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Indiana courts focus on improvements. **PAGE 3**

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Landlord/tenant initiative holds promise but lacks funding. **PAGE 7**

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Hoosier nominee

Judge Amy Coney Barrett stands on Ginsburg's shoulders to continue Scalia's work on Supreme Court

By Marilyn Odendahl
modendahl@ibj.com

Mitch Feikes, Republican Party chair in Chief Justice John Roberts' home county of LaPorte, may have gotten his wish.

Speaking a few days before 7th Circuit Judge Amy Coney Barrett was nominated to the U.S. Supreme Court, Feikes said he wanted President Donald Trump to choose someone who would follow the law.

A homebuilder who keeps abreast of federal and state court rulings, Feikes said sometimes a decision is issued that causes him to scratch his head and wonder what the jurist was thinking.

Feikes was noncommittal about who should fill the late Justice Ruth Bader Ginsburg's seat on the high court. He noted he is "very satisfied" with Trump's two other picks, Justices Neil Gorsuch and Brett Kavanaugh, but then he added he would like to see another Antonin Scalia.

He was a "very good justice," Feikes said of Scalia, who served on the Supreme Court for 30 years until his death in 2016. "He followed the law. He didn't make the law."

That was a sentiment echoed by Barrett as she stood in the Rose Garden on Saturday and accepted the nomination to the Supreme Court. Barrett, a graduate of the Notre Dame Law School, clerked for Scalia and said the late justice had an "incalculable influence" on her life.

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INSIDE

The late Justice Ruth Bader Ginsburg remembered for heartfelt ties to the Indiana legal community. Page 16

Associated Press photo

7th Circuit Court of Appeals Judge and University of Notre Dame law professor Amy Coney Barrett speaks after her nomination to the United States Supreme Court by President Donald Trump during a cemerony at the White House Rose Garden on Sept. 26.

New firms juggle business challenges, pandemic pressures

Photo courtesy of Larry Church

Church Langdon Lopp Banet opens the doors of its New Albany firm in January. The firm has faced unique challenges in its first year as it has contended with COVID-19. The firm's plans to fully embrace technology were prescient given the remote nature of practice during the pandemic.

By Olivia Covington
ocovington@ibj.com

Hanging a shingle is always risky. Add a pandemic to the mix and you've got a recipe for stress.

Most lawyers across Indiana felt the pinch of the COVID-19-induced economic downturn in some fashion. But those who made career moves in the months before the pandemic say the recession has put their business acumen to the test.

So how did lawyers who've recently made business changes deal with the effects of the pandemic? To hear them tell it, it takes a combination of grit, teamwork and flexibility — and some sleepless nights.

Indiana Lawyer spoke with Hoosier firms that experienced leadership and/or business transitions in the months preceding the pandemic. Here are their stories.

Learning new tricks

When the pandemic came to the Midwest, Larry Church thought to himself, "What we have gotten ourselves into?"

Church is one of nine lawyers who left the firm of McNeely Stephenson to open the New Albany firm Church Langdon Lopp Banet in January. The lawyers went into their new venture with a vision, but just months into it, their focus shifted from developing a business plan to developing an infectious disease plan.

Both plans were premised on the same goal: using the most recent technology. Even before coronavirus, CLLB had plans to update both its hardware and software, Church said. The lawyers were even offering virtual mediations before social distancing.

As a result, CLLB's mediation practice has "exploded," Church said. When the firm opened, his

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TOP 5 ONLINE

- Indiana expects to begin offering $300 unemployment bonuses next month
- State expects to start paying extra $300 unemployment benefit Sept. 21
- Justices suspend mayor's son following multiple alcohol arrests
- Bar applicants ace August 2020 exam
- 9 finalists named for Marion Superior Court vacancies

INDIANA LAWYER | Daily

Text reading 'u DONT have to testify' properly admitted, COA rules

A man convicted of battery resulting in bodily injury and invasion of privacy after he assaulted a woman failed to convince the Indiana Court of Appeals than an incriminating text he sent the victim was improperly admitted. **More**

Tax sale for which landowner wasn't given notice reversed

The LaPorte County auditor's failure to check records that would have revealed the actual address of a Michigan City property owner whose land was sold without notice for back taxes was a denial of constitutional due process, the Indiana Court of Appeals ruled Tuesday. The appeals court reinstated the landowner's challenge to the tax sale results and remanded the case. **More**

Lack of counsel for father overturns adoption decree

The Indiana Court of Appeals reversed an adoption order Tuesday, finding the child's biological father was denied due process when the trial court failed to give him notice of his right to be represented by counsel. **More**

WEB EXCLUSIVE

Inmate artwork aids recovery

Artwork by more than a dozen Clark County inmates was recently showcased in an exhibition of pieces that stressed healing and recovery from substance abuse.

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Photo courtesy of Southern Indiana District Court

Chief Judge Jane Magnus-Stinson (left) commemorates the 100-year anniversary of the 19th Amendment with a painting by Indianapolis artist Kyle Ragsdale (right) depicting the five women judges on the Southern Indiana District Court.

'Her Honor'

New painting reflects strength, diversity of women judges on Southern Indiana District Court

By Marilyn Odendahl
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Looking up from her desk, Southern Indiana District Court Chief Judge Jane Magnus-Stinson can have a moment of joy in a year where, as she noted, joyful moments have been too few.

The object of her respite is "Her Honor," a newly finished painting that depicts her and her female colleagues against a background of colorful bursts and expression to commemorate the achievement of women in the 100 years since the passage of the 19th Amendment. A century after women secured the right to vote, the Southern Indiana District reflects the advances that have been made with five women — Magnus-Stinson, Judge Tanya Walton Pratt and Senior Judge Sarah Evans Barker along with Magistrate Judges Debra McVicker Lynch and Doris Pryor — now among the 13 judges.

> **"I think you can think of ways to not lose that (creative) side of you and not look at your work as a rote function. … (T)hat's a side of our brain that we can be inspired by sort of the artist-side of life."**
> Southern Indiana District Court Chief Judge Jane Magnus-Stinson

"It brings me joy," Magnus-Stinson said. "I can sit here and be in the middle of the difficulties of this position and look up and feel joy. And I feel joy because women have had the right to vote, women are making progress."

Indianapolis artist Kyle Ragsdale was commissioned by Magnus-Stinson to create the work. After seeing photos and videos of the chief judge's courtroom and chambers, Ragsdale wanted to match the regal environment of the federal building, so he adopted a more stately approach. He initially placed the quintet of female jurists in an Indiana field, but when he sent some pictures of the painting in progress to Magnus-Stinson, she overruled.

PAINTING • page 5

New strategic goals set for improving state courts

Greater accountability, better access to justice guide 2020 Forward plan

By Katie Stancombe
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The Judicial Conference of Indiana's strategic plan for the next decade, titled 2020 Forward, rededicates areas of achievement previously attained with past white papers while also setting new goals striving for greater accountability and access to justice.

Several areas up for improvement already have seen progress spurred on by the changes posed by the COVID-19 pandemic. Others are aligning with current events and issues, reinforcing an urgency to make long-lasting changes to Indiana's justice system.

Spitzer

In 2008, the strategic planning committee introduced its first white paper, a second following soon after in 2010. The most recent white paper, 2020 Forward, has been in the works since June 2017, said strategic planning committee co-chair Judge Mark Spitzer of Grant County.

The committee met regularly to hear input from outside partners and cleared the table for discussion on the major concerns judicial officers face statewide, narrowing them down to seven areas of improvement.

Those key areas are improving courthouse security, enhancing technology, clarifying clerk and court staff duties, streamlining court structure, refining judicial selection procedures, securing proper funding and providing access to justice for all Hoosiers.

"There was a consensus that these are things that we need to focus on," Spitzer said. "It was a winnowing process."

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Bankruptcy lawyers foresee flood of COVID-related filings

By Olivia Covington
ocovington@ibj.com

If you thought the COVID-induced recession would cause a spike in bankruptcy filings, you'd be wrong. At least for the moment.

In fact, according to one Indianapolis practitioner, "bankruptcies are in the toilet."

The current economic downturn caused by the coronavirus pandemic bears some similarity to last decade's Great Recession, but it also has its differences, including the pace of bankruptcy filings. The Great Recession saw a near-immediate flood of filings, lawyers say, while various economic relief during the 2020 pandemic kept many Americans afloat, at least temporarily.

But that doesn't mean bankruptcy practitioners are sitting idle, as existing clients still need their service. More than that, a wave of new clients is likely coming.

Hester

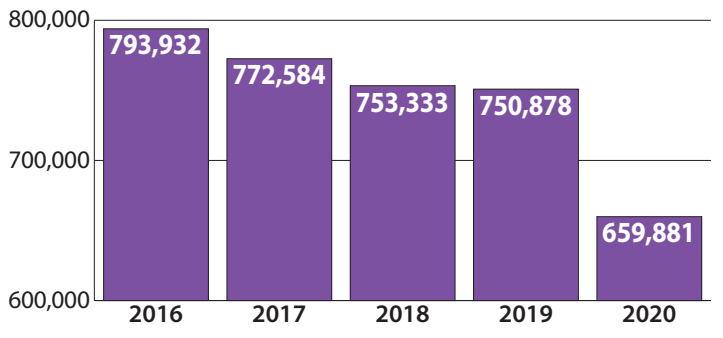
As government relief funds begin to dry up, many Americans will no longer be able to avoid the inevitable, bankruptcy practitioners say. That leaves one question: when will the inevitable strike?

"I think we've all been expecting a tsunami of filings," said Jeff Hester of Hester Baker Krebbs in Indianapolis. "Everybody thinks, 'Maybe this month, maybe this month,' but it keeps not happening."

BANKRUPTCY • page 18

Up or down?

Bankruptcy filings nationwide decreased 11.8% for the five-year period ending June 30, 2020. While business filings dropped from a high of 25,227 in 2016 to just over 22,000 for each of the past three years, here is a look at national nonbusiness filings since 2016:



Source: U.S. Courts Administrative Office

New lawyers take oaths, Zoom into practice

By Katie Stancombe
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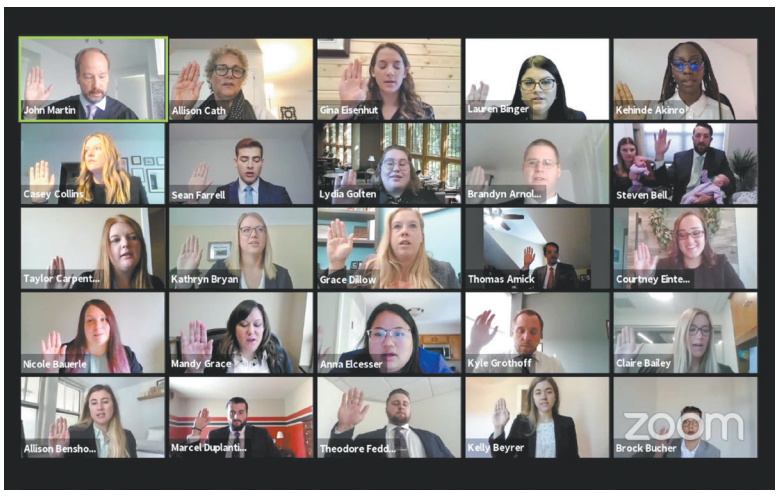

New lawyers take their oath during the Fall 2020 Bar Admission Ceremony conducted virtually in multiple Zoom sessions as a safeguard against coronavirus.

The Indiana Supreme Court hosted the Fall 2020 Bar Admission Ceremony by videoconference Sept. 21 in keeping with safeguards of hosting once in-person events online amid the COVID-19 pandemic.

Justice Steven David welcomed the first round of admittees to the virtual ceremony, which was split into three groups by alphabetical order. The justice informed the new lawyers that Chief Justice Loretta Rush would be unable to participate due to her quarantine after testing positive last week for COVID-19.

Relaying that the chief justice was very proud of them, David continued his welcome by likening the their accomplishments to ascending a mountain.

"The top of the mountain isn't just to enjoy the view," David told them. "While you have made it to the top of the mountain, don't stay anchored to the center. Never stop learning, never stop being curious and stay open to the opportunities before you."

Similar to the Spring 2020 Bar Admission Ceremony, each new lawyer introduced themselves to the Indiana judiciary and bar by turning on their cameras, clicking unmute and saying their names during the Zoom conference.

Friends and family from near and far watched proudly as their loved ones completed a milestone in their legal education by becoming lawyers. Some could be seen surrounded by their family as they introduced themselves, others receiving pats on the back and celebratory clapping.

Admittee Steven Bell cradled his baby in one arm while raising the other to swear in to the bar, while Blake Lehr's cat decided to join him on screen in taking the oath. Many of the admittees smiled ear to ear as they repeated the oath alongside their colleagues.

During introductions and remarks, Indiana Court of Appeals Chief Judge Cale Bradford offered the new admittees two pieces of advice as they prepare to embark on their legal careers.

"First, always remember to treat everyone you encounter throughout your legal endeavors equally, with dignity and respect," Bradford said. "Second, be zealous in your representation of your clients while also being kind. This will serve you and your clients well."

For the first and third groups, Justice Christopher Goff administered the Indiana oath, while Fulton Circuit Court Judge Christopher Lee led the Indiana oath for the second group. Magistrate Judge John Martin administered the oath for the Northern Indiana District Court for all three ceremonies.

Leading the admission to U.S. District Court for the Southern District of Indiana, Chief Judge Jane Magnus-Stinson took time to honor and reflect on the late U.S. Supreme Court Justice Ruth Bader Ginsburg.

"The light of the legal profession shines less brightly, so I put the challenge to you to shine your light as bright," Magnus-Stinson said.

"We are in the shadow and mourning as a profession the death of Ruth Bader Ginsburg," Martin said. "It is appropriate that you remember her and take inspiration from her and her life. It will help you in your practice."

In concluding remarks, Justice Geoffrey Slaughter noted that 2020 has been an "eventful and challenging year to say the least."

"I hope you will find that for all of its difficulties, precisely those obstacles overcome made what was accomplished today all the more worthwhile," he concluded.•

COA rules against Journey guitarist's wife

By Katie Stancombe
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The wife of Journey guitarist Neal Schon could not convince the Indiana Court of Appeals on Sept. 18 that she was deprived of an opportunity to conduct additional discovery against the Allen County War Memorial Coliseum after a security guard there allegedly injured her during a concert by the rock band.

While video recording her husband's encore performance of "Don't Stop Believing" at the Allen County coliseum in 2017, Michaele Schon asserted that without saying a word, ESG Security, Inc. security guard Mike Frantz put two hands on her and threw her into the PA system. She also claimed that Journey's own security guards had to remove the Frantz "off" of her.

Frantz testified that he never had physical contact with Michaele or invaded her personal space, instead walking her out the barricaded area in front of the stage where she had been at the time of the incident.

The Schons sued Frantz, ESG, Live Nation Worldwide, Inc. and the Coliseum, asserting the following claims: respondeat superior-assault and battery; intentional infliction of emotional distress; negligence; negligence/premises liability; negligent hiring, supervision, and retention of security personnel; and negligent undertaking.

In response, the Coliseum filed a motion for summary judgment, asserting that it was entitled to immunity as a political subdivision under the Indiana Tort Claims Act and denying liability based on various other theories. When the trial court granted its motion, the Schons appealed, arguing that the trial court deprived them of an opportunity to conduct additional discovery and that the Coliseum is not entitled to immunity as a political subdivision under the ITCA.

But the Indiana Court of Appeals disagreed in *Michaele Schon and Neal Schon v. Mike Frantz, ESG Security, Inc., Allen County War Memorial Coliseum, and Live Nation Worldwide, Inc.,* 20A-CT-741.

"Here, the Schons did not file a motion to compel discovery. Further, they requested and were granted essentially two extensions of time and specifically informed the trial court that they would rely on their response and that a hearing for a second extension of time would be moot. Thus, the Schons knowingly abandoned their request to conduct additional discovery. Under these circumstances, we cannot say that the trial court deprived the Schons of the opportunity to conduct additional discovery," Judge Terry Crone wrote for the appellate court.

Next, it found that the Coliseum is a political subdivision under the ITCA.

