossible to be 100% certain all bias is removed before utilizing content from ChatGPT. If lawyers do not recognize the biased content and merely cut-and-paste, they are at risk of violating Rule 8.4(g).

INDIANA RULES OF PROFESSIONAL CONDUCT 8.1(A), (D), AND (G)

Rules 5.1 and 5.3 require lawyers to adequately supervise and train other lawyers and nonlawyers (administrative staff, vendors, etc.).¹⁶ Lawyers must properly train their nonlawyer staff and other nonlawyers working under their direction on the ethical

risks associated with ChatGPT. If lawyers do not take the steps to properly train and supervise, they could be held liable for the ethical violations cited above in this article and face discipline regarding the same. Lawyers are responsible for the actions of nonlawyer staff and personnel working under the lawyers' direction. To guard against risk of violations from nonlawyer staff and personnel, lawyers should create policies and procedures to ensure all law firm staff know the boundaries of using ChatGPT.

CONCLUSION

Despite its flaws, ChatGPT is an amazing technology that has the potential to revolutionize how legal services are provided. It could be a tremendous time-saver and a great place to start legal research. However, for the present time, lawyers should utilize it with caution due to the numerous ethical violations that could occur. Although, lawyers should maintain hope that a legal version of ChatGPT will be created sometime soon. ☹️

Continued on page 35...

EVICTION TRAUMA: RETHINKING AN EXTREME REMEDY TO A CONTRACT DISPUTE

By Steven Nisi, Adam Mueller, and Fran Quigley



The removal of families from their homes under Indiana's landlord-friendly eviction laws occurs all too quickly. In any other contractual relationship (yes, leases are just plain old contracts), Indiana would never grant such an extreme remedy for the breach of a contract, especially where money damages would be adequate and economic loss to an injured party can be calculated to a specific dollar amount. Look at any eviction filing on public record, and you will see that landlords know what they are owed as past rent damages are easily calculated. So, why do we treat evictions differently than other contract cases? We shouldn't.

Evicting anyone from their home negatively disrupts their lives, but removing mothers, pregnant women, and children from their homes causes a particular type of immediate, irreparable harm. It is time for Indiana law to reflect the reality that fast evictions are a traumatic misapplication of contract law in need of change with dire consequences for our most vulnerable neighbors. By comparison, imagine a homeowner that got down on their luck and failed to make a mortgage payment. It would be absurd if the bank came to court ten days after the missed payment, seeking immediate possession of the home. But landlords can.¹

For such extreme relief in other contract disputes, the burden would be on the movant to meet the significant burden for

a preliminary injunction: (1) there is no adequate remedy available at law, (2) the equitable remedy is not a disservice to the public, and (3) a balancing of equities and relative harm to each party.² Specific performance of a contract, the functional equivalent to evictions, is an equitable remedy, and the power of a court to compel such a remedy is an extraordinary one. Whether you reframe evictions as a form of injunctive relief or specific performance, the bar, unlike eviction proceedings, is a high one to meet.

ADEQUACY OF REMEDY

In *Norlund v. Faust*, the Indiana Court of Appeals upheld a preliminary injunction, generally an extraordinary remedy because it would be “pure speculation to place a dollar amount on the damages” caused by the breach of a non-compete clause.³ But the court goes on to make it clear that if a party seeking equitable relief “could point to a specific dollar amount of losses, then a remedy at law would be sufficient.”⁴ This article in no way stands for the proposition that economic losses are somehow unimportant or irrelevant as to whether an eviction is warranted. Rather, the harm is so clear that it can be quantified with enough specificity to capture the *exact* losses suffered by the moving party, which calls for the more detailed scrutiny typical in other civil claims under Indiana law such as foreclosures. By comparison, current Indiana law allows landlords to seek court orders to evict tenants in as few as 10 days after the tenant receives notice, a speed that is virtually unprecedented for such consequential civil orders.⁵

Indiana law is clear that an ascertainable economic loss in the

form of damages is an adequate remedy at law that rarely warrants equitable relief, yet evictions of tenants from their homes for contract breaches are the opposite of rare, being ordered by the thousands each year across the state. The Indiana Court of Appeals has consistently recognized that

“[a] party suffering mere economic injury is not entitled to injunctive relief because damages are sufficient to make the party whole.”⁶ Evictions mitigate economic loss by making units available for rent, but economic damages produce the same result—money—without sustaining the enduring irreparable



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harm caused by removing mothers, pregnant women, and children from their homes.

IRREPARABLE HARM: THE PARTICULAR TRAUMA TO PREGNANT MOMS AND BABIES

Evicting mothers, pregnant women, and young children is an extreme remedy that creates an irreparable harm to families and their communities. Removing individuals from their homes while pregnant significantly increases the risk of low birth weight and the likelihood of the baby being admitted to the NICU for an extended period.⁷ On average, pregnant individuals experiencing homelessness stay in the NICU for an additional 17.6 days increasing healthcare costs by up

to \$42,000. Housing insecurity and evictions produce outsized harm on pregnant women and infants, but those injuries have a ripple effect on children and the broader community.⁸

"Whether you reframe evictions as a form of injunctive relief or specific performance, the bar, unlike eviction proceedings, is a high one to meet."

Even as children suffer negative health outcomes from evictions, researchers like Matthew Desmond, sociologist and author of the Pulitzer Prize-winning book *Evicted: Poverty and Profit in the American City*, have shown that they are also disproportionately likely to be in a household subject to eviction. While this observation runs counter to the general sentiment that youth need heightened protections under the law, Desmond concluded that "the presence of children in a household was more important to explaining the distribution of evictions across neighborhoods and the distribution of eviction judgments across tenants who appeared in court than were factors associated with race, gender or class."⁹ The negative impact on children is obvious.



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Evictions often lead to homelessness and high rates of residential mobility (i.e., frequent relocation). Children experiencing high rates of residential mobility are at a greater risk for poor standardized test performance, delayed literacy skills, and increased adolescent violence.¹⁰ Evictions force families to relocate to resource-scarce neighborhoods and diminish the community's social fabric. Rapid turnover of households thwarts efforts to establish and maintain "social capital, local cohesion and community investment."¹¹ By these measures, not only do evictions hurt the household being forced to relocate, but they hurt *every* child in the community.