"The (Allen County) Commissioners own the Coliseum. The Commissioners executed the Security Agreement with ESG. If a judgment is rendered against the Coliseum in this action, it appears that it would be satisfied from the assets of Allen County," the appellate court wrote. "We conclude that this relationship is sufficiently direct such that the Coliseum is not a separate entity from Allen County and/or its Commissioners for purposes of the ITCA."

Lastly, the appellate court found that the Schons have failed to establish that the trial court erred in finding that the Coliseum is a governmental entity immune from liability under Section 34-13-3-3(10) of the ITCA. It therefore affirmed summary judgment in favor of the coliseum.

In a concluding footnote, the appellate court cited Journey's best-known hit, the song that played at the time of the alleged incident. "While the governmental immunity statute may seem harsh, a wise man once said, 'Some will win, some will lose, some were born to sing the blues.'"•

Man convicted of killing IU student wins remand

By Olivia Covington
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The man convicted in the 2000 murder of Indiana University student Jill Behrman will not get a second hearing on habeas relief before the 7th Circuit Court of Appeals. However, the federal appellate court is allowing John Myers to pursue allegations of withheld evidence on remand.

Neither the original members of the panel that reinstated Myers' murder conviction nor the other members of the appellate court voted in favor of a rehearing or a rehearing en banc, according to a Sept. 16 order.

The order came down after a three-judge panel of the 7th Circuit in August agreed with Indiana Southern District Court Judge James Sweeney that Myers' counsel at his murder trial performed deficiently.

Myers was tried in 2006 for the murder of Behrman, an accomplished cyclist who went missing during a bike ride in 2000. Her body was found three years later.

In granting Myers' petition for habeas relief, Sweeney pointed to three instances of ineffective assistance of counsel: two statements made during opening arguments, and counsel's failure to object to evidence that Behrman was raped before her death.

The 7th Circuit panel agreed with Sweeney that these errors constituted deficient representation. Even so, Myers was not prejudiced under *Strickland v. Washington* in light of other evidence, the panel ruled.

"The jury also heard from John Roell, who shared a cell with Myers in May 2005, that Myers spoke about Behrman using degrading language and saying that nothing had to happen to her if she would not have said anything — statements evincing Myers's attempt to exert control over her," appellate Judge Michael Scudder wrote in August.

"… The incriminating statements Myers made to so many different people following Behrman's disappearance make all the difference in determining whether defense counsel's errors substantially affected the outcome of the trial," Scudder continued. "… Aside from these statements to family members, the jury heard from an array of friends, acquaintances, and community members recalling similar comments."

Both Sweeney and the 7th Circuit judges focused on the statements Myers' counsel made during opening arguments and the failure to object to the rape evidence. But Myers had raised additional arguments in his habeas petition — namely, allegations of withheld exculpatory evidence.

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FORWARD

Continued from page 3

Advances, setbacks

Members of the committee worked to piece together recommendations for improvement to Indiana's justice system long before the COVID-19 pandemic was on anyone's radar. But as the committee soon realized, the pandemic altered the future 2020 Forward seeks to address in significant ways — positively and negatively.

Improvements made to court technology, a recurring area for review, were pushed forward by the need to innovate during the pandemic, said committee co-chair Judge Richard Stalbrink of LaPorte County. Since his involvement with the first white paper in 2008, Stalbrink said older judges at that time spoke in jest about moving paper filings to an electronic system.

Stalbrink

"But in the last decade, we have moved all of that forward. What seemed like an insurmountable task a decade ago has almost been realized," Stalbrink said.

Seeing that 92% of the state's court caseload is now handled on the Odyssey case management system, the strategic planning committee hopes to embrace more technology to enhance Hoosiers' prompt access to the judicial process. That includes rapidly expanding technology that allows courts to conduct hearings remotely via videoconferencing platforms like Zoom.

"Obviously, COVID-19 kicked that to the forefront and we have already reached some of those goals that we had out two years ago," Stalbrink said. "It was really kind of satisfying to the committee that, here we said this should be something we are looking at doing, and all of a sudden the pandemic has pushed us to the point where we have realized those goals."

On the other hand, financial burdens faced by the deep economic impact of the pandemic have halted progress on the white paper's aim of moving toward centralized funding for the state's justice system.

Gull

Longtime strategic planning committee member Judge Fran Gull of Allen County said the committee's hope is that the state would one day fund all of Indiana's trial courts.

"The justice system in each of these counties represents a huge burden on the local taxpayer," Gull said. "These are services that we are offering as state employees and we should be offering this to everybody. Everybody should have the same opportunities, regardless of the fact that a small county may not be able to afford a problem-solving court, for example. So why shouldn't we aspire to have the state system be supported by the state dollars?"

Despite its desire to make that switch, the committee acknowledged now might not be the time.

"Right now with COVID-19, I think we need to take a step back and pause and look at where we can be now versus where we can be in 10 years," Stalbrink said.

Timely conversations

Other areas the white paper addresses will take more time to improve, such as access to justice, Spitzer said.

"This is another topic where it became much more timely over the first three quarters of 2020 when we started having national conversations over race and equity," Spitzer said. "The justice system is at the forefront of that conversation."

In order to engender the trust of Hoosiers in the state's justice system, the committee said Indiana "must undertake a serious look at race and equity, resources, legal aid, imposition of fines and jury selection."

"Regardless of what their situation is, their race, gender, social status, that they have an equal shot at a fair decision made in our justice system," Spitzer said, "to seek out and eliminate things that are unintentionally getting in the way of that objective."

The judges also emphasized urgency in making advancements on courthouse security, which Gull said is heartbreaking.

"I have colleagues across the state that are exposed to dangerous situations in their family, civil and criminal courts, and I sit in a well-protected courthouse. I happen to be in a county where I am in a secured building, but that isn't the case across the state. Why is it that our citizens aren't equally protected in all of our buildings?" she asked.

As to judicial selection, Spitzer said he has no question the topic will cause the most disagreement.

"First of all, much of the judicial selection process is a partisan election. We have seen in other states how that has devolved into concerns about PAC funding that results in political advertising that denigrates the judicial system or undermines the public's confidence in the judicial system as a partial player in the process," he said.

The second concern, Spitzer explained, is that the committee would like to see Indiana move to just one or two methods of judicial selection. The committee's recommendation and preference is to move toward nonpartisan selection.

Areas of improvement

The Judicial Conference of Indiana's new strategic plan, "2020 Forward," lists seven key areas for improvement to Indiana's justice system over the next 10 years. They are:

- Access to justice
- Courthouse security
- Technology
- Clerk functions
- Court system structure
- Judicial selection
- Centralized funding

Source: 2020 Forward, Indiana Judicial Conference Strategic Planning Committee

Strategically planning the future

Outside of her court work, strategic planning is one of the most interesting things that Gull said she gets to do as a judge. She loves the task of digging into long-term aspirational thinking that will one day impact her successors long after she's gone.

But while the white paper's aims are aspirational, Gull noted they are not suggestions for the state's trial courts. Rather, they are blueprints for how to get things done moving forward.

"We should not be sitting in our little silos and thinking that what we do doesn't have an effect on anybody else. It absolutely affects us. We are all involved in the fabric of the system and we all have to participate to make it better," Gull said.

"You can't sit there and go, 'We're fine, we don't need to change.' Not in this day and age."•

PAINTING

Continued from page 3

The chief judge wanted a dynamic and abstract setting. As a result, Magnus-Stinson and Ragsdale explained, the splashes of color and energetic brushstrokes reflect the diversity of the five women. Their differing backgrounds, experiences and perspectives come together in the slashes of pigment running through the work.

Ragsdale described his style as painting in "sort of a strange way."

He begins with one color to get the forms blocked onto the canvas, then he takes a trowel and, as he explained, breaks the work apart before reconstructing it. The technique allows him to be more expressive as he takes his brush and begins adding colors and shading, he said.

With "Her Honor," Ragsdale saw he was capturing a moment in Indiana history. He also viewed the work as bringing hope through the strength and resilience of the women judges.

Barker was the first female district judge in Indiana. She was confirmed to the Southern Indiana District Court in 1984 and served for 30 years before taking senior status in 2014. Magnus-Stinson joined the court as a magistrate judge in 2007, filling the vacancy created by the retirement of Magistrate Judge V. Sue Shields, who was appointed as the court's first female magistrate judge in 1994. Magnus-Stinson was confirmed as a district judge in 2010 when the late Judge Larry McKinney took senior status. Walton Pratt was confirmed in 2010 and is Indiana's first African American federal judge.

Lynch clerked for Barker from 1986 to 1988 then spent 20 years in private practice before becoming a magistrate judge in 2008. Pryor was appointed as a magistrate judge in 2018, continuing a career in public service that included working in the U.S. Attorney's Office for the Southern District of Indiana and for the State of Arkansas Public Defender Commission.

Magnus-Stinson said she draws inspiration from the work. District court judges are bound by precedent, but they do have some opportunity to be creative, she said. The painting can trigger her creativity as she, for example, looks for ways to encourage the defendant when preparing for sentencing or to appropriately praise good briefing from attorneys.

"I think you can think of ways to not lose that (creative) side of you and not look at your work as a rote function," she said. "… (T)hat's a side of our brain that we can be inspired by sort of the artist-side of life."

While talking about the 4-foot-by-4-foot painting that now hangs on the wall opposite her desk, Magnus-Stinson wore a mask and twice squirted some hand sanitizer onto her palms then rubbed them together. The almost absent-minded act was both a reminder of the anxiety and danger brought by the ongoing COVID-19 crisis and the seemingly ever-present need for comfort.

Through the painting, Magnus-Stinson was able to give her colleagues a chance to share some happiness. The chief judge successfully kept the art project a secret from her female cohorts even as maintenance personnel hauled the work into the federal courthouse and hoisted it onto the wall. On Sept. 4, she sent an email asking the women judges to come to her chambers because, as she phrased it, she wanted to celebrate them.

The five socially distanced in Magnus-Stinson's cavernous office and delighted when the sheet was pulled from the painting.

"I think it's so spectacular and I wanted to surprise them," Magnus-Stinson said. "I wanted it to be a moment and it really was. … It was a lovely moment in a year of not very many lovely moments."•

MYERS

Continued from previous page

Per the 7th Circuit's order, those allegations will now be considered on remand.

"We close by noting that the district court, while granting Myers' relief based on the three instances of ineffective assistance of counsel analyzed in this opinion, acknowledged but did not definitively resolve other, lesser alleged instances of ineffective assistance," Scudder wrote in an amended opinion. "Our analysis of the strength of the state's evidence forecloses relief based on these other allegations of ineffective assistance.

"But," Scudder continued, "we do remand for the sole purpose of allowing the district court to address the two claims Myers advanced under *Brady v. Maryland*, 373 U.S. 83 No. 19-3158 31 (1963), in his § 2254 application. The district court reserved judgment on these claims.

"Our conclusions regarding the strength of the state's evidence may well foreclose relief on those claims too, but the district court should assess the question in the first instance as neither party brief the claims in this appeal."

The case is *John Myers v. Ron Neal*, 19-3158.•

Judge recuses in Cathedral case; briefs support fired teacher

By Marilyn Odendahl
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Asserting the Archdiocese of Indianapolis made claims that are "irrelevant, inaccurate, misleading or make incorrect inferences," the Marion Superior Court denied the church's attempt to remove the special judge appointed to preside over the case involving the firing of a gay teacher at Cathedral High School. The judge did step aside, however, citing personal reasons.

The order denying the archdiocese's motion for recusal of the special judge was issued Sept. 25 by Bartholomew Circuit Senior Judge Stephen Heimann in *Joshua Payne-Elliott v. Roman Catholic Archdiocese of Indianapolis, Inc.*, 49D01-1907-PL-027728. However, while the court blocked the archdiocese, it entered Heimann's order voluntarily recusing himself for family reasons.

In recusing himself, Heimann provided an extraordinarily detailed account of the personal issues that are demanding significant amounts of his time. He explained the inclusion of personal matters was not something he would normally have done, but he wanted to counter the claims made in the archdiocese's verified motion for recusal of the special judge.

"That Motion is critical of the Special Judge's work in this case and contains direct assertions and insinuations that the Special Judge has violated Judicial Rules and is biased and prejudiced," Heimann wrote in his order. "Therefore, if the Special Judge simply 'voluntarily recuses' with general statement that he is overwhelmed with personal matters, it could be inferred that he is actually doing so because of the claims made in the Motion For Recusal."

Joshua Payne-Elliott sued the Archdiocese after he was fired from Cathedral High School for being married to a man. After multiple unsuccessful attempts at getting the case dismissed, the archdiocese filed a verified petition for writ of mandamus and writ of prohibition with the Indiana Supreme Court in mid-August. The archdiocese argued First Amendment protections of religious liberty prohibit the civil court from having authority over church matters.

The archdiocese also filed the motion for Heimann's recusal.

In the order denying the motion to recuse, Heimann countered what he described as the archdiocese's "broad assertions indicating that the Special Judge is biased or prejudiced against it."

Heimann claimed the archdiocese misrepresented his relationship with Raymond Shafer, an openly gay priest who 30 years ago was an associate pastor at the judge's home parish. The judge rejected the assertion that he failed to disclose he had a "social or pastoral relationship" with a priest affected by the archdiocese's employment practices related to sexual conduct and morality. He also countered claims that he had ex parte discussions with the parties during a settlement conference in October 2019 and that he "attempted to coerce" the archdiocese into settling the case.

The archdiocese's petition for writ of mandamus and prohibition is pending before the Indiana Supreme Court, where lay Catholics and law professors have filed friend-of-the-court briefs in support of Payne-Elliott. Advocates for Payne-Elliott include 47 lay men and women who identify themselves as being faithful and practicing members of the Roman Catholic Church. They are being represented pro bono by retired 7th Circuit Court of Appeals Judge John Tinder and Barnes & Thornburg partners Peter Rusthoven, former associate counsel to President Ronald Reagan, and John Maley, along with attorney Jim Riley of New York.

Among the arguments in their brief, the lay Catholics hold that discriminating against LGBTQ individuals is unjust from a religious standpoint and unlawful from a civil standpoint. Also, they assert the church's ultimately authority, Pope Francis, has encouraged church members to welcome LGBTQ individuals.

Briefs also were filed by Indiana appellate practitioners led by Indiana University Robert H. McKinney School of Law professor Joel Schumm arguing procedural rules mandate a ruling against the archdiocese's writ. Indiana University Maurer School of Law professors Aviva Orenstein and Luis Fuentes-Rohwer also filed a brief arguing the archdiocese is seeking to improperly invoke an emergency mechanism designed to be used in the rarest of cases.

Payne-Elliott is represented by Kathleen DeLaney and Christopher Stake of DeLaney & DeLaney in Indianapolis. The archdiocese is represented by John Mercer of Fitzwater Mercer in Indianapolis and Luke Goodrich, Christopher Pagliarella of the Becket Fund for Religious Liberty in Washington, D.C.•

FOCUS MEDIATION/ALTERNATIVE DISPUTE RESOLUTION

IL Photo/Eric Learned

Carmel Senior Living in Hamilton County is at the center of a case challenging compelled arbitration for nursing home residents. The Indiana Supreme Court is deciding whether to grant transfer to the case after hearing oral argument last week.

Compelled contract?

Indiana Supreme Court considers arbitration agreement in nursing home lawsuit

By Olivia Covington
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Arbitration is often hailed as a cost- and time-effective alternative to litigation. But can signing an arbitration agreement keep you out of court even when you want to litigate?

The Indiana Supreme Court is considering that question in the case of *Jane Doe I, as Legal Guardian of the Person and Estate, and Jane Doe II, an Incapacitated Adult v. Carmel Operator, LLC d/b/a Carmel Senior Living, Spectrum Retirement Communities, LLC, Michael Damon Sullivan, and Certiphi Screening, Inc.,* 19A-CT-2191.

After hearing oral argument on petition to transfer Sept. 24, the court must now decide if it will rule in the dispute filed by an elderly woman and her representative against the assisted living facility where the woman once lived and an independent contractor hired by the facility.

Known as Jane Doe, the plaintiff-appellants are an elderly woman who moved into the Carmel Senior Living private assisted living facility in June 2018 and her guardian. Doe alleges two months after moving in, CSL employee Michael Sullivan raped her, and the following November she filed a civil suit against Sullivan, CSL and parent company Spectrum Retirement Communities LLC.

Doe later amended her complaint to include a claim against Certiphi Screening Inc., the independent contractor hired to run a background check on Sullivan. The screening failed to reveal that Sullivan was previously convicted for the rape and murder of a 6-year-old girl.

But the defendants served Doe with a demand for arbitration, pointing to a provision in the residential agreement requiring arbitration in "(a)ny and all claims or controversies involving the Community… ." Both the Hamilton Superior Court and the Indiana Court of Appeals upheld the arbitration requirement – including as to Certiphi, a nonparty to the agreement — setting the case up for Supreme Court review.

Contract questions

Represented by Ashley Hadler of Garau Germano in Indianapolis, Doe challenged the arbitration agreement as unconscionable. Hadler pointed to three provisions of the agreement: a waiver of judicial review, a waiver of punitive damages and a requirement for confidentiality.

Hadler

In briefs before the Supreme Court, lawyers for the defendant-appellees argued the arbitration agreement applies equally to them, meaning they also could not seek judicial review of an arbiter's decision or recover punitive damages and would be required to maintain confidentiality. But speaking with Indiana Lawyer before

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Settlement program offers alternative to eviction

Landlord-tenant agreements beneficial but rental assistance still needed

By Marilyn Odendahl
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As the uncertainty continues over how many struggling Hoosiers could be evicted in the coming months, the Indiana Supreme Court is trying to prevent housing loss and all the bad ramifications that can ensue by inviting landlords and tenants to first have a conversation.

The new Landlord and Tenant Settlement Conference Program, launched in August, is a mediation-like initiative that brings together renters who are in danger of eviction and landlords who are preparing to evict. Primarily, the parties will meet for free with a neutral facilitator to see if they can reach an agreement.

About a month into the program, 69 Hoosiers have filed requests for settlement conferences, according to Michelle Goodman and Mike Commons, staff attorneys with the Indiana Office of Judicial Administration. More than 200 mediators and attorneys have expressed interest in becoming facilitators and 42 have completed the training.

The program was developed in response to the COVID-19 crisis, which has thrown millions of Americans out of work and stoked fears of a wave of evictions. With support from the Indiana Bar Foundation and the Office of the Governor, the Indiana Supreme Court through its Office of Judicial Administration designed and runs the program.

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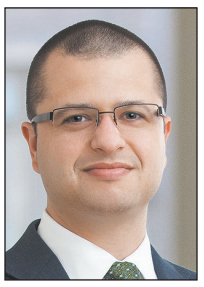
Shutterstock illustration

The Census Bureau reports 24% of Indiana households were housing insecure in mid-July, having missed, or were about to miss, a rent or mortgage payment.

Adjusting arbitration for the age of COVID-19

By Alexander P. Orlowski


Orlowski

A few weeks ago, I put on a suit and tie for the first time in six months. My oral argument scheduled for March had been delayed until May and — because the parties all agreed the argument needed to be done in person — delayed again until September. Excited to feel like a real litigator again, I gathered my notes and outline, drove to my downtown office and logged in to Zoom to conduct the argument … via videoconference.

Let's face it, litigation today looks very little like it did seven months ago. Even though courts are beginning to resume in-person proceedings and jury trials, most civil matters are still being conducted remotely. And even if a matter is heard in person, masks, social distancing and other health and safety procedures detract from many of the benefits in-person proceedings once afforded. Unfortunately, it does not appear that is going to change anytime soon. In a recent CLE hosted by the Southern District of Indiana Court Historical Society, Chief Judge Jane Magnus-Stinson explained that the court is preparing for perhaps years of interruptions from COVID-19.

To be sure, our judges and court staff have undertaken a Herculean effort to keep the courts open and proceedings moving. But even as courts continue to fully come back online, lawyers and litigants are, understandably, still balancing the need for in-person proceedings with health and safety considerations. As my experience shows, even when the court and parties agree that proceedings for a particular matter would best be conducted in person, there is no guarantee that will actually happen.

Is arbitration the answer?

As a result, the civil litigation world has turned to alternative dispute resolution (ADR) options in recent months out of necessity. It may, however, be time to assess whether remote ADR proceedings should become a more frequent tool to resolve civil disputes. Even in the best of times, litigation is a long and expensive endeavor, and while every litigator likes to think they shine brightest in front of a jury, if we are honest with ourselves, jury trials are not necessary for every matter.

One alternative to consider is expedited arbitration. While I have arbitrated a number of cases in my career, they tend to look a lot like — and cost nearly as much as — litigation in front of a traditional court. Both the American Arbitration Association (AAA) and the International Institute for Conflict Prevention & Resolution (CPR), however, offer an "expedited" or "fast track" option for dispute resolution that truly accelerates the proceedings. Essentially, the arbitration looks much like a summary judgment proceeding, with limited (if any) discovery and the goal of progressing from arbitration demand to award in just 90-180 days.

For example, I filed an arbitration under the AAA's Commercial Expedited Procedures right before COVID-19 began to shut things down and found it to have a number of benefits:

1. It is fast. I tell clients that from case initiation to trial, they are typically looking at no fewer than 12-18 months at best. In my expedited arbitration, we went from filing our demand to receiving our award in about 120 days. The expedited procedures require an arbitrator to issue an award within 14 days after the close of proceedings. In our case, the arbitrator issued our award just seven business days after the submission of all of the evidence and briefing.

2. It is inexpensive. Experienced litigators know that the amount of work required on any particular case seems to fill the amount of time allotted between initiation and decision. Motion practice, jurisdictional fights, discovery, pretrial conferences, interlocutory appeals and trial are all very expensive and — if an opposing litigant is dead set on driving up costs — difficult to rein in. One way to allay a client's concerns about costs spinning out of control is to fix the scope of discovery and shorten the time to resolution from the outset. Moreover, the AAA Expedited Procedures feature a fixed compensation for the arbitrator and fixed administrative fees due to the AAA.

3. It is private. Many commercial disputes necessarily require the decisionmaker to assess trade secrets, confidential information or other facts the litigants would prefer to keep out of the public realm. And while both state and federal courts permit certain matters and filings to be sealed, the presumption that publicly funded proceedings will be, well, public, makes sealing them a cumbersome procedure and sometimes an uphill battle. With expedited arbitration proceedings, the parties can limit or preclude discovery and even keep the fact of the entire dispute out of the public eye.

Obviously, expedited arbitration is not the right choice for every matter. When a dispute involves complicated factual issues or requires assessment of witness credibility and conflicting testimony, traditional litigation or arbitration may likely be the best choice. However, in an era when virtual proceedings, masks and social distancing make litigation even more unwieldy, consider balancing the incremental benefits gained by traditional litigation against the benefits of a fast, inexpensive and private expedited proceeding. For your relatively routine civil matter or business dispute, it may be the right fit.•

■ **Alexander P. Orlowski** *is a partner with Barnes & Thornburg LLP, where he concentrates his practice on complex business and commercial litigation. Opinions expressed are those of the author.*

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this month's oral arguments, Hadler said the agreement is not as equitable as the defendants claim.

First, Hadler said CSL would never bring a claim against Doe that would result in punitive damages. A small claims action for unpaid rent, for example, would not yield such damages, she said, making that provision one-sided.

Similarly, Hadler argued the confidentiality provision would only benefit CSL. Speaking to the justices, Hadler noted the case has reached the state's highest court, yet her client's identity has not been revealed. There are laws in place to protect sexual abuse victims, she said, so the confidentiality provision does not benefit her client.

Conversely, she argued, CSL could benefit from confidentiality in arbitration if multiple residents bring complaints.

"It gives the repeat player a substantial advantage over consumers prevented from sharing discovery, fact patterns, or work product," Hadler wrote in her petition to transfer. "It conceals patterns of abuse."

The facility noted in its brief that there is no evidence that it has been previously accused of employing an alleged sexual offender.

But hypothetically, if a previous confidential arbitration revealed other instances of sexual abuse, Justice Christopher Goff asked CSL's counsel if that fact could be discoverable. Rafael McLaughlin, a Fort Wayne lawyer representing CSL/Spectrum, answered negatively.

McLaughlin declined to comment on the case when contacted by Indiana Lawyer. Counsel for Sullivan and Certiphi did not respond to requests for comment.

Finally, on the issue of judicial review, Hadler argued her client could not have known when she signed the agreement whether the provisions of arbitration would benefit her.

"Even as a lawyer, I can't advise you on if the terms are beneficial until a dispute arises," she told IL.

What's more, Hadler argued, the 82-page document that included the arbitration agreement was not provided to Doe's representative until May 31, 2018, one day before she said the moving process began. Both the defendants and the Court of Appeals note that Doe did not physically move in until June 4, but Hadler notes Doe's family began moving her belongings into the facility on June 1.

Even so, "CSL provided Guardian with a copy of the Agreement and offered to answer questions before she signed," McLaughlin wrote in a brief opposing transfer. "Guardian returned an executive copy of the Agreement to CSL; she did not ask questions, object to any terms, indicate that she did not have an opportunity to read it, and/or state that she did not understand the terms."

Compulsion question

The more "interesting" issue, according to McLaughlin, is the question of whether Certiphi can compel arbitration even though it was a not a signatory to the arbitration agreement.

Chad Kaldor, an Ohio lawyer with Littler Mendelson representing the screening company, argued in favor of his client's ability to compel arbitration under *German Am. Fin. Advisors & Trust Co. v. Reed*, 969 N.E.2d 621 (Ind. Ct. App. 2012), which held that non-signatories can compel arbitration under the theory of equitable estoppel. The court in *Reed* found "substantially interdependent and concerted misconduct by both the non-signatory and the signatory."

Here, the claims against CSL/Spectrum and Certiphi are interdependent and represent concerted misconduct, Kaldor told the high court. Among other things, he said following *Reed* helps avoid piecemeal litigation and inconsistent judgments.

"An arbitrator would have to decide whether Sullivan assaulted Doe, whether the background check conducted by Certiphi on behalf of the CSL Defendants was negligent, and whether such negligence caused injury," Kaldor wrote in Certiphi's brief opposing transfer. "The trial court (or a jury) would then have to decide those same exact issues regarding Guardian's claims against Certiphi. If the arbitrator finds that Sullivan did not assault Doe, Guardian would get to argue the case all over again before the trial court to try to recover from Certiphi."

The plaintiffs, however, urged the justices to overturn *Reed*, arguing it conflicts with the U.S. Supreme Court's holding in *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009). Also, Hadler argued, *Reed* does not account for the "detrimental reliance" element in the Indiana common law definition of equitable estoppel.

Even if *Reed* should not be overruled, Hadler argued its holding was misapplied here because the claims against CSL and Certiphi are not interdependent and concerted misconduct.

"CSL, Spectrum and Sullivan's misconduct begins before Certiphi's involvement and extends long after Certiphi performed the background screening," she wrote in the transfer petition. "Those claims include a host of negligent acts and/or omissions with nothing to do with Certiphi."

Policy questions

Though not discussed during oral arguments, Hadler's final argument focused on the fact that the Centers for Medicare and Medicaid Services implemented a rule last year restricting pre-dispute binding arbitration under various conditions, including if — as Hadler said happened here — an arbitration agreement is a requirement for

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HOUSING

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Goodman said the conferences are not prescriptive. "The process is open for the parties to create what settlement will work for them," she said. "If the parties don't agree, they don't have to agree."

Housing attorneys who represent tenants applauded the new program, pointing out it could not only help renters stay in their homes but also could enable landlords to keep their properties occupied. Still, they said, the settlement conferences would be more effective if parties were required to participate and if they were coupled with initiatives that offer funds for rental assistance.

Without money to help struggling families cover their past-due rent, the settlement conferences will not be as beneficial as they could be, said attorney Chase Haller, director of housing and consumer justice at the Neighborhood Christian Legal Clinic in Indianapolis.

Sickles

Elizabeth Maora Sickles, president of the Indiana State Real Estate Investors Association, agreed rental assistance is "very important," but even without funds available, she said she believes the settlement conferences can have a positive impact. In particular, the program can bring the landlord and tenant face-to-face.

Landlords were cast in a bad light even before the pandemic but the negative perception has grown as the public health emergency continues, Maora Sickles said. Fueling the tension is the reliance on online services to collect rent and submit maintenance requests, so tenants sometimes never meet the property owners and a personal relationship never develops. Now, with some renters falling behind, the tendency may be to close off rather than reach out and try to find a solution.

"People can get into their own little worlds" Maora Sickles said, so the opportunity to meet and "potentially avoid a court case is a good thing."

Unbalanced negotiations

Tenants going into the settlement conferences will likely be in a weaker position compared to landlords. Housing advocates said state laws disadvantage Hoosier renters because they cannot withhold payment if their home has habitability issues such as a broken furnace or clogged plumbing, and landlords do not have to show cause when filing for an eviction. In addition, wages have not kept pace with housing costs, creating an affordability issue.

Judith Fox, director of the Economic Justice Clinic at Notre Dame Law School, said housing instability can ripple beyond the evicted tenants. She and Haller said individuals and families who lose their homes in eviction court will have difficulty renting another place. They also will have trouble finding and keeping gainful employment, they are at risk of experiencing more health problems and their children will be likelier to fail in school.

Neighborhoods can become disrupted by the constant turnover of residents, Fox continued, and in the process, more abandoned homes could sprout. "It's better for everyone if people can stay in their homes," she said.

A just-released study, "Displaced in America," highlighted how Indiana tenants particularly struggle to maintain housing. The report, compiled by the nonprofit nonpartisan think tank New America, examined housing loss across the country and included a close examination of Marion County.

Between 2014 and 2018, Marion County experienced an eviction rate of 6.8%, according to the study, compared to a national rate of 2.6% between 2014 and 2016 based on available data. The study found the most common reason was the inability to pay rent.

Once evicted, tenants have a very difficult time recovering, said Yuliya Panfil, attorney and director of the Future of Property Rights Program at New America. They will be shuffled into neighborhoods with the worst housing stock. Landlords will have no incentive to keep homes in good repair because renters will have no other place to go.

Panfil expects that with the pandemic-induced rise in unemployment, more households will be thrown into the eviction cycle.

"I worry that it's not going to be a temporary blip for these new people experiencing housing instability for the first time," Panfil said. "It's going to create a whole new class of people who are stuck in that downward spiral."

Both Panfil and Haller said the settlement conferences could provide some relief. But Haller reiterated the need for public funding to be coupled with the program. Mediation without rental assistance, he said, just delays tenants eventually losing their homes.

Photo courtesy of Indiana Real Estate Investors Assn.

The Indiana Real Estate Investors Association has started a campaign to dim the negative spotlight that has been cast on landlords as fears of evictions rise during the pandemic.

'Always something'

Tenants who are behind on their rent and have no means to pay arrears would seem to have little to gain from the settlement conferences. They might be able to voluntarily move out, which would prevent the stigma of an eviction on their record but would still leave them homeless.

Commons, however, disputed that scenario, noting mediations can take unexpected turns. He described a recent settlement conference where the parties were able to reach an agreement that allowed the tenant to stay. Other conferences have helped connect renters to other resources in the community.

"You can't know what the situation is going to be," Commons said.

Maora Sickles is not convinced a tenant in financial hardship will have nothing to offer in a settlement conference. "There's always something you can do," she said.

For example, the renter might be able to do some work for the landlord, like mowing the yard, pulling weeds or doing small repairs around the property, she said. From the help wanted signs she sees and the job ads she hears on the radio, she believes positions are available but, she added, even if tenants cannot get employment, they can at least volunteer to show their landlord they are not sitting on the couch all day.

"Landlords want to do everything they can to keep good tenants in their properties," Maora Sickles said. "If the tenants are even halfway willing to try to work something out, the landlords definitely want to help them."

Milwaukee landlord Tim Ballering has seen successes from a similar settlement conference program in Wisconsin. The negotiations avoid the expense and time of going to court, and they alleviate some of the tension between the landlords and the tenants.