The ill effects of evictions on children are not a short-lived phenomenon. School-age and adolescence children living in households facing eviction have "increased behavioral disturbances, poor emotional adjustment, increased teenage pregnancy rates, earlier illicit drug use, drug-related

problems and teenage depression."¹² Additionally, residential mobility impacts engagement with health services more broadly. Not only are children and households facing eviction under the immediate threat of negative outcomes due to

"The ill effects of evictions on children are not a short-lived phenomenon."

relocation, but the cycle of frequent movement also hinders primary healthcare access to address the ill effects caused by evictions and unstable housing.

THE BALANCE OF HARMS

The Indiana Court of Appeals holds that when the balance of harms tips in favor of the non-moving party, injunctive relief will be denied.¹³ Indiana law gauges the balance of harms by "whether the threatened injury to the moving party outweighs the potential harm to the non-moving party."¹⁴ The weight of these harms is a fact sensitive consideration evaluated on a sliding scale.¹⁵

When balancing the equities and potential harms of eviction, the families removed from their homes suffer the most. There are few situations where a monetary award for the landlord due to nonpayment of rent outweighs the sizeable health impact. The Fair Housing Center of Central Indiana recognized in their 2022 fair housing report, "At What Cost? Rents, Burdens, Evictions, and Profits" that the monetary losses endured by landlords, consisting mostly of large international corporations, will never offset the

continued negative impact on the health of residents.¹⁶ Additionally, a limitation on access to the extreme remedy of summary displacement of tenants from their homes would not foreclose the opportunity for landlords to collect monetary damages. Those suffering from a loss of income due to nonpayment of rent will still be able to initiate proceedings to collect the unpaid rent as they would in any typical claim for breach of contract. And they could pursue preliminary injunction as a remedy in the minority of cases where they could meet the well-established standard.

The balancing of equities and harm are interconnected with adequate available remedies. Landlords have an adequate remedy available in

"An adequate, fair resolution...would be to treat evictions like any other type of equitable relief, an extreme one."

the form of monetary damages. To be sure, landlords have a legal right to the performance of their contracts. But, evictions, like specific performance or other forms of equitable relief, are an extraordinary power reserved for those circumstances where no other remedy is sufficient. Landlords do

not owe, rent, and sell property for the right to evict, they do so to make money on their investment. An adequate, fair resolution that avoids irreparable harm to vulnerable mothers, infants, and children would be to treat evictions like any other type of equitable relief, an extreme one. The interests of all parties can easily be squared with this view. Landlords get paid, tenants stay housed.

CONCLUSION

Current Indiana law allows landlords to start the eviction process in as few as 10 days after the notice is received from the landlord. Evictions irreparably harm the lives of Indiana's most vulnerable residents,¹⁷ and this harm impacts most deeply those households consisting of mothers, pregnant women, and young children. The removal of families through the eviction process requires a shift in legal analysis that permits a balancing of harm suffered by both the landlord and tenant as well as the entire Indiana community. There are no equitable remedies more extreme than displacing parents and children from their homes. Evictions are the functional equivalent of preliminary injunctions, yet they are not subject to the same level of movant burden or judicial scrutiny. They deserve, at a minimum, the same legal scrutiny as any other claim for breach of contract. Ⓢ

This article was written as part of the Housing Equity for Infant Health Initiative, which seeks to mitigate the harm caused by evictions, especially to mothers and infants. Students and faculty in the Health and Human...

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THE HOW-TO'S OF LGBTQ+ CLIENTS: LANGUAGE, ETHICAL CONSIDERATIONS, AND BUILDING TRUST

By *Stephanie Chey-Sluss and
Kaden Alexander*



The average Indiana cisgender heterosexual lawyer might feel underqualified legally representing a member of the LGBTQ+ community. Various stereotypes and preconceived notions are ubiquitous in our general society, and those stereotypes and notions can negatively interfere with how an attorney interacts with their client and vice versa. The ever-evolving terminology and apprehension about offending an individual may also contribute to a sense of uncomfortableness. However, the guidance of our professional rules of conduct paired with the simple concept of treating others as you would like to be treated should form the basis for any attorney-client relationship.

The preamble to a lawyer's responsibilities under the Indiana Rules of Professional Conduct identify attorneys as advisors, advocates, negotiators, intermediaries, and evaluators. In all roles, attorneys are to be competent, maintain communication with their client, and keep attorney-client information confidential pursuant to these rules. Further, Ind. Prof. Cond. R. 1.2(b) specifically reference that an attorney's representation of a client does not constitute endorsement of that "client[s] political, economic, social or moral views or activities." These rules also coincide with the basic concept of treating others as you wish to be treated. Generally, the Indiana

Rules of Professional Conduct paired with treating others as we wish to be treated, can serve attorneys well when developing *any* attorney-client relationship, as our job as legal counselors should also encompass the basic concept of human respect even if one does not personally agree with another's sexual or gender identity or expression.

The LGBTQ+ terminology may be confusing to some, but with some simple explanations, it can be better understood. One concept that is important for this understanding is that gender identity and expression, meaning a person identifying and expressing oneself as male, female, or neither, is different than a person's sexual identity which refers to the type of people one

when their identified gender (male or female) is different than the one assigned to them at birth; while cisgender is a term used when a person's identified gender is the same as the one assigned to them at birth. Nonbinary is a term used when a person does not identify themselves as being either gender.

With such a continuum of sexual identities and gender identities and expressions, it may feel overwhelming to ensure that correct terminology is used. However, it is much easier than one might imagine. Simple and open neutral forms are a great way for the individual to identify themselves, and then, the attorney can follow suit. Neutral forms allow the individual completing them to provide the

"With such a continuum of sexual identities and gender identities and expressions, it may feel overwhelming to ensure that correct terminology is used."

is romantically, sexually, and/or emotionally attracted to. LGBTQ+ stands for Lesbian, Gay, Bisexual, Transgender, Queer (or Questioning) with the plus sign symbolizing other sexual and/or gender identities or expressions not incorporated into the acronym specifically. Topics surrounding transgender identity have recently been thrust into the American political and legal spotlight, and with that, a lot of transgender terminology has surfaced into mainstream society such as trans, cisgender, and nonbinary. Trans is short for transgender and is a term that someone uses to identify themselves

attorney with the necessary information instead of the attorney having to make assumptions. For example, use phrases such as "legal name" and "preferred name" instead of just "name," "preferred pronouns" so that you can correctly refer to your client as they identify, "spouse" instead of husband/wife, and "parent" instead of mother/father. Also, if you are unsure on how someone identifies their gender, you may simply ask in a respectful manner how they identify or use they/them pronouns as these pronouns can be used to identify anyone.