He recalled one conference with a tenant who had fallen five months behind in rent during the pandemic. The moratorium in place at the time did not apply to her because her job was still available, but she had quit in order to stay home and care for her children. They worked out an agreement and she was able to stay by paying an extra $50 every other Friday and drawing on funds available to renters.

"Rental assistance is absolutely necessary," Ballering said, "if you don't want to see either a majority of tenants in service jobs fail or a majority of small-property owners who are self-capitalized fail."•

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Continued from previous page

admission to a facility. She also noted the American Bar Association and the AARP have come out against nursing home arbitration mandates.

"My client and every client has told me, you go in and you think you have to sign in order to be admitted. It doesn't matter if I'm at this facility or at the one down the street — they think these are standardized contracts and rules," Hadler told IL. "But the price of admission to a health care facility should not be giving up your constitutional rights to a jury trial."

Likewise, the Indiana Trial Lawyers Association filed an amicus brief in the Court of Appeals, arguing, "Indiana's courts should diligently protect the interests of a new nursing home resident being asked to sign away their right of access to the court system." Counsel for ITLA did not respond to an Indiana Lawyer request for comment.

In response to Doe's policy argument, CSL/Spectrum said the Medicare/Medicaid rules do not apply here and noted that "CSL is not a long-term care facility, but an assisted living facility where each resident signs a month-to-month agreement, terminable at any time."•

VIEWPOINT

3 things to know about attorneys' social media

3 Things to Know About Ethics

James J. Bell Stephanie L. Grass

Because our parents (who have trouble with remote controls) are now officially on Facebook, we can safely assume that close to all attorneys are using social media. Using social media is simply an inexpensive and convenient way to get the word out about your law firm. However, there is an element of risk that comes along with an attorney's use of social media. These risks were highlighted in July, when the Indiana Supreme Court Disciplinary Commission listed social media's many "minefields" in its third ever advisory opinion: Third Party Comments or Tags on a Lawyer's Social Media. We address some of these warnings and share other cautionary tales in the following article.

1. If you can't say something ethically, then don't say it to the world on social media

As we all know, the Rules of Professional Conduct sometimes prohibit what an attorney can say to another. For example, under Rule 7.1, an attorney cannot make a false or misleading claim about one's legal services, and under Rule 1.6, an attorney cannot reveal information related to the representation of a client. Rule 4.2 prohibits talking to a represented person in many circumstances, and Rule 4.3 limits what an attorney can say to an unrepresented person.

Lawyers have been sanctioned for making impermissible statements on social media that would have also been sanctionable if the statements had been made in person. For one, a Nevada attorney received a six-month suspension from the practice of law for violating Nevada's Rule 8.4(d) for posting public comments on Facebook accusing a judge of bias and religious discrimination. *Matter of Discipline of Hafter*, 406 P.3d 23 (Nev. 2017). In another matter, an Indiana lawyer received a 30-day suspension from the practice of law for sending a threatening and obscene private social media message to a client's ex-husband in violation of Rules 4.4 and 8.4(d). *In re J.H.*, 53 N.E.3d 412 (Ind. 2016).

In the above cases, the attorney would have presumably been sanctioned whether or not the attorney's statements were made on social media. The use of social media, though, made the statements more easily provable and widely available. However, the latest advisory opinion from the Disciplinary Commission shows there are times when the format of social media itself can cause an ethical issue for an attorney.

2. Adopting a third-party comment can lead to a violation

Unlike statements made in "normal life" (if there is such a thing anymore), statements on social media allow for third parties to contribute comments. What happens if the comments violate the Rules of Professional Conduct and the attorney "likes" or otherwise adopts these comments? According to the Disciplinary Commission, "[a]n attorney who responds to or 'likes' a third party's comment that contains prohibited content could be deemed to have adopted the third-party comment. Such action could subject the attorney to a rule violation. The failure by the attorney to delete prohibited content could be considered acquiescence and expose the lawyer to discipline." Advisory Opinion #1-20 at p. 2. The advisory opinion also advised that

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10 tips for new lawyers: Get your career off to a good start

Eye on the Profession

John Trimble

On Sept. 21, 2020, a whole new cohort of lawyers took the oath to practice law in Indiana. You have joined our profession in the strangest and least predictable year that any of us has seen. We welcome you into the bar with enthusiasm, high expectations and hope that our profession will soon return to a semblance of normal. This year more than ever you will need our support, guidance and patience as you get started.

The tips that I suggest in this article are designed for two audiences. New lawyers, I hope that you will embrace these tips and that you will find some benefit in heeding them. Employers and mentors, I hope that you will share these tips with your new lawyers and encourage them to embrace them. These tips are not in perfect order, nor are they exhaustive, but if you can follow them, you will have a short and personal strategic plan that will get you started. Here you go:

1. Expectations. You will not master the practice of law and balance it with life in one month or six months or even a year. Set reasonable expectations for yourself; do your best to meet or exceed them; re-evaluate your expectations from time to time; and, above all else, do not beat yourself up. The reality is that you may have very little frame of reference for what to expect, so find what works for you, your family and your employer, and be prepared to realign expectations over time.

2. Your client. My first day of work the partner who hired me asked me, "John, who is your biggest client?" I guessed and got it wrong. The answer was simple … that partner was my biggest client. He was the person whom I had to please. He was the one who would give me repeat work if I pleased him. He was the person who would evaluate the quality and timeliness of my work. He was the person who would pay me for my services and let me go if my services were lacking. So, this tip is simple … *work hard to please your client!*

3. Reliability. You will have no job and no clients if you fail to be reliable and responsive. That means being on time, keeping promises, responding promptly to emails and texts, and returning phone calls. There is a very simple rule in law and life: reliable people get ahead and unreliable people are left behind.

4. Work hard. This one sounds really simple, and it is. Just because you have a law degree, a law license, a job and a paycheck does *not* mean you have succeeded. Too many new lawyers make the mistake of believing that they have arrived and that they are owed the job and the income for having gotten there. The reality is that

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Working while sick? It's different in the COVID-19 era

Defense Trial Counsel of Indiana

Germaine Winnick Willett

I dread cold and flu season. It is the rare winter that I do not get walloped by a sinus infection, flu or some other virus at least once, if not twice. I'm sure you know that feeling of waking up with that tell-tale tickle in your throat or increased congestion, or just feeling a little "off." You pop some Vitamin C or acetaminophen, increase your fluid intake and dress warmly. Then you go about your day, hoping it will not progress further or will at least be short-lived.

For most of us, going about one's day means going to work. There you keep the tissue box nearby. You watch the clock for the time to take more acetaminophen to keep the throat pain at bay. Sometimes you feel a little flushed and wonder if you have a fever, but the acetaminophen is keeping that at bay, too. You cancel your lunch plans and generally try to keep your distance from co-workers.

You know if you start to feel much worse, you will call your doctor or head to the PromptMed. You also know there is a good chance the doctor will tell you it is "just a virus" and may not even prescribe medication, so you debate with yourself whether to bother. You might also decide to skip the doctor because, due to your high-deductible health plan (or lack of health insurance), you know the visit will be expensive.

You can call in sick if the symptoms become severe. However, you think long and hard about whether you want to give up your paid time off for this illness. Even if you have plenty of paid time off or have allotted sick days or unlimited time off, the press of work weighs on your mind. There may be deadlines looming, or you just don't want to let your boss or your team down. So you keep taking your over-the-counter medication each morning and trudging off to work day after day, coughing, sniffling and maybe even feverish. Eventually your symptoms subside, your energy level returns and life returns to normal. You might notice one team member coughing and sniffling a day or two later. Then you hear about another who has called off. You wonder for a moment whether you passed your illness to them, then conclude they could have gotten it anywhere.

I would say that employers have, on the whole, benefitted from the cost-benefit analysis and internal debates described above that result in employees coming to work sick. Their employees soldier on through their winter colds and flus, and the work gets done. Employers in Indiana and in many states are not legally obligated to provide paid time off or sick leave. Many, of course, do provide a certain number of paid days off that employees can use for illness, but employees are often pulling from the same pot for doctor appointments, being at home to let the plumber in and taking a much-needed vacation. The incentive for these

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PRESIDENT'S COLUMN

Justice Ruth Bader Ginsburg: A Reflection in Her Own Words

Andrew L. Campbell
Faegre Drinker Biddle and Reath LLP
2020 Indianapolis Bar President

During her eulogy for the late Justice Antonin Scalia, Justice Ruth Bader Ginsburg recalled one of her favorite Scalia stories — when President Bill Clinton was considering his first nomination to the Supreme Court, Justice Scalia was asked, "If you were stranded on a desert island with your new court colleague, who would you prefer, Larry Tribe or Mario Cuomo?" Scalia answered quickly and distinctly: "Ruth Bader Ginsburg." "And within days, the President chose me," Justice Ginsburg quipped.

Justice Ginsburg's life was reflected in a quote she gave during a 2012 interview: "So often in life, things that you regard as an impediment turn out to be great, good fortune." Her background likely would have been an impediment for many: "I am a first generation American on my father's side, barely second generation on my mother's. Neither of my parents had the means to attend college, but both taught me to love learning, to care about people and to work hard for whatever I wanted or believed in." During her confirmation hearing, she explained that "what has become of me could happen only in America. Like so many others, I owe so much to the entry this nation afforded to people yearning to breathe free."

Famously, Justice Ginsburg graduated from Columbia Law School tied first in her class. Yet, she was rejected for a Supreme Court clerkship because of her gender. That experience, among others during her early career, inspired much of her life's work as an advocate for women's rights. The simplest explanation of "feminism," she explained in 2012, "is a song that Marlo Thomas sang, 'Free to Be You and Me.' Free to be, if you were a girl — doctor, lawyer, Indian chief. Anything you want to be. And if you're a boy, and you like teaching, you like nursing, you would like to have a doll, that's OK too. That notion that we should each be free to develop our own talents, whatever they may be, and not be held back by artificial barriers — manmade barriers, certainly not heaven sent."

She employed that philosophy during her 27 years on the Supreme Court, including when she wrote for the majority striking down the longstanding male-only admission policy of the Virginia Military Institute: "[T]he Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature — equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talent and capacities."

Despite her personal achievements as a Supreme Court litigator and justice, she was quick to recognize that "the work of perfection is scarcely done. Many stains remain . . . [W]e still struggle to achieve greater understanding and appreciation of each other across racial, religious and socioeconomic lines." But, again, these impediments were an opportunity for Justice Ginsburg, to "strive to realize the ideal — to become a more perfect union."

Although that task often appeared insurmountable, Justice Ginsburg made it clear that the makeup of the judiciary offered solutions: "[A]t the end of the day, a wise old man and a wise old women will reach the same decision. But it is also true that women, like persons of different racial groups and ethnic origins, contribute 'a distinctive medley of views influenced by differences in biology, cultural impact and life experience.' Our system of justice is surely richer for the diversity of background and experience of its judges. It was poorer when nearly all of its participants were cut from the same mold."

Her personal relationships in life made her contributions toward "a more perfect union possible" — something we can all learn from: "If you have a caring life partner, you help the other person when that person needs it. I had a life partner who thought my work was as important as his, and I think that made all the difference for me."

Ultimately, Justice Ginsburg paved the way for many, including my daughter, and encouraged us all to do the same: "And as you pursue your paths in life, leave tracks. Just as others have been way pavers for you, so you should aid those who will follow in your way. Do your part to help move society to the place you would like it to be for the health and well-being of generations following your own."

Regardless of our fractured politics, we can all appreciate that Justice Ginsburg was an inspired "guardian of the great charter that has served as our nation's fundamental instrument of government for over 200 years." But, she cautioned, "Justices do not guard constitutional rights alone; courts share that profound responsibility with Congress, the president, the states and the people. The constant realization of a more perfect union, the Constitution's aspiration, requires the widest, broadest, deepest participation on matters of government and government policy."

Let us reflect on and be inspired by Justice Ginsburg's life and career. And, importantly, do our individual part to work toward a more perfect union. •

Indianapolis Bar Foundation Happenings

Apply Now for Indianapolis Bar Foundation Board & Committees in 2021

The Indianapolis Bar Foundation (IBF), the charitable arm of the Indianapolis Bar Association, is a community-focused leader of the local legal profession. The foundation's ongoing grants and programs are maintained solely through the generosity and energy of its directors, fellows and donors.

Service with the IBF is a fun, meaningful experience that connects you to your colleagues and your community. Applications are now being accepted for both positions n the board of directors as well as with foundation committees.

To express your interest or to nominate a colleague, complete the form at indybar.org/ibfboard by October 23.

The IBF will be led by Adam Christensen of Weston Foods in 2021. Raegan Gibson, Paganelli Law Group, will assume the position of President Elect.

Sign Up for a Night of Spooky Family Fun at the IBF Fright-In at the Drive-In!

IndyBar and IBF members LOVE Halloween. If you do too, celebrate (while also social distancing) at the IBF Fright-In at the Drive-In event on Oct. 10! It'll be a fun night with family and friends at Tibbs Drive-In, where we'll show two movies and host a costume contest for all adults, children and pets in attendance. Sign up to attend at indybar.org/drivein!

Make an Impact on Oct. 21 During the 2020 Day of Giving!

The world may have changed, but our community and our profession are still counting on the Indianapolis Bar Foundation, perhaps now more than ever. And we have risen to the challenge.

While continuing to support our existing services, grants and charitable programs, the foundation has created new programs to help lawyers and our community overcome the hardships caused by the COVID-19 pandemic.

This year, of all years, we need your financial support. You can make a difference with a gift on our Day of Giving on Oct. 21! See details at indybar.org/dayofgiving.

Start Gifting with IndyBar's Giving!

Knock out your holiday shopping while doing some good at our week-long virtual auction Nov. 23–27!

IndyBar's Giving is your opportunity to help the fundraising efforts of the IBF and to support local businesses as we auction off items purchased and donated by members of the legal community. Items will include loaded gift baskets, hot holiday toys, gift cards and trips to socially distant locations!

All proceeds will benefit the Indianapolis Bar Foundation (IBF) and its many charitable causes. This virtual auction is being held in lieu of the annual Evening Under the Stars Gala, which is the IBF's largest annual fundraising event.

The auction will begin at 9 a.m. Monday, Nov. 23 and will end at 10:30 p.m. Friday, Nov. 27. See more details at indybar.org/barsgiving.•

Frazzle, Dazzle, Rinse, Repeat

Gibson

By Raegan Gibson, Paganelli Law Group

Let's dispense with the pleasantries and get real. We are not OK. We are in the midst of a global pandemic, suffering through a highly contested presidential election, gearing up for another Supreme Court battle, the Pacific Northwest is on fire, the Eastern seaboard and Gulf Coast have been hit with so many hurricanes that they are using the Greek alphabet, we have all been forced to conserve toilet paper at some point in the last six months, and the cherry on top — many of us are educating our kids from home while working full-time jobs. What in the literal 2020 is happening? I honestly have no idea, but I have devised a three-part survival guide to get us through this.

Frazzle. As I write this article, imbued with the credibility of my third-day hair and my dress leggings, I hereby declare that we must embrace the frazzle. It is the new normal. While we attempt to juggle our regular lives from the before-time and all the challenges gifted to us by this pandemic, we have to cut ourselves some slack. The house may be messy (except the tiny portion visible on Zoom). You may be wearing a dress shirt on top and pajama pants on the bottom (a 2020 mullet). You may be running your law practice out of your bed or a damp corner in your basement. And you may

more **FRAZZLE** next page

Preparing for Civil Mediation in Personal Injury Cases

By Matthew Kavanagh, Schiller Law Offices LLC

In order to conduct and participate in a successful mediation, there are two things you can do to prepare that will increase the likelihood of a successful result for you and your client. These premediation steps, if not considered, can throw off what would have otherwise been a successful mediation.

First, confirm the last offer and demand with opposing counsel. Sometimes, particularly for attorneys who handle cases after suit was filed, there were pre-litigation settlement negotiations that were discussed between the presuit attorney and presuit adjuster. Many times, the new adjuster handling the case, either currently or incorrectly, presumes that the last demand made by the plaintiff is the same demand that the plaintiff will start with at mediation. Again, sometimes this is correct and sometimes it is incorrect depending on the specific circumstances surrounding the case. This also applies vice versa.