Overall, whether an attorney is appointed to a client in the LGBTQ+ community or the attorney and said client chose to enter into their relationship, the Indiana Rules of Professional Conduct paired with showing basic human respect to your client are simple foundational elements in developing a positive attorney-client relationship.

Interested in learning more? The following resources are a great starting point:

- To learn more about terminology, explore the Human Rights Campaign's *Glossary of Terms* (available at hrc.org/resources/glossary-of-terms) or PFLAG's *LGBTQ+ Glossary* (available at pflag.org/glossary).
- To learn more about being a better ally, review the ABA's *Ally Toolkit* at americanbar.org/groups/diversity/sexual_orientation/resources/how-to-be-an-ally-toolkit/.
- To gain further guidance for you and your practice, visit the ISBA Diversity Committee's list of resources at inbar.org/DEI. You'll find a collection of on-demand CLE, articles, podcasts, and more. We particularly recommend the *Break Language Habits* series by Jessica Heiser and Todd Shumaker. 🌈

Stephanie Chey-Sluss is a 2006 graduate of IU McKinney Law School and, for the past fifteen years, has primarily practiced child welfare law. She is married, has the most awesome twin boys, a lazy dog, and an interesting cat.

Kaden Alexander works with the Marion County Public Defenders.



MARCH CASES ADDRESS RESISTING LAW ENFORCEMENT, ADMENDMENT OF CHARGES, INSANITY DEFENSE

The Indiana Supreme Court issued no opinions in criminal cases in March, but the Court of Appeals issued opinions addressing resisting law enforcement, amendment of charges, admission of prior testimony, and the insanity defense.

SUFFICIENT EVIDENCE DEFENDANT FORCIBLY RESISTED LAW ENFORCEMENT BY LODGING ARM UNDER HIS BODY

A person who “forcibly resists, obstructs, or interferes with a law enforcement officer or a person assisting the officer while the officer is lawfully engaged in the execution of the officer’s duties” commits resisting law enforcement. Ind. Code 35-44.1-3-1(a)(1). Indiana appellate decisions have found forcible resistance from even “modest exertion(s) of strength, power, or violence.” *Walker v. State*, 998 N.E.2d 724, 727 (Ind. 2013). In *Shepard v. State*, 22A-CR-2029 (Ind. Ct. App. March 14, 2023), police officers learned Michael Wayne Shepard, who had an outstanding arrest warrant, was inside a woman’s home and she did not want him to remain there. When no one answered the officers’ knocking, the homeowner gave consent for the police to enter and search the house. Once inside, officers determined Shepard had opened a ceiling attic access portal and was hiding in the attic. When Shepard did not heed the officers’ commands to leave the attic, they deployed

a “pole camera” to observe his movements in the attic and sprayed pepper spray into the confined space to persuade him to leave. After some time, Shepard moved over to the attic access point and extended his two hands out of the opening. In the scuffle as two officers held each of his arms, Shepard fell face down onto the floor. In that position, he “pulled his arm up under his body and kind of balled...his hands up underneath of his chest.” *Id.* Slip Op. at 3-4. After a police dog bit his leg, Shepard put his hands behind his back to be handcuffed.

In affirming his resisting law enforcement conviction, the Court of Appeals found enough evidence of forcible resistance. Shepard's interactions with the officers before they tried to handcuff him (hiding in the attic) indicated he did not intend to cooperate. In discussing the role of a police dog in getting Shepard to comply, the Court of Appeals noted “a resisting law enforcement conviction should not turn on the level of force needed by law enforcement to bring the arrestee under control because such a practice would create a perverse incentive for law enforcement to prolong arrests and use more force than necessary to effectuate them.” *Id.* at 9.

DEFENDANT NOT PREJUDICED BY STATE'S ADMENDMENT OF AUTO THEFT CHARGE DAY OF TRIAL

In *Bright v. State*, 22A-CR-1875 (Ind. Ct. App. March 15, 2023), the trial court did not abuse its discretion by letting the state amend its charging information on the day of the trial. The day after learning of his father's death, Craig Bright kicked in the door of his ex-wife's house, intending to take possession of his father's truck, which had been on the property.

Bright took the truck keys and his ex-wife's cellphone from inside the house. The state charged Bright with burglary and auto theft, alleging that he knowingly or intentionally exerted unauthorized control over the truck that allegedly belonged to his ex-wife. On the day of trial, the state successfully moved to amend the auto theft count to allege the truck belonged to his ex-wife and/or the estate of his father.

Following Bright's conviction, the Court of Appeals rejected his challenge to the last-minute amendment, concluding it did not affect Bright's ability to present evidence he owned or had authorized control over the truck. Thus, the amendment to the charging information did not prejudice his substantial rights. The court also rejected defendant's sufficiency challenge to his burglary conviction, noting the trial court could reasonably infer from the circumstantial evidence that Bright intended to steal the truck.

MEASURING DEADLINE FOR ADDING HABITUAL OFFENDER ENHANCEMENTS

Indiana Code § 35-34-1-5(e) requires a charging amendment to add a habitual offender enhancement must be made at least 30 days “before the commencement of trial,” whenever that may occur. In *Owens v. State*, No. 21A-CR-1900 (Ind. Ct. App., March 28, 2023), a habitual offender enhancement filed 21 days before a trial eventually rescheduled for 18 months later was not untimely, thus the state did not have to show good cause for its allegedly belated filing of the amendment. Relying on the plain language of the statute, the Court of Appeals rejected Owens' argument the phrase “before the





commencement of trial” meant the trial date on the books when the habitual offender enhancement was filed. If the legislature intended the deadline to be measured from the “trial date” in place when the state files its amendment, it would have chosen that language. *Id.*, Slip Op. at 5-6. The trial court did not err in denying Owens’ motion to dismiss the habitual offender enhancement.

NO ERROR IN ADMITTING ABSENT WITNESS’S PRIOR TESTIMONY

In *Winston v. State*, 22A-CR-1455 (Ind. Ct. App. March 27, 2023), the trial court did not err in admitting a witness’s prior testimony when he could not come to the second trial. Kevoszia Winston’s first jury trial for murder and robbery ended in a mistrial due to the prosecutor’s illness, but he was convicted after a second trial. The trial court admitted the absent witness’s testimony from the first trial, finding the state made a reasonable effort to get him to appear in court. The trial court also noted Winston had an opportunity to cross-examine the now-absent witness at his first trial. Where a witness is unavailable for trial, and the opposing party had the opportunity to cross-examine the witness at a prior trial, the Confrontation Clause will not bar admission of that witness’s prior testimony. *Crawford v. Washington*, 541 U.S. 36, 57 (2004). Here, the Court of Appeals found the state made a good-faith, reasonable effort to obtain the witness’s presence at trial and his testimony was cumulative of other testimony, so any error in the admission of the prior testimony was harmless.

REJECTION OF INSANITY DEFENSE AFFIRMED IN SPLIT DECISION

A man and woman came home to their apartment and found Megan Henderson rummaging through their belongings. They confronted Henderson, who responded by running out of the apartment holding several of the couple’s belongings, including a vase that “didn’t even have a value to it.” *Henderson v. State*, 22A-CR-956 (Ind. Ct. App. March 17, 2023), Slip Op. at 2. The couple and the woman’s mother, who was also with them, gave chase. In the ensuing altercation, Henderson punched the woman in the face and then punched the woman’s mother in the face several times. Henderson was charged with several offenses, including burglary. Her attorney filed notice of mental disease or defect and requested a competency evaluation, which the trial court granted. Henderson refused to meet with the court-appointed psychologists. Based on other medical records, the trial court determined she was not competent to stand trial. She was committed to a state hospital and restored to competency six months later. Neither party called any experts or mental health professionals at the bench trial. Henderson entered the competency report into evidence, but it did not indicate her mental health diagnoses or the details of her treatment. The report expressed no opinion as to whether Henderson could appreciate the wrongfulness of her criminal conduct. Henderson testified she had never been treated for mental illness and did not believe she suffered from any. She also testified that she heard a voice in her head shortly before entering the couple’s apartment. The trial court

found her guilty of all charges and imposed an aggregate sentence of six years executed at the Department of Correction.

A majority of the Court of Appeals affirmed, although it was sympathetic to the reality of facts in the record showing Henderson

suffering from mental illness. During her initial hearing, Henderson made strange comments and did not appear to understand the charges against her. At a later hearing, the possibility of transfer to a special problem-solving mental health court was examined, but she refused to be assessed for the program. Henderson

has consistently refused to have any involvement with mental health professionals or cooperate with her attorney. But the court ruled that its examination of the insanity defense must be limited to evidence presented at trial. Based on that evidence, it could not conclude Henderson met her burden. "No witnesses, expert or lay, opined as to whether Henderson suffered from mental illness. Likewise, whether Henderson was incapable of appreciating the wrongfulness of her conduct. Moreover, the testimony regarding Henderson's conduct is consistent with explanations other than insanity, meaning that a trier of fact could have rightfully concluded that [she] was not insane." *Id.* at 7-8.

"At a bare minimum, the court's finding that Henderson was guilty should be modified to a finding of guilty but mentally ill."

Judge Mathias wrote a 22-page dissenting opinion, noting "the only reasonable conclusion from the record is that Henderson established by a preponderance of the evidence that she suffered from an obvious and serious mental illness at the time of the alleged offenses and also that her mental illness prohibited her from appreciating the wrongfulness of her conduct. Henderson needs to be committed, not incarcerated. At a bare minimum, the court's finding that Henderson was guilty should be modified to a finding of guilty but mentally ill." *Id.* at 9. ☹

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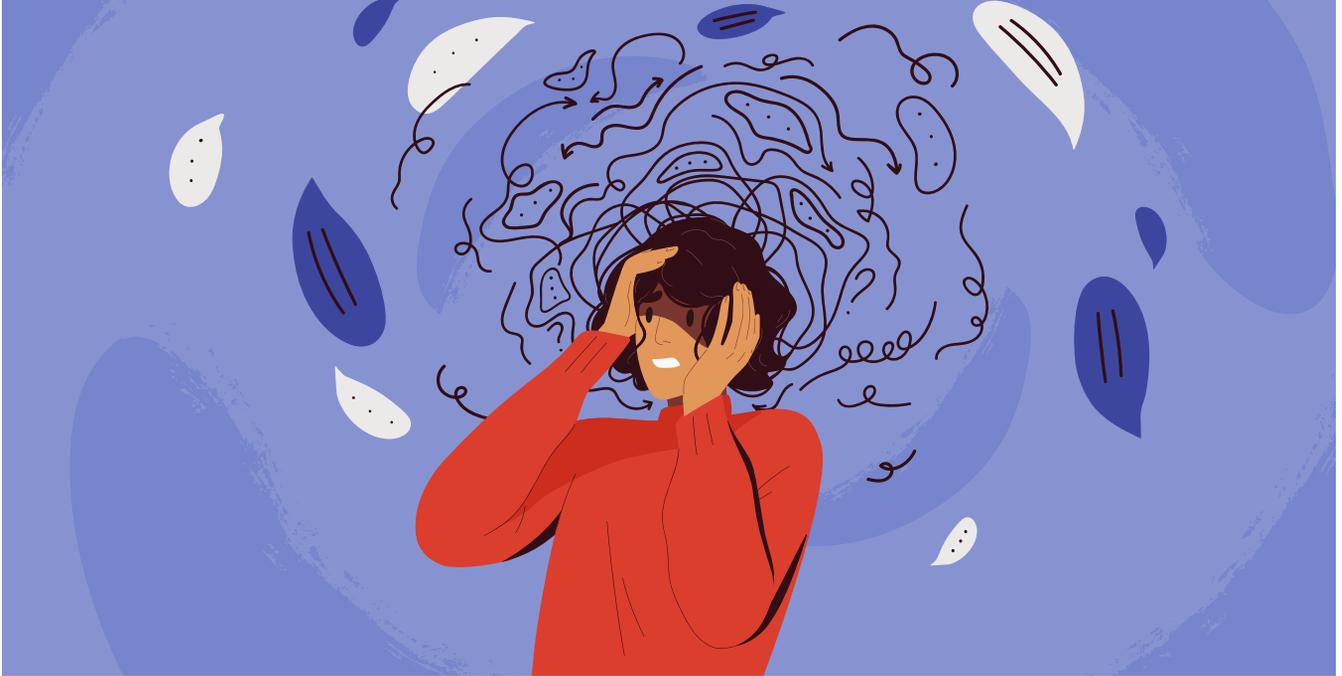


*By Meg Christensen
and Katie Jackson*

CLIENT COMMUNICATION: LET'S TALK ABOUT IT

Review of the disciplinary opinions issued by the Indiana Supreme Court so far this year demonstrates that lack of communication with clients is a prevalent problem leading to attorney discipline. Your initial thought may be that the pandemic caused a decline in attorney-client communication. Despite general agreement that the pandemic caused social isolation, the overwhelming number of grievances alleging lack of communication is nothing new. Every year, the Indiana Disciplinary Commission releases an annual report apprising the public of, among other things, the number of grievances filed against Indiana attorneys and the case type and misconduct alleged in those grievances.