Second, confirm that the defendant has all of the medical records and medical bills in their possession that the plaintiff is claiming is related to their injury. Many times, a defendant and their insurance company adjuster need at least 30 days to appropriately review and evaluate any medical records and bills that are related to a plaintiff's claim. Although most of the time the defendant has this information long before mediation is scheduled, it is important to confirm this with the defendant and/or adjuster, at the very least, 30 days before the mediation.

Following these two premediation steps in personal injury cases can greatly improve your client's chances of resolving their case at mediation.

This article was originally published on the Alternative Dispute Resolution Section blog page. See more from the section at indybar.org/adr.•

Around the Bar

IBF Board member Amber Finley was one of several volunteers staffing voter registration tables on behalf of the IndyBar at locations throughout Indianapolis.

Judge James Sweeney of the U.S. District Court for the Southern District of Indiana chats with IndyBar Program Director Deneen Fitzgerald during IndyBarHQ self-guided office tours on Friday, Sept. 25. Members had the chance to come in and safely check out the new IndyBarHQ space, which is open for member use Monday through Friday, 8:30 a.m. to 4:30 p.m. and Fridays from 8:30 a.m. to 1 p.m..

September was IndyBar Member Appreciation Month, and here you'll see IndyBar members lining up for our annual free shredding event! Members were able to bring up to 20 boxes to the parking lot of IndyBarHQ to be securely shredded for no cost.

The Young Lawyers Division hosted a blood drive with the Versiti Blood Center of Indiana on Friday, Sept. 25. Thank you to all of the IndyBar members who participated for giving back during a time of such great need.

Volunteers Needed for Virtual Ask a Lawyer Event on Oct. 6

Volunteers are needed at a limited number of library and community centers to give legal advice and answer questions from the Indianapolis community at this year's virtual Ask a Lawyer event. Volunteers will be participating remotely via Zoom so only the public and two to three volunteers will be onsite at each location to handle check-in, one-direction traffic flow, assist attorneys with onsite access, general questions and continuous disinfecting of on-premise public areas. If you're an attorney and are interested in giving legal advice, please fill out the short form at indybar.org/aaloct2020. Attorneys, paralegals and support staff can also sign up at indybar.org/aal2020onsite to assist with on-site needs.

Nominate an Outstanding Real Estate Professional for the 2020 Zeff Weiss Award!

In 2016, the Real Estate & Land Use Section of the IndyBar awarded the first Zeff Weiss Excellence in Real Estate Award posthumously to the named honoree, Zeff Weiss, for his career of extraordinary and positive achievements to the Indianapolis real estate and development community. The Real Estate and Land Use Section desires to annually consider the presentation of this award to a practicing or recently retired attorney or land use planner in the Indianapolis community who has made significant impacts in the legal and development community. Submit your nomination at indybar.org/zeffweiss by Oct. 2!

Nominate an Outstanding Professional for the Family Law Section Award!

The IndyBar Family Law Section is excited to announce nominations are now being accepted for the 2020 Family Law Section Award. The purpose of this award is to recognize those individuals and/or organizations who have made contributions to the legal profession and the community. The award seeks to honor attorneys, both practicing and retired, other professionals, law firms, law students, paralegals or organizations who have shown a passion and dedication to promoting family law issues through advocacy and education. Read more and nominate by Oct. 9 at indybar.org/famaward.•

FRAZLE continued from prev. page

be ordering way too much Door Dash and gravitating toward your holiday pants. It is OK. Don't beat yourself up. Give yourself some grace, pat yourself on the back and take comfort in knowing that we are all right there with you.

Dazzle. The pandemic has changed the way that we practice law, but it hasn't decreased the demands of our jobs. Quite the opposite: the shift to working from home has extended our workdays and created a new expectation that we are available for legal work 24 hours a day, seven days a week. It seems that the ultimate flex is continuing to crush it at work while maintaining our sanity, occasionally speaking to our significant others, keeping our children clean, fed and reasonably educated, and not completely losing contact with our friends. But how do we do this? On a particular rough day over the summer, during one of my award-winning pity parties (if you want an invite to the next one, let me know), a dear friend gave me some great advice — adjust your expectations. He suggested that previous metrics by which we measure the success or failure of our days are no longer applicable. We are living in a new world and if we don't change what we expect out of each day accordingly, we will always fall short and end up stressed and disappointed. Solid gold. Since that call, I have worked to be more reasonable about the goals that I set for myself and I have found that I am still able to dazzle professionally and personally while maintaining my sanity.

Rinse, Repeat. One of the most difficult things to do right now is to keep showing up. To shake off the fear, uncertainty, disappointment and exhaustion and move forward with a positive outlook. I've certainly had my days. Weeks even. But this will end. We just have to take care of ourselves until it does. So, make sure that you take time out of each day to do something that makes you happy and refreshed, whether that is a walk, yoga, a movie, a good book, time with friends, or even a nap. Lean on your tribe of family and friends to support you. If you don't have a tribe, if you are feeling isolated and alone, the IndyBar is here for you. We are a legal community. We have multiple, daily opportunities for you to connect and develop relationships with other lawyers. We have multiple resources to help you maintain your practice. And we have formed a group to support lawyer-parents during this challenging time. If you need support, you have the IndyBar.

In conclusion, you've got this. We've got you. And as for 2020, it can go 2020 itself.•

IndyBar CLE is convenient, cost-effective and high quality!

As courts and businesses gear back up over the coming months, an avalanche of paperwork, hearings and client needs is likely approaching for central Indiana attorneys. Take the time now to earn your 2020 CLE credits, and you'll have one less thing to worry about while managing the load!

Live Zoom Webinars

We've got multiple live CLE webinars taking place each and every week. These webinars offer the latest info you need as well as the opportunity to engage with speakers and fellow attendees. Register now at **indybar.org/events.**

Online CLE

With hundreds of programs, the IndyBar online CLE catalog is the largest in the state. Browse through various categories to find programs that fit your needs, or purchase a convenient online CLE bundle. Browse now at **indybar.org/onlinecle.**

Free CLE

IndyBar members have access to free CLE throughout the year! While our live replays are currently on hold, you can watch a variety of free programs 24/7 in the online CLE catalog. Check them out at **indybar.org/freeonlinecle.**

For more information visit **indybar.org** INDYBAR Indianapolis Bar Association

Indianapolis Bar Association

EVENTS UPDATE

INDYBAR Indianapolis Bar Association

WHAT'S NEW

NLRB Update
Tuesday, Oct. 13, 2 to 3 p.m.
Zoom Webinar

As a labor law attorney, it's important to understand recent changes in the interpretation of the National Labor Relations Act by the current National Labor Relations Board. Join us for the latest updates from local practitioners!

LEARN MORE

Personality Disorders in Family Law
Wednesday, Oct. 7, 1:30 to 4:30 p.m.
Zoom Webinar

Can you adequately distinguish personality disorders from mental illness? Do you know the most common personality disorders? Learn these things and more at this program, where we'll also provide strategies for assisting clients with personality disorders.

SPECIAL EVENT

Fright-In at the Drive-In
Saturday, Oct. 10, 6:45 p.m. to 11 p.m.
Tibbs Drive-In Theatre, 480 S. Tibbs Ave.

Celebrate spooky season with family and friends at the Indianapolis Bar Foundation Fright In at the Drive-In! We're gathering (and being socially distant) at Tibbs Drive-In on October 10 to catch some great films and safely have fun with friends and family. Pack your car and join us!

UPCOMING LIVE WEBINARS

All seminars will be held as live Zoom webinars and include 1 General Distance Credit unless otherwise noted.

Hot Topics in Healthcare Legislation +CLE
Featuring Grant Achenbach, Indiana State Medical Association; Tory Castor, Indiana University Health; Amy Levander, Krieg DeVault LLP
Tuesday, Oct. 6, noon to 1 p.m.

Finding Your Peace: Resolving Environmental Claims +CLE
Featuring Angela P. Krahulik, Ice Miller LLP; Michael J. Reeder, Hatchett & Hauck LLP
Tuesday, Oct. 6, 2 to 3 p.m.

Personality Disorders in Family Law *[3 General Credits]*
Featuring Dr. Bart Ferraro, Meridian Psychological Associates PC; Dr. Philip M. Stahl, Steve Frankel Group, LLC; Melanie Reichert, Broyles Kight & Ricafort P.C.
Wednesday, Oct. 7, 1:30 to 4:30 p.m.

Expungements: Updates and Common Mistakes *[1.5 General Credits]*
Featuring Andrew Fogle and Martha Showers, Marion County Prosecutor's Office
Tuesday, Oct. 13, 11:45 a.m. to 1:15 p.m.

NLRB Update +CLE
Featuring Anthony Alfano, United Steelworkers; Ryan Funk, Faegre Drinker Biddle & Reath LLP
Tuesday, Oct. 13, 2 to 3 p.m.

Indemnification Provisions and Limitations in M&A Transactions +CLE
Featuring B. Ronan Johnson, Taft Stettinius & Hollister LLP
Wednesday, Oct. 14, noon to 1 p.m.

Working With a Professional Genealogist
Featuring Laurie Hermance-Moore, Heritage Bridge Genealogy
Wednesday, Oct. 14, 4 to 5 p.m.

Ethics for Tax Professionals +CLE (E)
Featuring Marc Caito, Dan De Jong, Timothy McCormally, KPMG LLP
Friday, Oct. 16, noon to 1 p.m.

Be an Effective Advocate for Your Clients in Family Law Mediation
[3 CME Credits and 3 General Credits]
Featuring Christopher Barrows, Barrows Legal Group LLC; Kathryn Hillenbrands Burroughs, Cross Glazier Burroughs P.C.; Christine Douglas, Keating Douglas
Tuesday, Oct. 20, 9 a.m. to noon

Don't Throw Away Your Shot: How to Craft an Impactful Rebuttal
Featuring Hon. Nancy Vaidik, Indiana Court of Appeals
Tuesday, Oct. 20, 2 to 3 p.m.

Please Note: *Distance education limitations have been relaxed due to the COVID-19 public health emergency. There is no limitation on distance education for attorneys and judges until further notice.*

+CLE No cost for Plus CLE members of the sponsoring section or division.
(E) Includes Ethics Credit

Register for these events and more at indybar.org/events.

DAY OF GIVING
10.21.20
INDIANAPOLIS BAR ASSOCIATION & FOUNDATION
indybar.org/dayofgiving

MAKE A DIFFERENCE ON OCTOBER 21!

The world may have changed, but our community and our profession are still counting on the Indianapolis Bar Foundation, perhaps now more than ever. And, we have risen to the challenge.

While continuing to support our existing services, grants and charitable programs, the foundation has created new programs to help lawyers and our community overcome the hardships caused by the COVID-19 pandemic.

This year, of all years, we need your financial support. Make a difference when you make a gift on our Day of Giving on **October 21**!

YOUR SUPPORT IMPACTS:

OUR Community 

OUR Profession 

OUR Future 

LEARN MORE AT INDYBAR.ORG/DAYOFGIVING!

The death of Supreme Court Justice Ruth Bader Ginsburg has been devasting to many, including me. She became only the second woman to serve on the court, and her reputation was legendary.

In her memory, I've reprised my reviews of "RBG" and "On the Basis of Sex," both released in 2018 and both of which should be required viewing for all law students.

In light of what Republican Senate Majority Leader Mitch McConnell did with President Obama's nomination of Merrick Garland to replace the late Justice Scalia, we lawyers should be demanding the same approach today. Equity and fairness, two principles we are sworn to uphold, will be tossed into a garbage dump if we follow Trump and his supporters.

Like it or not, McConnell created a standard in 2016 that Republicans now want the American public to ignore. Every senator — and that includes our two from Indiana — needs to be held accountable. I'm hopeful that most lawyers join me when we protest with the reminder, "We won't forget."

"RBG"

"RBG" is a meaningful documentary for a number of reasons. Centering on the extraordinary life of Supreme Court Justice Ruth Bader Ginsburg, it tells a larger story concerning the treatment of American women as second-class citizens.

RATING
RBG had no problems with her new nickname, noting with a smile that the comparison to the Notorious B.I.G. was apt given they were both born in Brooklyn.

Justice Ginsburg was nominated for the Supreme Court in 1993 by President Bill Clinton, and she won over the senators during the confirmation process even though she unashamedly endorsed the right of women to seek an abortion. More to the point, she noted a fundamental principle ignored by many politicians, namely that it is a woman's sole role, not the government's, to make decisions concerning her own body.

As Ginsburg's life is examined by directors Betsy West and Julie Cohen, you watch her successfully fight for admission to a Harvard Law School overwhelmingly dominated by male students. Though she goes on to join the Law Review during her second year, she subsequently transfers to Columbia Law School in New York when her lawyer husband joined a firm in that city. She didn't let a minor thing like sleep and raising two children get in the way when it came to pursuing her own career. Ginsburg set her destiny when she became involved in cases where women were suffering discrimination at the hands of business and government. This included several successful arguments before the U.S. Supreme Court, one of which resulted in the court forcing the Virginia Military Institute to finally break a barrier and admit women to the historic school.

But what makes "RBG" so much fun to watch is the wonderful revelation of her as an individual. Even in her early 80s, she continued to pursue a personal policy of frequently not going to bed until 5 a.m. to get her work done. She has always had to be coaxed to come home to eat an evening meal, and her children laughingly noted that she remains one of the worst cooks who ever lived.

It was also amusing to discover that her lack of a sense of humor was fully handled by her late husband, Martin. During their 50-plus-year marriage, he recognized that his wife's career became more important than his, and he proceeded to play a supporting role that will gain your admiration.

Various well-known people, including Gloria Steinem, give interviews focusing on Ginsburg's devoted efforts to make meaningful changes in the American landscape. Given her lifelong quest to point out the difference between women being placed on a pedestal as opposed to in a cage, it remains revealing to note that she is only one of three women presently on the Supreme Court.

One of Ginsburg's great strengths flows from her ability to form friendships with justices on the opposite side of many legal opinions. Though she frequently disagreed with the late Justice Antonin Scalia in any decided case, they were often seen in public settings where they enjoyed each other's company. That is a lesson that could help our fractured Congress rise from the political ashes. Though she will not acknowledge it, Ginsburg is obviously proud of the many dissents she has authored. She fought for the rights of the little men and women in our country, and when this wonderful film concludes, it is hard to resist the urge to stand up and applaud her.

"On the Basis of Sex"

RATING
Who would have thought one of the great movies about a successful marriage would center on Supreme Court Justice Ruth Bader Ginsburg?

While "RBG" centers on Ginsburg's early fight to have women treated equally with men under our United States Constitution, in "On the Basis of Sex," you see her personally suffer such discrimination. Only one of nine female students at Harvard Law School in the 1950s, she thereafter found it impossible to land a job in New York despite later graduating at the top of her Columbia Law School class. Yet her personal battle only gave her greater motivation to attack gender discrimination wherever it existed.

While the principle focus of this film deals with a federal appeal that Ginsburg and her husband Marty handled as co-counsel in the 1970s, the love and dedication that these two had for each other will stir you emotionally from beginning to end. This movie is first and foremost one of the great authentic romances you will see on the big screen.

Felicity Jones and Armie Hammer give brilliant, warm-hearted portrayals as a couple equally dedicated to the law and their family. Jones is a knockout in and out of court, and lawyers in particular will marvel at her interaction with students when she accepted a law school teaching position at Rutgers when she couldn't find meaningful employment elsewhere. Jones is as funny as she is captivating, and you should do yourself a favor and hunt down her role as Stephen Hawking's tireless companion in "The Theory of Everything" (2014).

Hammer continues to show his great acting skills as demonstrated in "Call Me by Your Name" (2017) and "Sorry to Bother You" (2018). Here, despite the fact that he is a successful tax lawyer, he proudly takes a second chair to support the career of his spouse, which frequently included cooking at home and taking care of their two children. The love between this couple will frequently leave you wiping tears off your cheeks, particularly when you realize that Marty died in 2010 after they had been married for 59 years.