- The 2020-2021 Annual Report¹ reveals that failure to communicate was the fourth most alleged rule violation, accounting for 155 out of 860 grievances. Neglect was the second most alleged rule violation, accounting for 179 out of 860 grievances. Communication/non-diligence was the tenth most alleged rule violation, accounting for 9 out of 860 grievances.



- Similarly, in 2019-2020, failure to communicate was the fifth most alleged rule violation, accounting for 107 out of 1647 grievances. Neglect was the third most alleged rule violation, accounting for 180 out of 1647 grievances. Communication/non-diligence was the sixth most alleged rule violation, accounting for 86 out of 1647 grievances.
- In 2018-2019, failure to communicate was the sixth most alleged rule violation, accounting for 70 out of 1647 grievances. Neglect was the third most alleged rule violation, accounting for 214 out of 1647 grievances. Communication/non-diligence was the fourth most alleged rule violation, accounting for 182 out of 1647 grievances.

There is no question that clients experience frustration when their attorneys fail to keep them informed about their cases and, worse yet, ignore their cases altogether. Severe, repeated, or chronic instances of ignoring clients risk more than negative Google or Yelp reviews; this conduct is a sure path to disciplinary proceedings.

THE RULES

While multiple Rules of Professional Conduct require attorneys to communicate with their clients, the Disciplinary Commission tracks a specific category of grievances titled “communication/non-diligence,” implying that diligence and communication go hand-in-hand. Rule 1.3 requires a lawyer to “act with reasonable diligence and promptness in representing a client.” Rule 1.4(a) requires that a lawyer actually tell clients about the progress in their representation and shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(e), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about

any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law or assistance limited under Rule 1.2(c).

Being busy is not a viable excuse when it comes to representing a client diligently. The comments explain that “[a] lawyer’s workload must be controlled so that each matter can be handled competently.” Rule 1.3, Cmt. 2. Charles Baudelaire aptly commented in his “Intimate Journals,” “[i]n putting off what one has to do, one runs the risk of never being able to do it.” The drafters of the Rules of Professional Conduct agree, recognizing that “[p]erhaps no professional shortcoming is more widely resented than procrastination.” Rule 1.3, Cmt. 3.

LAWYERS AND MENTAL HEALTH

Despite the clarity with which the Rules require communication and diligence, regulators recognize that this ilk of unethical conduct often arises when lawyers suffer from undiagnosed or untreated mental or emotional health disorders.

Indiana disciplinary opinions analyzing alleged Rule 1.3 or Rule 1.4(a) violations frequently discuss the personal circumstances or mental health diagnoses of the respondent attorneys. This is not surprising given that issues such as anxiety and depression often cause people to avoid tasks that take on oversized difficulty in the throes of mental illness. While not all mental health concerns result in ethical breaches, our entire profession should be alert to the symptoms of these mental conditions and be willing to intercede on behalf of friends or colleagues before the symptoms result in chronic neglect of clients and result in disciplinary proceedings. Most lawyers would

28% of attorneys were experiencing symptoms of depression, 19% of attorneys were experiencing symptoms of anxiety, and 23% of attorneys were experiencing symptoms of stress. The good news is that attorneys who can demonstrate that their unethical conduct arose from underlying mental health conditions may be treated more leniently in disciplinary proceedings.

WHEN IS MENTAL HEALTH A MITIGATOR?

The Rules of Professional Conduct are a consumer protection code, and an attorney can be liable for violating most Rules without any

attorney engaged in meaningful treatment or rehabilitation. *See, e.g., In re Hurtt*, 19 N.E.3d 252, 253 (Ind. 2014). The Indiana Supreme Court recognizes that mental health can be a particularly relevant mitigator in cases involving violations of Rule 1.3 or Rule 1.4(a). *See In re Usher*, 987 N.E.2d 1080, 1090 n.5 (Ind. 2013) (“[D]epression is more appropriate to consider as a mitigator when the misconduct is caused by neglect or oversight,” as opposed to misconduct that “was deliberate and dishonest.”).

In re Fairchild, 777 N.E.2d 726 (Ind. 2002), illustrates the impact of underlying mental health concerns on an attorney’s inability to diligently represent clients and the impact on the attorney discipline process. There, the respondent was disciplined for an ongoing pattern of neglect of five clients’ cases resulting in multiple violations of Rules 1.3 and 1.4(a). His conduct included failures to transmit funds to clients, failures to prosecute clients’ claims, and ignoring calls from clients. The respondent attributed his misconduct to depression and entered evidence that he regularly attended a JLAP Depression Support Group and that had “made some efforts to see a psychiatrist in the near future” as mitigators. *Id.* at 732. The hearing officer rejected application of mental health mitigators because the respondent did not offer any “medical evidence that he is suffering from a mental disability or that his misconduct was caused by a mental disability.” *Id.* at 732. The Indiana Supreme Court disagreed with the hearing officer’s finding and instead, “ascribe[d] some mitigating value...

"Despite the clarity with which the Rules require communication and diligence, regulators recognize that this ilk of unethical conduct often arises when lawyers suffer from undiagnosed or untreated mental or emotional health disorders."

agree that they would prefer an opportunity to resolve their mental health symptoms and maintain the ability to practice law over losing the privilege to practice law due to untreated mental health crises.

Unfortunately, the legal profession is no stranger to mental health issues. Recently, the American Bar Association conducted a study of attorney’s well-being,² and the results are concerning. The study sampled 12,825 licensed and employed attorneys and asked them to complete surveys assessing alcohol use, drug use, and symptoms of depression, anxiety, and stress. The results of the study showed that

intent to do so. In connection with this, many ethical violations do not equate to moral culpability. For instance, while an attorney who steals money from a client is both ethically liable and morally culpable, an attorney who suffers from depression and neglects a client’s case would be considered by many to lack moral culpability, despite having violated ethical standards. Attorneys who are ethically liable but not morally culpable are often treated with more leniency in disciplinary proceedings.

Mental health issues are often viewed as a mitigator in the sanctions analysis, especially if the

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By Maggie L. Smith and
Cameron S. Trachtman



MARCH OPINIONS ADDRESS AMENDING TERMS, REGULATORY TAKINGS, AND MORE

The Indiana Court of Appeals issued nineteen published civil opinions in March 2023. The Indiana Supreme Court issued four civil opinions during this time and granted transfer in two other cases.

SELECT COURT OF APPEALS DECISIONS

SUPREME COURT HOLDS BANK CANNOT ADD AN ARBITRATION AND "NO CLASS ACTION" CLAUSE USING THE "ADMENDMENT" PROCEDURE IN THE ORIGINAL CONTRACT

Bank's agreement with customer allowed it to "change any term of this agreement" upon giving "reasonable notice in writing." The bank emailed customers their monthly bank statement which included an amendment barring class actions and making claims against the bank subject to arbitration.

Recognizing that Indiana favors arbitration, a majority of the Supreme Court in *Decker v. Star Financial Group, Inc.*, 204 N.E.3d 918 (Ind. 2023) (Slaughter, J.), nonetheless

held the agreement "does not say the Bank can change the agreement however it wants," it says the bank can change "any term of this agreement" which "limits the Bank to modifying the terms that existed in the original account agreement."

Because the original agreement did not contain any dispute-resolution provisions, there was no "term" the bank could "change to effectuate the result it sought here through its addendum."

Justice Goff concurred in the judgment, finding the agreement would permit the addendum, but "given the lack of reasonable opportunity to reject the addendum, the [Customer] did not, as I see it, assent to a change in terms."

SUPREME COURT CLARIFIES THE TEST OF REGULATORY TAKINGS UNDER THE FEDERAL CONSTITUTION WHEN FLOODING IS INVOLVED

After the town completed a drainage-improvement plan, low-lying portions of the plaintiffs' property flooded after

any heavy rainfall, “encumbering” their farming enterprise. The plaintiffs sued the town (and others) for inverse condemnation. A unanimous Supreme Court in *Town of Linden v. Birge*, 204 N.E.3d 229 (Ind. 2023) (Goff, J.) issued a decision clarifying “the proper analytical framework” for regulatory takings claims under the federal constitution when flooding is at issue.

The court held federal law mandates: “(1) if the flooding is continuous or intermittent but inevitably recurring, and the invasion is substantial, then it results in a per se [or permanent] taking; (2) if, on the other hand, the flooding is temporary or of finite duration,” then the *Arkansas Game & Fish Commission v. United States*, 568 U.S. 23 (2012), factors apply. The court remanded the case for determination as to whether the flooding at issue was substantial enough to amount to a permanent physical invasion.

SUPREME COURT HOLDS TRIAL COURT HAS NO AUTHORITY TO ISSUE ORDERS INTERFERING WITH THE SUBJECT MATTER OF AN APPEAL

After the trial court awarded plaintiff damages, plaintiff immediately moved for proceedings supplemental to enforce the judgment and defendant did not stay enforcement pending appeal. The trial court issued a Proceedings Supplemental Order awarding certain of defendant’s assets to plaintiff to satisfy the judgment and defendant appealed.

The Court of Appeals then resolved the first appeal by affirming the defendant’s liability but remanding with instructions to reduce the damage award. The defendant paid

the new damage award, and the trial court entered an order finding full satisfaction of the judgment and vacating the Proceedings Supplemental Order pending on appeal. The Supreme Court in *Conroad Associates, L.P. v. Castleton Corner Owners Association, Inc.*, 205 N.E.3d 1001 (Ind. 2023) (Rush, C.J.), held this was impermissible.

The court began by noting that the trial court had jurisdictional authority to issue the Proceedings Supplemental Order while the first appeal was pending because the rules expressly allow it. But it did not have jurisdiction to act on the Proceedings Supplemental Order while that second appeal because “Appellate Rule 8 erects a jurisdictional fence between the trial court and the appellate court—preventing parties from pursuing similar relief in different courts at the same time. Under Rule 8, once a final judgment is appealed and the clerk certifies completion of the record, the trial court has no authority to interfere with the subject matter of that appeal until it is terminated.”

SUPREME COURT HOLDS CONTRACTUAL AGREEMENTS TO INSURE AND WAIVE SUBROGATION SHIFTS ALL RISK OF LOSS TO INSURANCE AND AFFIRMS GENERAL RULE THAT CONTRACTORS DO NOT OWE A DUTY OF CARE TO THIRD PARTIES EXCEPT IN LIMITED INSTANCES

A sprinkler system in a commercial building malfunctioned and flooding damaged the property of the company that had the system installed and other commercial tenants in the building. The company that had the system installed had

a contract with the entity who did the work, but none of the other commercial tenants did. The contracting company’s insurer paid damages and then sued the contractor for subrogation and the other commercial tenants sued the contractor to recover their property damages.

A majority of the Supreme Court in *U.S. Automatic Sprinkler Corporation v. Erie Insurance Exchange*, 204 N.E.3d 215 (Ind. 2023) (Rush, C.J.), held the contract between contractor and the company contained both an agreement to insure—whereby the company agreed it alone would maintain “all liability and property insurance”—and a waiver of subrogation against the contractor. The court held these two provisions established “the parties’ intent to shift all risk of loss to insurance” and eliminated the insurer’s right to recover through subrogation.

As to the non-contractual tenants, the court noted Indiana’s “general rule that contractors do not owe a duty of care to third parties after the owner has accepted the work” and the only exception to this rule involves personal injury. Here the commercial tenants suffered only property damage and, therefore, the absence of contractual privity precludes any recovery.

Goff, J. dissented, believing that the “general rule” should be abrogated in property damage cases just like personal injury cases.

TRANSFER GRANTS

Morehouse v. Dux North LLC, 196 N.E.3d 704 (Ind.Ct.App.2022) (Mathias, J.) *transfer granted 3/16/23* (dealing with easement of necessity).

Mellowitz v. Ball State University, 196 N.E.3d 1256 (Ind.Ct.App.2022) (Crone, J.) *transfer granted* 3/2/23 (whether statute barring class action lawsuits conflicted with class action trial rule).