There are also a number of great supporting roles. Cailee Spaeny gives a wonderful performance as Jane, the Ginsburgs' teenage daughter. She reflected the anger and turmoil engulfing our country in the 1960s-1970s, and her parents had a full-time job keeping her focused on how to fight injustice. This is a talented young actress as reflected by her contribution in "Bad Times at the El Royale" (2018).

In addition, Kathy Bates and Sam Waterston give meaningful portrayals of lawyers on the opposite end of the gender divide. Bates plays Dorothy Kenyon, a lawyer who had to deal with having her heart ripped out after losing an important case, while Waterston plays Erwin Griswold, the arrogant, self-centered sexist who was the dean of Harvard Law School.

As I watched the Ginsburgs sit next to each other as they conducted oral argument in the federal appeals court, I couldn't help but be reminded of my experiences with my wife, Monica Foster. We practiced for years together before she became executive director of the Federal Public Defender's Office for the Southern District of Indiana, and we were co-counsel in some memorable cases.

Like the Ginsburgs, we sat together during an oral argument before the 7th Circuit in Chicago on a complicated appellate case while also representing an indigent client in a state jury trial. The young man was accused of robbing and shooting a gas station attendant, leaving him blinded, and our trial followed Monica's success in getting him a new trial after his conviction and sentence of 110 years was overturned. Though the trial resulted in a hung jury, we eventually worked out a plea where our client was placed on immediate probation after serving more than five years in prison.

As I watched the Ginsburgs walk out arm-in-arm after their oral argument, I thought of the emotional reaction Mo and I had after our client, Gregory Resnover, became the last man to be executed in the Indiana electric chair. We passionately believed he was wrongly convicted, and a small bottle of Jack Daniels could not wash away our emotional collapse in Michigan City.

Finally, as Marty watched Ruth's powerful appellate closing argument, I could not help but reflect on the moment when Monica argued in front of the United States Supreme Court that included Justice Ginsburg. Mo's response to a particular question from Justice Scalia reminded me of the pointed response of Ginsburg in this film when a judge sarcastically noted that the word "woman" does not appear in the constitution: "Neither does the word freedom, (pause) Your Honor."

So here's to two great women who as lawyers have brought honor and dignity to our profession.•

■ **Robert Hammerle** *practices criminal law in Indianapolis. When he is not in the courtroom or the office, Bob can likely be found at one of his favorite movie theaters preparing to review the latest films. To read more of his reviews, visit www.bigmouthbobs.com. Opinions expressed are those of the author.*

3 THINGS

Continued from page 10

a "lawyer should also be careful to adjust privacy settings to avoid being 'tagged' to improper content which could show up on the lawyer's page and thereby be deemed adopted by the lawyer." *Id.*

It is unlikely that a lack of tech savvy will provide an excuse. Comment 6 to Rule 1.1 requires a lawyer to be well-informed of the "benefits and risks associated with technology relevant to the lawyer's practice … ." Based on a lawyer's duty to supervise nonlawyer assistants under Rule 5.3, it is also unlikely that "my outside marketer did all this" will fly as a defense. So be careful with those "likes" and "retweets," and make sure you aren't endorsing prohibited content like the statements mentioned above. Finally, make certain that an attorney is monitoring your firm's social media platforms.

3. Prosecutors must be especially careful with social media accounts

The Disciplinary Commission's advisory opinion also noted that "[p]rosecutors have the dual responsibility of keeping the public informed" and, under Rule 3.8 of the Indiana Rules of Professional Conduct, a duty "to 'refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused' which could affect the due process rights of criminal defendants." Advisory Opinion #1-20 at p. 3. Therefore, the advisory opinion also warns that "[a]llowing public comment to these posts adds an additional risk to the reputation and rights of the defendants." *Id.* In other words, a third party's statement could theoretically make a prosecutor's ethical statement in a post suddenly problematic. This is more reason to have an attorney monitor any social media activity, including the comments. The commission suggests that for prosecutors' social media accounts, it is "best practice to simply disable comments on posts regarding pending criminal matters all together." *Id.*•

■ **James J. Bell** *and* **Stephanie L. Grass** *are attorneys at Paganelli Law Group in Indianapolis. Opinions expressed are those of the authors.*

Photos courtesy of Notre Dame Law School

During her 2016 visit to the University of Notre Dame Law School, Justice Ruth Bader Ginsburg (seated, left) took time to talk to the students in a discussion moderated by former Dean Nell Jessup Newton (standing with microphone).

Through friendships, visits, Ginsburg became part of Indiana legal history

Hoosier lawyers, judges remember RBG for her intellect, acts of kindness

By Marilyn Odendahl
modendahl@ibj.com

Fitting all the participants with military uniforms busted the budget for the mock trial. But the special guest jurist for the event, U.S. Supreme Court Justice Ruth Bader Ginsburg, loved the idea of costumes, so Indiana University Maurer School of Law found the extra money.

The fictional legal exercise, which took place in 1998, was based on the premise that Lt. Col. George Armstrong Custer had survived the battle of Little Big Horn and was facing a court martial. IU Maurer students paired with alumni of the law school and served as attorneys in what was essentially an oral argument. The three judges were "Gen. Ginsburg," then-Indiana Justice Frank Sullivan and IU Maurer Professor David Williams.

Sullivan

Williams

C-SPAN recorded the event, and IU Maurer posted a link to the video on Twitter after Ginsburg died at her Washington, D.C., home Sept. 18. The 87-year-old justice was a champion of gender equality, and her fight for equal rights eventually made her a pop culture icon. But during her visit to Bloomington in the years before she became the "Notorious RBG," she showed her intellectual depth, sharp mind and commitment to legal education.

And she did all that while dressed in a navy blue wool jacket with red piping and brass buttons. Williams was not surprised. He had clerked for Ginsburg when she was a judge on the D.C. Circuit Court of Appeals and knew well her ability to think about and interpret the law.

Yet, as with all her other law clerks, Williams' clerkship became an enduring friendship. The justice would always take him and his family out to dinner whenever they visited Washington, and his children, now adults, still have the Sacagawea gold dollar coins she gave them when they were young.

"She was really wonderful," Williams said, emotion choking his words. "To me, knowing she was in the world and what she made possible for us … was huge."

Hoosier connections

Ginsburg's visit to IU Maurer was one of several she made to Indiana during her tenure on the Supreme Court. She had friendships with the professors and deans at the law schools in the Hoosier State, and she influenced law students, lawyers and judges across the state.

Indiana Chief Justice Loretta Rush issued a statement saying to those who emulated Ginsburg, "this is not just the loss of a powerful leader and statesperson, but the personal loss of a mentor." Southern Indiana District Court Chief Judge Jane Magnus-Stinson said Ginsburg's "groundbreaking work as a lawyer, judge and justice has and will continue to serve as an example and inspiration for generations to come."

James White, professor at Indiana University Robert H. McKinney School of Law, developed a friendship with Ginsburg based on their work as teachers and interest in legal education. He remembered whenever he wrote her a short note, passing along some news of the day, she would drop a reply in the mail within a week.

"She would immediately respond, with all she had on her plate," White said. "Very few people would do that."

In 2007, Ginsburg visited IU McKinney to give the James P. White Lecture on Legal Education. She and her husband, Marty, were scheduled to arrive in the Circle City at 2 p.m., but their flight was delayed until 6 p.m., just an hour before the lecture was scheduled to begin.

White said the justice was unfazed. She lectured then attended a dinner that followed the event. The next day, she taught two classes and had a special luncheon with members of the Indianapolis legal profession.

She never lost her interest in education, White said. She saw law schools as the way to bring more diversity into the bench and bar.

Former Notre Dame Law School Dean Nell Jessup Newton also saw Ginsburg's passion for the classroom. The pair met infrequently through the years, but always the justice would inquire about the students. She wanted to know how they were affected by the Catholic mission of the law school and how many women were enrolled.

By the time she visited the University of Notre Dame in 2016, Ginsburg's status had grown beyond the legal profession. The crowd of more than 7,000 that filled the Joyce Center was both charmed and enlightened as she answered questions about her life and the law.

At one point, the moderator of the evening, former 7th Circuit Court of Appeals Judge Ann Claire Williams, joked with Ginsburg by asking if she was Queen Ruth. The justice caused the audience to erupt with her reply: "I'd rather be notorious."

"She was one of the most amazing women I've ever met," Newton said of Ginsburg.

Veronica Root Martinez, the first Black woman to become a tenured full professor at Notre Dame Law School, remembered Ginsburg taking time to talk to the law students while she was on campus. "Her representation and contributions matter to our law students and to young women and girls all over this country and world," Martinez said.

IU Maurer's David Williams knew of Ginsburg's work for gender equality when he was a law student at Harvard. Even though he interviewed with other judges, he wanted to clerk for Ginsburg.

He remembered the day she stopped by his desk to praise his draft of an opinion. She dropped the papers on his desk, stood on her tiptoes and kissed him on the cheek.

"I blushed," Williams said.

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Photo courtesy of IU McKinney School of Law

Justice Ruth Bader Ginsburg, who began her legal career as a law professor, had a long friendship with IU McKinney professor James White, who has long championed legal education.

BARRETT

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"His judicial philosophy is mine too: a judge must apply the law as written," Barrett said. "Judges are not policymakers and they must be resolute in setting aside any policy views they might hold."

Barrett, a devout Catholic and mother of seven, has been a favorite of social conservatives. However, her confirmation is already inciting partisan fighting, coming just weeks before the Nov. 3 presidential election. Republican senators are preparing for a swift process with her hearing before the U.S. Senate Judiciary Committee scheduled for Oct. 12 and possibly her nomination being sent to the Senate floor by Oct. 22 or 26, according to CNN.

Trump's Democratic rival, Joe Biden, implored the Republican-led Senate to hold off on voting on her nomination until after the Nov. 3 election to "let the people decide." Democratic senators, while appearing united against Barrett, also appear to lack the votes to block her nomination.

Barrett's elevation from being a law professor at Notre Dame to the 7th Circuit Court of Appeals was marked by contention over her views on abortion and stare decisis. A largely partisan vote, with then-Indiana Democrat Joe Donnelly breaking ranks with his party, narrowly propelled her to the appellate bench.

Notre Dame President Rev. John Jenkins alluded to the storm ahead in his statement issued after her nomination.

"The same impressive intellect, character and temperament that made Judge Barrett a successful nominee for the U.S. Court of Appeals will serve her and the nation equally well as a Justice of the United States Supreme Court," he said. "… I join her colleagues in the law school and across the campus in congratulating her on the nomination and wish her and her family well through what has become, sadly, a personally bruising confirmation process."

In her remarks, Barrett addressed "my fellow Americans" and outlined how she would rule if she is confirmed to the Supreme Court — an institution, she said, that belongs to everyone.

"I would assume this role to serve you," she said. "I would discharge the judicial oath which requires me to administer justice without respect to persons, do equal rights to the poor and rich, and faithfully and impartially discharge my duties under the United States Constitution."

Appellate rulings

Since she joined the 7th Circuit Court of Appeals in October 2017, Barrett has authored 107 opinions, 97 of which were written for the majority.

Brian Paul, appellate attorney at Faegre Drinker Biddle & Reath LLP in Indianapolis, said Barrett has decided cases on the basis of the Constitution and the text of the statutes rather than her personal policy preferences or the identity of the litigants.

"Her decisions can only fairly be described as pro-Constitution and anti-judicial imperialism," Paul said. "She implements the law as it is written and enacted, without regard who the litigants before her and regardless of her own policy preference — exactly as our Framers meant for the law to be implemented."

Barrett has spent much of her professional life in academia. After law school, she clerked for Judge Laurence Silberman of the U.S. Court of Appeals for the D.C. Circuit before clerking for Scalia. She then worked as an associate at Miller Cassidy Larroca & Lewin in Washington, D.C., before joining the Notre Dame Law School faculty in 2002.

Steve Sanders, professor at Indiana University Maurer School of Law, noted Barrett's record is thin. "She hasn't been a judge long enough to where you could say she's developed a distinctive judicial voice or distinctive jurisprudence," he said.

Still, some of her rulings do reflect what are accepted as traditional Republican values.

In *Kanter v. Barr,* 18-1478, she wrote a 37-page dissent arguing the Wisconsin statute violated the Second Amendment because it prohibited all felons — regardless of whether they had been convicted of a violent or nonviolent crime — from owning a gun.

Likewise, in *United States of America v. Hector Uriarte*, 19-2092, she dissented along with two other Trump appointees to the 7th Circuit — Michael Brennan and Michael Scudder.

The majority of the en banc court affirmed Uriarte was covered under the First Step Act and should not be sentenced to the 25-year mandatory minimum. Barrett and her fellow Trump appointees admonished her judicial colleagues' reasoning, even though the majority noted a in a similar case before the 9th Circuit that a bipartisan group of senators who were the principal drafters of the First Step Act had filed a brief in favor of the defendant.

"Speculating about congressional desires is dicey enterprise, which is one reason among many that we should stick to the text," Barrett wrote.

Also, in *Cook County v. Wolf*, 19-3169, Barrett disagreed with the majority that blocked Trump's public charge rule prohibiting immigrants from receiving public benefits such as food stamps.

Most recently, Barrett sided twice with the majority of Chief Judge Diane Sykes and Judge Frank Easterbrook in July 2020 to allow the execution of Daniel Lewis Lee to proceed. Lee's execution in July was the first of seven that have been carried out at the federal prison in Terre Haute since the Trump administration lifted a 17-year moratorium.

Tilt to the right

Barrett's confirmation to fill the seat vacated by liberal icon Ginsburg would be the sharpest ideological swing since Clarence Thomas replaced Justice Thurgood Marshall nearly three decades ago. The appellate judge paid homage to the champion of gender equality.

"Justice Ginsburg began her career at a time when women were not welcome in the legal profession. But she not only broke glass ceilings, she smashed them," Barrett said. "… She was a woman of enormous talent and consequence and her life of public service serves as an example to us all."

Indiana University Robert H. McKinney School of Law professor Jennifer Drobac hopes the awareness of Ginsburg and what she fought for is a moderating force on Barrett. Acknowledging how Barrett would rule is uncertain, Drobac said the Supreme Court could get out of step if the justices tilt too far to the right and be seen as no longer reflecting the values of the nation. This could weaken the judicial system, which could endanger American Democracy.

"Barrett is on the bench in large part because of the efforts of Ruth Bader Ginsburg," Drobac said. "If she is elevated to the highest court, maybe that will give her some perspective that will influence her future decisions."

Glenn Sugameli, attorney and retired founder of the Judging the Environment project on the federal judiciary, also sees the potential for the public to lose faith in the Supreme Court as an impartial arbiter. But even if Americans question the motivations of the justices, the court's rulings will still have "real world consequences." And Congress might be able to do very little in response if a statute is overturned because it is found to be unconstitutional.

"This is once in a lifetime, maybe once in history, where the entire integrity and ability of the court to have the faith of the people that its rulings are just and fair is at stake," he said.•

— The Associated Press and Indiana Lawyer editor Dave Stafford contributed to this article.

GINSBURG

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On the bench

Jon Laramore, executive director of Indiana Legal Services, sparred with Ginsburg at oral arguments on Jan. 14, 2015, believing the justice was pushing him to broaden his interpretation of state and federal statute.

Then an attorney in private practice at the firm that is now Faegre Drinker Biddle & Reath LLP, Laramore was providing pro bono representation to Moones Mellouli. A lawful permanent resident, Mellouli had pleaded guilty to a misdemeanor offense under Kansas law of possession of drug paraphernalia. The paraphernalia was actually a sock that contained four unidentified orange tablets.

Laramore

Laramore remembered Ginsburg queried him about the state and federal statutes in *Mellouli v. Holder*, 575 U.S. ___ (2015). He thought she was trying to get him to say the state law conviction had to be identical to a federal statute to justify his client's deportation. However, Laramore was reluctant to go that far.

Looking back at the transcript of the argument and Ginsburg's opinion for the majority in the 7-2 decision in Mellouli's favor, Laramore realized Ginsburg "turned out to know more than I did."