SELECT COURT OF APPEALS DECISIONS

- *Indiana Board of Pharmacy v. Elmer*, 2023 WL 2699543 (Ind. Ct.App. 2023) (Bradford, J.) (reversing the trial court's award of attorney's fees to plaintiff and its grant of plaintiff's motion to correct error, reasoning the defendant Board of Pharmacy held quasi-judicial immunity shielding it from Section 1983 claims).
- *A.O. v. Community Health Network, Inc.*, 2023 WL 2669844 (Ind.Ct.App. 2023) (Weissmann, J.) (noting the trial court correctly determined a patient was "gravely disabled" as required for a temporary commitment after patient chewed through IV and drank saline solution while being treated for rhabdomyolysis).
- *American Senior Communities v. Indiana Family and Social Services Administration*, 2023 WL 2638721 (Ind.Ct.App. 2023) (Crone, J.) (determining FSSA's re-classification of the position "Nursing Scheduler Coordinator" to administrative component from American Senior Communities' original classification as direct care component was not arbitrary and capricious, emphasizing the ability of an administrative law judge to rely on his or her prior experience in decision-making).
- *Indianapolis Museum of Art d/b/a Newfields v. Kathleen Hurley*, 2023 WL 2620664 (Ind.Ct.App.

2023) (Pyle, J.) (affirming the trial court's grant of summary judgment which held certain trust provisions were not ambiguous and provided benefits to the descendants of the settlor before providing trust funds to non-descendant beneficiaries).

- *Krieg DeVault, LLP v. WGTV, LLC*, 2023 WL 2620666 (Ind.Ct.App. 2023) (May, J.) (agreeing with the trial court that genuine issues of material fact existed with regard to determining whether an attorney-client relationship existed, whether a fiduciary duty existed, and whether the applicable statute of limitations had expired, thereby precluding summary judgment).
- *Pennington v. Memorial Hospital of South Bend*, 2023 WL 2591517 (Ind.Ct.App. 2023) (Bailey, J.) (upholding the trial court's grant of summary judgment in favor of an architect and builder with regard to the design of a swimming pool wherein a swimmer suffered a head injury and denying the grant of summary judgment in favor of the pool owner, citing genuine issues of material fact with regard to the swimmer's premises-liability claim).
- *Spokane Kart Racing Association v. American Kart Track Promoters Association, Inc.*, 2023 WL 2565103 (Ind.Ct.App. 2023) (Vaidik, J.) (holding the trial court did not err in denying a motion to dismiss for lack of personal jurisdiction filed by out-of-state parties because the out-of-state parties "purposely availed" themselves of doing business in Indiana as required for a court to retain specific jurisdiction).

- *Weoc, Inc. v. Niebauer*, 2023 WL 2506465 (Ind.Ct.App. 2023) (Crone, J.) (in an interlocutory appeal, denying a joint motion to dismiss filed by two restaurant-defendants who had been sued for violations of Indiana's dram shop laws for allegedly overserving a patron who later caused a car wreck ultimately resulting in a fatality).
- *Wireman v. LaPorte Hospital Co., LLC*, 2023 WL 2468523 (Ind.Ct.App. 2023) (Tavitas, J.) (finding no liability on the part of a hospital regarding the disclosure of private health information after the plaintiff himself disclosed such information to third parties, who did not keep plaintiff's health information private).
- *Raylu Enterprises, Inc. v. City of Noblesville, Indiana*, 2023 2360060 (Ind.Ct.App. 2023) (Vaidik, J.) (holding a property owner whose land had been taken after the initiation of eminent domain proceedings and had been compensated for the taking of the land could not receive additional compensation for the taking of the business, which could have opened in an alternative location). ☞

Maggie L. Smith is a member with Frost Brown Todd LLC and practices in the area of appellate litigation. She is recognized in the field of appellate practice by Best Lawyers in America®, Indiana Super Lawyers®, and Chambers USA.

Cameron S. Trachtman is an associate in the Indianapolis office of Frost Brown Todd practicing business and commercial litigation. She joined the firm in January 2021 after graduating magna cum laude from IU McKinney School of Law.

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Cari Sheehan is an assistant clinical professor of business law and ethics at the IU Kelley School of Business—Indianapolis where she currently teaches commercial law and business ethics. Additionally, Sheehan is an adjunct professor at the IU Robert H. McKinney School of Law where she has taught courses in appellate practice and procedure and torts. In practice, Sheehan is a part-time conflict attorney at Scopelitis Garvin Light Hanson & Feary advising on ethical issues. She is a well-respected seminar and continuing legal education speaker covering a range of ethical issues across various platforms both locally and on a national level. Similarly, Sheehan

writes a business ethics column in conjunction with the Hamilton County Business Journal about the benefits and pitfalls of business ethics.

FOOTNOTES:

1. Ind. Rule of Prof. Conduct 1.1 (2023).
2. *Id.*
3. *Id.* at comment 6.
4. *United States v. O'Rourke*, 943 F.2d 180 (3d Cir. 1991); *In re Miller*, 210 P.3d 1069 (Or. 2009) - **inaccurate citation**; *Kala v. Aluminum Smelting & Refining Co.*, 481 N.W.2d 25 (Minn. Ct. App. 1992) - **inaccurate citation**; *In re Saulters*, 625 S.E.2d 511 (Ga. 2006) - **inaccurate citation**.
5. Any case name or citation generated by ChatGPT needs to be double checked in Westlaw,

- LexisNexis, or other legal platform.
6. Ind. Rule of Prof. Conduct 1.4 (2023).
7. *Id.*
8. Ind. Rule of Prof. Conduct 1.5 (2023).
9. Ind. Rule of Prof. Conduct 1.3 (2023).
10. Ind. Rule of Prof. Conduct 1.4 (2023).
11. See *supra* discussion regarding Ind. Rule of Prof. Conduct 1.4 (2023) and Ind. Rule of Prof. Conduct 1.2 (2023).
12. Ind. Rule of Prof. Conduct 1.6 (2023).
13. *Id.*
14. Ind. Rule of Prof. Conduct 8.4(a), (c), (d) and (g) (2023).
15. Ind. Rule of Prof. Conduct 8.4(g) (2023)
16. Ind. Rule of Prof. Conduct 5.1 (2023); Ind. Rule Prof. Conduct 5.3 (2023).