"Wise in the ways of her court, Justice Ginsburg may have asked me a difficult question to get me to clarify for others on the bench that we were not seeking the broader interpretation she posited, but rather just the interpretation immigration authorities had been applying for many years up until the current administration," Laramore explained in an email. "And she may have known that response was all a couple of her colleagues, whose votes we did not think we could get, needed to hear to vote our way."

Northern Indiana District Court Judge Damon Leichty also argued before Ginsburg when he was a student at IU Maurer and represented the U.S. government at the Custer mock trial.

Leichty spoke first, standing before the panel in his uniform, which he recalled became hot under the television lights. Even though he knew the moment would come, he was still terrified and exhilarated when Ginsburg interrupted his presentation to ask a question.

His time ran out as Williams was querying him, so Leichty asked for another moment to answer. Ginsburg told him to do it in one sentence.

"Imagine a young law student faced with the challenge by a Supreme Court Justice," Leichty wrote in an email. "Somehow I managed to rattle off one of the longest sentences known to man, and she kindly let me."•

Conversations between former Notre Dame Law School Dean Nell Jessup Newton (left) and Justice Ruth Bader Ginsburg often included the operas they were each planning to see.

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goal was to eventually make mediation up to two-thirds of his practice over a two-year period. But in the first nine months alone, mediation has grown to 75% of his work.

Learning to roll with those unexpected changes is what has helped CLLB get through its tumultuous first year, Church said. The partners started out with a business plan to guide them, but they've been willing to adjust to the COVID-19 curveballs.

Intentionally learning to use new technology certainly didn't hurt, either.

"We spent both time and money in that investment," Church said. "The funny part of it for me is a quote that went around the office: 'You can teach a middle-aged lawyer new tricks.'"

Solo no more

Criminal defense is a practice area that's pretty recession-proof, but that doesn't mean private defenders haven't been affected by the COVID-19 downturn.

Levin & Diehl opened its Indianapolis office in February, and very quickly partners Josh Levin and Michael Diehl had to learn how to run a virtual practice.

Levin

Diehl

It would have been a transition for them anyway — Levin worked as a solo practitioner for two years before Diehl joined him, so he was used to doing things on his own. With a pandemic and court closures to also deal with, the two lawyers had to adapt on the go.

Criminal defendants don't have the luxury of postponing their cases for a global health crisis, Levin said, so he and Diehl spent a lot of time in virtual meetings. As it turns out, having a partner made it easier for the former solo practitioner to navigate a virtual practice.

"Ideally we were going to split our cases down the middle as far as workloads and counties, but we still have the flexibility for one of us to be able to cover for the other if something came up," Levin said. "What we found with several hearings being remote, and several still are remote, is that it makes it easier to be in two places at once."

The partners have also had to adjust some business aspects of their original plan in light of COVID-19. For example, they've become more flexible with client payment schedules as layoffs and unemployment have affected client income, and they've both been conscientious about saving money in case another widespread shutdown is implemented.

Though it's been an unusual transition, Levin is confident that bringing on a partner helped him to better navigate the last six months: "It was the best decision we could've made."

Leadership lessons

Alan Bouwkamp jokes that his partner, Elizabeth "Biz" Eichholtz Walker, learned to be a law firm partner in a trial by fire.

Walker became a partner at what is now Becker Bouwkamp Walker in August 2019. Working alongside Bouwkamp and partner Carl Becker, she said the transition to their new three-partner structure was largely complete when the pandemic hit.

But that doesn't mean they were fully prepared.

Like other firms, the leaders of "B2W" were making decisions on the fly. The partners decided on Saint Patrick's Day 2020 to close their office, and within 48 hours they had a formal COVID plan in place.

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BANKRUPTCY

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Why the decline?

In years past, Jennifer Thornburg saw about 1,000 bankruptcy cases filed per month in the Indianapolis division of the Southern District of Indiana. Though that mark hasn't been met for a while, she used to gauge the number of cases based on the month — in September, for example, case numbers often hit the 9,000s.

Thornburg

But on Aug. 31, Thornburg filed case 4,904.

"From that (2008) recession, cases are lower now," said Thornburg, of Thornburg Law Office in Greenfield. "There wasn't the help back then — the stimulus checks and those things."

Bankruptcy practitioners across Indiana agree that federal relief funds are the driving factor behind this year's low filings. In addition to the stimulus checks distributed in the spring, the government offered an extra $600 in weekly unemployment benefits. That meant more income than normal for some Americans, the lawyers said.

Additionally, federal and state governments, including in Indiana, instituted moratoriums on evictions and foreclosures. That relieved some of the pressure that often leads to bankruptcy, according Mark Zuckerberg, a solo practitioner in Indianapolis.

Zuckerberg

Businesses also benefited from federal assistance such as the Paycheck Protection Program and COVID-specific relief from the U.S. Small Business Administration. Thornburg's own practice benefited from SBA assistance, she said.

What's more, there's a very basic explanation for the drop in filings, according to Thornburg: would-be clients don't have the money to pay for bankruptcy proceedings. Zuckerberg's clients have been going back to work, he said, but often they're not bringing home the same income.

The reckoning

As the pandemic continues on, relief efforts seem to be slowing.

The $600 unemployment checks have stopped, and the $300 weekly benefit implemented in September won't provide the same level of assistance. Additionally, Congress has so far been unable to agree on a second round of stimulus funding.

DeNeal

Also, eviction and foreclosure moratoriums are ending. And in the commercial arena, multi-tenant landlords are finding themselves stuck between their lenders who expect payment and their tenants who want payment relief, said Dustin DeNeal.

"Most of those relief options kicked the can down the road," said DeNeal, of Faegre Drinker Biddle & Reath. "I expect at some point there'll be a reckoning."

Already DeNeal is hearing from clients who know they are or will soon be unable to meet their financial obligations. To that end, he's been busy helping those clients plot the best course.

Zuckerberg describes bankruptcy as a way to "help the honest but unfortunate." Likewise, DeNeal sees bankruptcy as an effective tool, but only when used in the right context.

"Bankruptcy does not create income where income is not there in the first place," DeNeal said. Businesses and individuals whose income streams are "irreversibly affected" by COVID-19 might not be suited for a bankruptcy proceeding.

Instead, a business might look into liquidation, DeNeal continued. That option could be appealing to small- and mid-sized companies, which often find bankruptcy to be too expensive.

It can be difficult, though, to know now what the best choice will be for a business that wants to succeed in a post-pandemic world.

"I compare it to a hospital — when you check into a hospital, you don't know what you're going to look like on the other side," DeNeal said. "It's tough to tell where you're sitting right now when your check out date would be, and it's tough to tell what you'll look like post-coronavirus."

When's it coming?

Right now, DeNeal said he's dipping his toes in the water of COVID-related bankruptcies. But eventually the flood will come.

Hester estimates a surge of filings coming late this year or early next. Thornburg agreed, opining that the flood could start in a matter of months. Zuckerberg thinks either October or February, though he's not sure which.

Filings in Thornburg's practice are usually cyclical, she said. Tax season tends to be a busy time, as people will often use tax refunds to fund their bankruptcy proceedings. The back-to-school season also usually presents a surge, she said, because parents have more time to consider their finances when children aren't at home.

The tax-based surge was just about to hit when the pandemic came to Indiana, she said. A few new cases have trickled in, but there's already a backlog in bankruptcy courts caused by widespread court closures.

Even now with courts reopening, there have been calls to make more bankruptcy judges available. A report released by the Harvard Law School Bankruptcy Roundtable recommended an additional 50 temporary bankruptcy judgeships in the best-case scenario, and an additional 246 judges in a worst-case scenario.

Zuckerberg's concern is for the reintroduction of mortgage payments into people's budgets. Many companies put mortgage payments in forbearance during the initial shutdown, but he stresses the importance of understanding what that means.

"Forbearance does not mean forgiven, forbearance does not mean modified — it just means forbearance," he said. "At the end of these six months, a majority of people are going to have to pay again. That's going to sink a lot of people."

Another area of debt that concerns Zuckerberg is student loan default. He pointed to a Sept. 20 article in the Wall Street Journal showing that student loan debt has increased by more than 350% since 2003 in the total household debt balance. Comparatively, auto loans and housing debt have increased in the total household debt balance by around 50%, while credit card debt has decreased in the balance.

Further efforts

Though government relief is slowing, Zuckerburg still sees options. As it relates to student loans in particular, he noted that Congress has considered providing a debt discharge mechanism.

But absent such relief, the bankruptcy filings will come soon, lawyers say. Some industries may be hit harder than others, DeNeal noted, pointing to the retail, hospitality, tourism and food sectors.

Some bankruptcy practitioners themselves have faced business difficulties because of the pandemic, with Zuckerberg saying he's had some sleepless nights in recent months because of the decreased filings. But he was comforted by a fact he knows other businesses can't yet cling to.

"I know I'm going to be super busy soon," he said. "But if you're a downtown restaurant and nobody is downtown and nobody is eating, that may go on for the near future."•

Indiana snapshot

Indiana bankruptcy practitioners expect a pandemic-related increase in bankruptcy filings in the coming months. Here's where the state stood with filings for the year ending June 30, 2020.

Indiana Northern District
Business: 86
Non-business: 8,137

Indiana Southern District
Business: 201
Non-business: 12,297

Source: U.S. Courts Administrative Office

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Each of the three partners plays a role in managing the northside Indianapolis firm. Bouwkamp oversees human resources, Becker handles accounting and Walker takes the lead on marketing and technology. But when it came to the coronavirus, collaboration was key.

"Challenges are inevitable with any firm transition, and when you add on top of it more partner meetings than are typical, I think that made us closer," Walker said. "We had to be open and honest and communicative. We had to realize our strengths, because we are different, and that's a huge benefit and asset to the firm."

Walker is in her 30s while Becker and Bouwkamp are in their 50s, and that generational difference worked to the firm's advantage, Bouwkamp said. He pointed to the transition to remote work, noting that Walker's age gave her a firmer grasp on how available technologies could keep their practice afloat despite having to close the physical office.

For Walker, the experience of transitioning into leadership during a global crisis opened her eyes to issues she hadn't previously considered, such as meeting the firm's financial obligations. And though she expected to love the flexibility of remote work, COVID has also shown her the power of in-person collaboration.

"That's the whole value of being a partner — not just working from afar and sending messages, but getting to interact and have the support of one another," she said.

Photo courtesy of Becker Bouwkamp Walker

Elizabeth Walker, Carl Becker and Alan Bouwkamp began a transition to a three-partner structure in August 2019, bringing Walker into a partnership role for the first time.

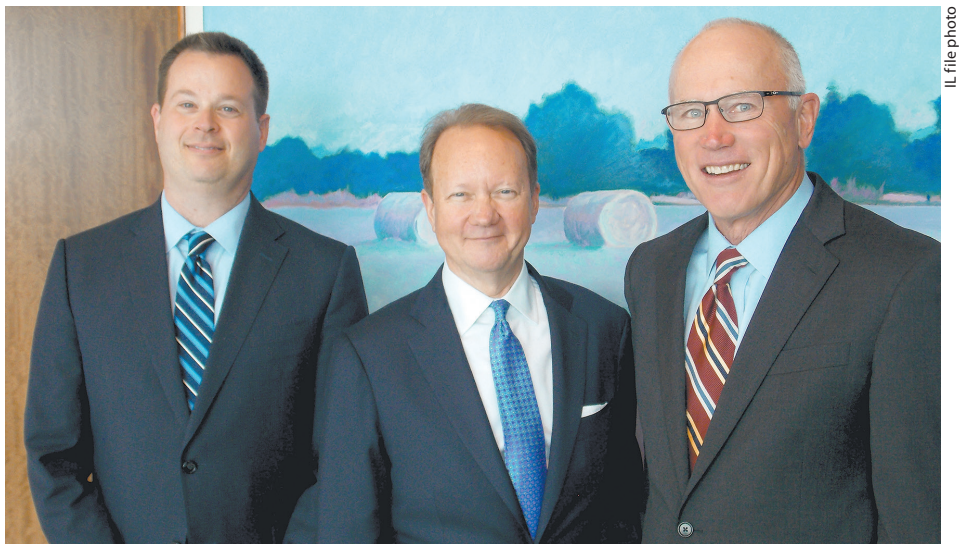
Extra resources

Already one of Indianapolis' largest firms, the former Bingham Greenebaum & Doll became even bigger when it combined with global giant Dentons to form Dentons Bingham Greenebaum in January. As it turns out, having the resources of a firm like Dentons made all the difference during COVID-19.

Dentons Bingham Greenebaum was about six weeks into its formal integration when the pandemic came to Indiana, managing partner Keith Bice said. But rather than add to the stress of such a transition, Bice said the combination actually made the pandemic easier to deal with.

"As we adapted to changed circumstances, we were forced to learn very quickly how to work remotely – and how to do it well in order to serve our clients," Bice said in an email to IL. "The learning curve was accelerated but also was far easier since we combined with a firm that is very experienced in bringing other firms on-board and creating immediate connections across a sophisticated technology infrastructure."

IL file photo



Dentons Bingham Greenebaum managing partner Keith Bice (left) stands with Dentons global chairman Joe Andrews and Tobin McClamroch, managing partner of Dentons' US region.

Dentons Bingham Greenebaum has operated during the pandemic with two goals, Bice said: protecting the health and safety of its employees and providing uninterrupted service to clients. Joining the ever-expanding Dentons team provided opportunities to meet those goals in ways that otherwise might not have been possible, he said.

For example, clients had access to the Dentons COVID-19 Hub, which includes national and international pandemic policy and employment data, as well as information about financial relief and legal considerations. Providing the national and international data, in particular, would not have been feasible without access to Dentons' resources, Bice said.

Adapting to the pandemic was faster and easier than expected, Bice added. Even when working with thousands of lawyers across dozens of offices, he's learned that even large organizations can be nimble enough to survive a global crisis.

"In fact," Bice said, "this experience has provided us an opportunity to more rapidly execute on our plans to become a law firm of the future."•

EYE ON THE PROFESSION

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real day-to-day law is harder than law school. You must adopt an immediate attitude to work just as hard (or harder) as you did in law school. The first two to three years are critical for you to learn your craft and begin developing confidence in yourself and the confidence of others. There is no shortcut.

5. Professional credentials. As soon as you begin to see your substantive legal interests materialize, begin doing what you need to do to develop professional credentials. That requires additional CLE, skills courses, membership in substantive groups, writing, speaking and handling cases in the substantive area. Modern lawyers have an ever-evolving resume online — their website bio. Other lawyers and clients will want to see your professional credentials before they hire you. Don't neglect this important piece of your career building. You need credentials.

6. Social media. Now is the time to realize that your social media presence matters. You need to be on social media, and you need to remember that social media shapes perceptions of who you are. Astute lawyers have a "brand" for each social media platform they use. You want your brands to fit who you are, and it is okay to have different brands for different platforms. What you cannot afford is to be invisible or to be viewed as undisciplined, rude, outlandish or worse. Remember, social media creates awareness of who you are and what you do. Long term, your social media footprint will either bring you clients or drive them away.

7. Your debt. This tip is easier said than done. You are just coming off of several years of relative or actual deprivation. A paycheck feels good. You will want to eat and drink better than you have been able to enjoy as a student. You may want a nicer car or finer clothes or a house. However, I strongly urge you to do all you possibly can to manage and pay down your debt before you take on more debt. Be disciplined. Create a budget. Put bonuses and tax refunds into paying down debt. Long term, you will appreciate it.

8. Civic/bar associations. Join your state, local and specialty bar associations as early as you can and carve out time to participate. Be persistent and make bar association activity a lifetime commitment. You will also want to join civic and arts groups, but join for the right reasons. Bottom line: get out from behind the desk, meet people and get involved. It will be good for your mental health, good for your career and good for your family.

9. Your health. Don't let work get in the way of your health. Exercise, take time off, sleep well and maintain your fitness. Law is hard and stressful, but it can also be amazingly fun. It will be easy for you to work long hours, and the pay rewards can incentivize you to push your health aside. The truth is that if you can maintain your health and fitness, you will be more productive.