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to the respondent's apparent efforts to address the personal stresses that contributed to his misconduct, while nonetheless recognizing that the respondent's neglect was severe and warrants suspension designed to protect the public from further harm." *Id.* at 732. Ultimately, the Court suspended the respondent for a period of not less than one year, with six months executed, and the balance was stayed to a two-year period of probation. The terms of the probation included, among other things, that the respondent enter into a JLAP monitoring program, that he continue to attend regular monthly depression support group meetings, and that he continue to utilize computer systems and software to keep current on active cases. *Id.* The policy embodied in the *Fairchild* opinion is that attorneys who find themselves suffering from mental health issues are encouraged to seek treatment and protect their current and future clients from harm.

Ultimately, attorneys suffering from mental health issues should seek treatment in order to improve their own health and protect their clients. But in doing so, they should maintain records to demonstrate their efforts to the extent they face disciplinary proceedings from their conduct during a period of mental distress.

PRACTICAL ADVICE

1. Judges & Lawyers Assistance Program

If you are struggling with anxiety, depression, addiction, or any other mental health issues, it is our hope that you know that you are not

alone. JLAP is a great resource for confidential help. JLAP can be contacted at 317-833-0370 or 866-428-JLAP (5527) and all contact is confidential pursuant to Admission and Discipline Rule 31 §9 and Rule of Professional Conduct 8.3(c). JLAP does not solely assist with substance use and addiction. They also assist with attorneys or judges experiencing stress, anxiety, and depression, aging and cognitive decline, compassion fatigue and secondary trauma, and caregiving, grief, and other situational stressors.

2. Involve Staff

The comments to Rule 1.4 provide that your staff can assist in client communication. *See* Rule 1.4, Cmt 4. ("When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected.") Your staff can quickly respond to a client and let them know that a response to their request is coming. If you have a particularly needy client or a client that you may dread calling, give your staff a heads-up that you may need extra assistance and/or motivation in ensuring that you are meeting your ethical obligations of communication and diligence.

3. Set Up Regular Reminders

While this may seem fairly obvious, using your email or calendar system is a great way to set up regular reminders to communicate with clients. As the comments to Rule 1.4 suggest, "[a] lawyer's regular communication with clients will

minimize the occasions on which a client will need to request information concerning the representation." Rule 1.4, Cmt. 4. If you schedule a periodic reminder to update clients on the status of their case, or even email them to let them know that there have been no updates on the case, you can get out in front of a distressed call from a client who feels like they are being left in the dark. These scheduled reminders can also help you remember to follow up with opposing counsel, the court, or whoever's court the ball is in to keep the matter moving along. ☎

Meg Christensen is the Office Managing Partner of the Indianapolis office of Dentons. Meg focuses her practice on litigation, appeals, and attorney ethics.

Katie Jackson is an associate in the Indianapolis office of Dentons, focusing her practice on litigation and attorney ethics.

FOOTNOTES:

1. The Disciplinary Commission Annual Reports are available here: <https://www.in.gov/courts/discipline/about/>.
2. The results of the study can be found at the following link: https://journals.lww.com/journaladdictionmedicine/Fulltext/2016/02000/The_Prevalence_of_Substance_Use_and_Other_Mental.8.aspx

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Rights Clinic at IU McKinney School of Law join the Housing Equity for Infant Health Initiative in promoting policy change to secure the human right to housing in Indiana for mothers and infants.

This article represents the authors' opinions and is not endorsed by the Indiana State Bar Association. Res Gestae invites members with an opposing view to submit an essay for consideration.

FOOTNOTES:

1. Ind. Code Ann. § 32-31-1-6 (West).
2. *Indiana Fam. & Soc. Servs. Admin. v. Walgreen Co.*, 769 N.E.2d 158, 161 (Ind. 2002). The fourth prong of this test, the reasonable likelihood of success on the merits, has been omitted from this article for clarity. The fundamental message of this article is that evictions cannot, except in extremely limited circumstances, be successful because of the inherent, irreparable harm posed by removing mothers, pregnant women, and children from their homes. Success on the merits of the case in eviction proceedings is an irrelevant inquiry because of the imbalance of harms suffered by evicted tenants.
3. *Norlund v. Faust*, 675 N.E.2d 1142, 1150 (Ind. Ct. App. 1997), *decision clarified on denial of reh'g*, 678 N.E.2d 421 (Ind. Ct. App. 1997).
4. *Id.* at 1149.
5. Ind. Code Ann. § 32-31-1-6 (West).
6. *Indiana Fam. & Soc. Servs. Admin. v. Walgreen Co.*, 769 N.E.2d 158, 161 (Ind. 2002). *see, e.g., Ind. Family & Social Servs. Admin. v. Legacy Healthcare, Inc.*, 756 N.E.2d 567, 571–72 (Ind. Ct. App. 2001); *Jay County Rural Elec. Membership Corp. v. Wabash Valley Power Ass'n, Inc.*, 692 N.E.2d 905, 909 (Ind. Ct. App. 1998); *Xantech Corp.*, 643 N.E.2d at 921 (Ind. Ct. App. 1994); *Ind. State Dept. of Welfare, Medicaid Div. v. Stagner*, 410 N.E.2d 1348, 1352–53 (Ind. Ct. App. 1980) (citation omitted).
7. Kathryn M. Leifheit et al., *Severe Housing Insecurity during Pregnancy: Association with Adverse Birth and Infant Outcomes*, 17 Int. J. of Environmental Res. And Public Health 1, 2 (2020), doi:10.3390/ijerph17228659.
8. *Id.*
9. Matthew Desmond et al., *Evicting Children*, 92 Social Forces 303, 319 (2013), doi: 10.1093/sf/sot047.
10. *Id.* at 320.
11. *Id.*
12. T Jolleyman & N. Spencer, *Residential Mobility in Childhood and Health Outcomes: A Systematic Review*, 62 J. Epidemiol. Cmty. Health J. 584, 590 (2008), doi:10.1136/jech.2007.060103.
13. *Zimmer, Inc. v. Davis*, 922 N.E.2d 68, 71 (Ind. Ct. App. 2010).
14. *Id.* at 72.
15. *Ervin Equip. Inc. v. Wabash Nat'l Corp.*, 187 F. Supp. 3d 968, 978 (N.D. Ind. 2016).
16. FHCCI State of Fair Housing Report, *At What Cost? Rents, Burdens, Evictions, and Profits in Marion County*, 9 (2022).
17. Ind. Code Ann. § 32-31-1-6 (West).



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