10. Your reputation. If you don't remember or follow my other tips, take this one to heart: *guard your reputation!* A reputation that is lost is horribly difficult to rehabilitate. Never lie, no matter how much the truth hurts. Don't cheat on hours, work product or billings. Be ethical and above reproach. It may not always be easy, but if you get off to a good start now, you will have a better time doing the right thing later.

You are exceptionally fortunate to be entering our profession. Don't take it for granted. Be strategic. My hope is that you will love the law and love lawyers. We are expected to be solid citizens and to stand up for our Constitution and our communities. It won't always be easy, but if you have a guiding personal plan, you will do well. Congratulations! #WillYouBeThere?•

■ **John Trimble** *(@indytrims) is a senior partner at the Indianapolis firm of Lewis Wagner LLP. He is a self-described bar association "junkie" who admits he spends an inordinate amount of time on law practice management, judicial independence and legal profession issues. Opinions expressed are those of the author.*

DTCI

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employees, I'm afraid, is to work while sick so they can "save" PTO days for vacation and emergencies.

Now enter the age of COVID-19. Having a system that incentivizes employees to work while sick is no longer tenable. Most of the symptoms of COVID-19 overlap with the symptoms of illnesses such as strep throat, bronchitis, sinus infection and other viruses that are so common when the weather turns cold. As we well know, if an employee's illness turns out to be COVID-19, working while sick could be a medical calamity or worse for a vulnerable coworker.

Congress passed temporary leave protections for employees who either have or care for others afflicted with COVID-19, but these protections will sunset at the end of 2020. Now is the time for employers to consider whether their current policies incentivize working while sick. When the shutdown occurred in the spring, many employers and employees quickly learned they could still be productive working from home. Continuing to invest in remote work capability is a great way to keep illness out of the workplace but still get work done and employees paid. When work must be performed on-site, offering employees a sufficient amount of paid leave just for illness, or even unpaid leave that does not result in attendance points, should be considered to help prevent illness from spreading. Aside from policy changes, messaging is very important. Employers must make clear that working while sick is not expected and, in fact, not acceptable.

As the cold and flu season ramps up this year, our workplaces will be challenged. Each illness must, for the time being, be viewed with suspicion. Employers who revise policies that incentivize working while sick will reduce contagion, and they might end up increasing employee morale at the same time.•

■ **Germaine Winnick Willett** *is senior counsel at Ice Miller LLP and is a member of the board of directors of DTCI. Opinions expressed are those of the author.*

INDIANA COURT DECISIONS – SEPT. 10-SEPT. 23, 2020

■ **For Publication opinions** on Indiana cases released by the 7th Circuit Court of Appeals and the Indiana Supreme Court, Court of Appeals and Tax Court during this issue's reporting period are highlighted in this section. To read the complete opinion issued in any of these cases, visit **www.theindianalawyer.com** and search by case name.

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7th Circuit Court of Appeals

SEPT. 20

Civil Plenary — Habeas/Stay of Execution Denial

Christopher Andre Vialva v. T. J. Watson, Warden, United States Penitentiary, Terre Haute
20-2710

The first Black man scheduled to be executed since the resumption of lethal injection on federal death row lost his appeal for a stay Sept. 20 when the 7th Circuit Court of Appeals found he had almost no chance of relief arguing his claims of ineffective assistance of counsel and that the judge who condemned him was an alcoholic.

Christopher Andre Vialva was executed Sept. 24 at the United States Federal Penitentiary in Terre Haute. He was the seventh man executed at the federal prison since July, when the Department of Justice under President Donald Trump resumed lethal injections after a nearly two-decade hiatus.

Southern District of Indiana Chief Judge Jane Magnus-Stinson denied Vialva's habeas corpus petition, and a panel of the 7th Circuit affirmed in a four-page per curium opinion.

Vialva was 19 when he and four younger teen accomplices in 1999 carjacked, robbed and killed an Iowa couple in Texas. He was convicted and sentenced to death in 2000 in Waco, Texas, by U.S. District Judge Walter S. Smith Jr.

Smith retired from the federal bench in 2016, leading the 5th Circuit Judicial Council to drop renewed investigations of sexual harassment and other claims against him that had resulted in a reprimand and a suspension from hearing new cases.

"The details of Vialva's crimes do not matter for current purposes. Nor do the details of his current legal arguments. It is enough to identify the sort of contentions he presents," the panel wrote in *Christopher Andre Vialva v. T. J. Watson*, 20-2710.

"He maintains that he received ineffective assistance of counsel at trial because his lawyer had a conflict of interest. (While representing Vialva, counsel also was seeking an appointment as an Assistant United States Attorney.) He also contends that counsel conducted an inadequate investigation of his mental state and thus did not represent him competently during sentencing. Vialva maintains that the district judge suffered from alcoholism and should not have been allowed to preside at trial or impose sentence. These contentions may or may not be substantively valid, but Vialva's problem in seeking relief under §2241 is that issues of these kinds are commonly entertained and resolved under §2255.

"Indeed, Vialva's contentions were entertained and resolved under §2255. See *United States v. Bernard and Vialva*, 762 F.3d 467 (5th Cir. 2014); *United States v. Vialva*, 904 F.3d 356 (5th Cir. 2018). The fact that Vialva lost does not entitle him to another collateral attack under §2241. Nor does the fact that the Fifth Circuit resolved his collateral attacks by denying his requests for certificates of appealability. He maintains that the Fifth Circuit did not give his arguments the consideration they deserved, but we do not sit in judgment on the decisions of our sister circuits. That power belongs to the Supreme Court, which denied Vialva's petitions for certiorari. *Vialva v. United States*, 136 S. Ct. 1155 (2016); *Vialva v. United States*, 140 S. Ct. 860 (2020)."

The panel further rejected Vialva's arguments under the Suspension Clause, noting the Supreme Court has held that it does not entitle anyone to successive collateral attacks on a criminal judgment.

"A person who seeks a stay pending appeal must establish a material probability of success on the merits. A better-than-negligible chance will not do. See *Nken v. Holder*, 556 U.S. 418, 434 (2009); *Illinois Republican Party v. Pritzker*, No. 20- 2175 (7th Cir. Sept. 3, 2020), slip op. 4–5. Vialva has not established even a better-than-negligible chance of prevailing in his quest for another round of collateral review," the panel concluded in denying the stay of execution.

SEPT. 22

Civil Plenary — Habeas/Stay of Execution

Bruce Webster v. T. Watson
19-2683

The 7th Circuit Court of Appeals has vacated the death sentence of a federal death row inmate convicted of murdering a teen girl. The condemned man has spent years claiming he is intellectually disabled, and the appellate court agreed, citing evidence withheld by the government during his trial.

Bruce Webster was one of five men involved in a marijuana ring and was indicted in 1994 for the kidnapping and murder of 16-year-old Lisa Rene. She was taken from an apartment near Dallas, repeatedly raped and found buried in a park in Pine Bluff, Arkansas. Webster convicted and placed on death row two years later.

The 7th Circuit granted the Terre Haute death row inmate's 2241 petition in 2015 only after the court agreed to rehear the case en banc and only by a close 6-5 vote. The majority reversed the lower court, finding Webster should be allowed to present evidence supporting his argument that he has an intellectual disability.

The Southern Indiana District Court found that Webster met all three criteria to qualify as intellectually disabled, leaving him, therefore, ineligible for the death penalty. The government subsequently appealed.

Regarding Webster's intellectual disability, the 7th Circuit concluded that it saw no clear error in the district court's finding that Webster suffers from intellectual deficits. Specifically, it noted "every one of Webster's nine I.Q. scores over 27 years falls below 75 — with many falling well below that number."

"The district court found no evidence of malingering on any of these tests — before or after Webster's murder of Lisa Rene," the 7th Circuit wrote.

It likewise declined to disturb the district court's finding that Webster exhibits adaptive deficits in one of the three adaptive domains — "all that is needed for the adaptive functioning analysis."

"Having demonstrated substantial deficits in intellectual functioning and adaptive functioning (at the very least in the conceptual domain) as well as an onset of the deficiencies before the age of 18, Webster has carried his burden of proving that he is intellectually disabled and therefore constitutionally ineligible to remain under a death sentence," the 7th Circuit wrote.

The 7th Circuit also concluded that there was no clear error in the district court's determination that Webster's trial counsel, Larry Moore, was duly diligent.

"The government begs to differ, insisting that Moore's account — root and branch — is implausible. What most troubles the government is that Moore's account of his own diligence has grown in clarity and detail despite the passage of substantial time — a result at odds with the workings of human memory, at least as the government would have it. But the district court heard and considered the government's position and responded with findings that are plenty reasonable and reflect no clear error," Circuit Judge Michael Scudder wrote for the 7th Circuit.

But because the district court's findings — that Moore's testimony was credible and supported by contemporaneous documentary evidence — are not "internally inconsistent or implausible," the 7th Circuit concluded that it would not upset them.

The panel also addressed the "stream of frustration over Webster receiving relief in federal court in Indiana after years of proceedings that had seemed to reach finality in federal court in Texas." It found that the government's frustration was well received in one aspect, but not another.

"… (M)uch of the frustration seems aimed at registering disagreement with our 2015 en banc decision holding that Webster had made a sufficient showing to satisfy the safety valve in 28 U.S.C. § 2255(h)(1) to pursue the prospect of relief in the district court in Indianapolis. But now is not the time to relitigate our en banc decision," the 7th Circuit wrote.

"Nor do we agree that the remand proceedings in the district court 'all but swept away the nearly month-long trial and sentencing proceedings involving 50-plus sentencing witnesses and detailed jury findings on Webster's intellectual functioning that took place in the Fort Worth trial court.' Remember the reason for the remand: the government, in particular the Social Security Administration, failed to produce documents pre-dating the murder showing that Webster was mentally retarded. But even more, the evidence from the Texas proceeding was before the district court in Indiana. But so too was substantial other evidence developed by the parties on remand," it wrote.

The 7th Circuit further noted that the record shows that the district court proceeded with great care on remand, praising the district court by stating that "There

• continued next page

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is no way to read the transcripts of the proceedings below and not walk away impressed with the care taken by Judge (William T.) Lawrence."

"Our role is limited. Weighty though the obligation, the question before us is whether the evidence presented on remand leaves us with the definite and firm conviction that the district court's findings reflect clear error. Having taken our own detailed look at all aspects of the proceedings on remand, we see no clear error anywhere," it concluded.

The 7th Circuit therefore vacated Webster's capital sentence in *Bruce Webster v. T. Watson*, 19-2683.

Indiana Court of Appeals

SEPT. 10

Miscellaneous — RFRA "Fix"/ Nondiscrimination Ordinances

Indiana Family Institute Inc., et al. v. City of Carmel, et al.
19A-MI-2991

A lawsuit challenging Indiana's controversial Religious Freedom Restoration Act will not proceed, for now, after the Indiana Court of Appeals declined to reverse summary judgment for four cities with nondiscrimination ordinances. The appellate panel found that the conservative organizations challenging the RFRA "fix" lacked standing to challenge the ordinances on free speech and religious exercise grounds.

Judge Robert Altice wrote for the unanimous appellate panel Sept. 10 in *Indiana Family Institute Inc., et al. v. City of Carmel, et al.*, 19A-MI-2991. The case was filed and appealed by the Indiana Family Institute, Indiana Family Action and the American Family Association, all of which advocate for traditional marriage and other conservative principles.

Represented by noted conservative lawyer Jim Bopp of Terre Haute, the three organizations sued the cities after the Indiana General Assembly amended RFRA to include a provision prohibiting discrimination based on certain protected classes, including sexual orientation and gender identity, with exceptions for churches and other nonprofits.

The plaintiffs argued they did not fall within those exceptions, so the so-called RFRA fix "grotesquely" stripped them of their right to use RFRA as a defense to nondiscrimination ordinances in Bloomington, Carmel, Columbus and Indianapolis. The plaintiffs said they do not allow known same-sex couples to participate in their programming, so under the ordinances, they could not offer programming in the four defendant cities.

The three organizations prevailed on a standing argument back in 2016, when the Hamilton Superior Court denied a motion to dismiss under Trial Rule 12(B)(6). The Court of Appeals declined to review that decision.

The case was back in the trial court on motions for summary judgment and dismissal last October, and Judge Michael A. Casati subsequently granted summary judgment to the four cities, finding the plaintiffs lacked standing. He also declined to take judicial notice of magazine and newspaper articles about RFRA and a related letter signed by several law professors.

The plaintiffs appealed but fared no better in the Court of Appeals, which noted that according to the companies' own evidence, no participant has ever actually been excluded from its programming.

"Moreover, the Companies cannot point to any exclusion policies that were in place and … there were no inquiries about the attendees' religious beliefs or views on human sexuality prior to admission at the events. In fact, the Companies emphasized that all individuals are welcome to attend their programs, and only those who are disruptive or 'actively advocate' against the issues the Companies support are subject to exclusion," Altice wrote. "The Companies do not require event attendees to share the same religious beliefs, and the Companies' own designated evidence demonstrates that they have permitted 'many gay people' to attend their programs. In fact, the companies 'want people who don't agree' with their religious views to attend their events and hear their pro-traditional-family message."

What's more, Altice said, the companies have not been subject to a discrimination complaint or investigation, nor have they been threatened with sanctions or penalties. They've also continued to hold programming in the defendant cities, and that programming has not been altered.

"In short," the judge wrote, "the Companies remain free, without interference, to express their religious views on marriage and human sexuality as they always have."

The appellate panel likewise rejected IFI, IFA and AFA's argument of constitutional violations related to future events they might hold in the four cities. Altice called their plans for future events "wholly speculative and hypothetical."

The panel also did not accept the plaintiff-appellants' claim under the public standing doctrine, finding no public right at issue.

In a footnote, the panel declined to address the companies' arguments regarding judicial notice.

"We need not address those arguments, inasmuch as the evidentiary rulings that the Companies challenge address the merits of their contentions, and the trial court's decision to deny the Companies' request to take judicial notice of that material has no bearing on the threshold question of standing," Altice wrote.

SEPT. 14

Civil Tort — Judicial Review/ Athletic Trainer License Suspension

Molly Ann Melton v. Indiana Athletic Trainers Board, et al.
19A-CT-1972

An athletic trainer who lost her license after beginning a sexual relationship with a student-client lost her second bid at the Indiana Court of Appeals to reinstate her license.

After being hired by IU Health Paoli Hospital's Rehab and Sports Medicine department in 2012, Molly Melton had a consensual sexual relationship with an 18-year-old patient who was a high school student. Her athletic trainer's license was suspended for at least seven years by the Indiana Athletic Trainers Certification Board in 2014 after the relationship was reported.

The suspension was based on conduct that violated the standards of professional practice, according to the board, but Melton filed a complaint seeking judicial review of the board's sanction. She asserted claims under 42 U.S.C. §1983 for alleged violations of her constitutional rights in the disciplinary process.

In her complaint, Melton named the board, the Indiana Professional Licensing Agency and the five members of the board at the time of the disciplinary decision in their official and individual capacities. The Marion Superior Court heard the judicial review petition first and, finding that Melton had been prejudiced by the agency action, reversed the sanctions order.

After the defendants filed a motion for summary judgment asserting immunity defenses to the § 1983 claims, the trial court granted the board's motion and dismissed Melton's § 1983 claim. The Indiana Court of Appeals, however, reversed on due process grounds and remanded with instructions for the board to vacate its Feb. 3, 2014, sanctions order and hold a hearing on the administrative complaint against her that comports with due process.

Pursuant to the remand instructions, the board held an administrative hearing and in a March 2017 order again found that Melton's conduct violated Indiana Code subsections 25-1-9-4(a)(5) and (11). It placed Melton on indefinite suspension for at least three years from the date of the order, prompting her to file a petition for judicial review.

The trial court subsequently found that the board's decision was arbitrary and capricious and without substantial evidence, and that it had violated Melton's constitutional rights. Her license status was subsequently changed to "expired."

But in July 2019, the trial court entered summary judgment for all defendants on Melton's §1983 claims and, finding no just reason for delay, entered final judgment on Melton's complaint.

The Indiana Court of Appeals this time concluded the trial court properly granted summary judgment to the defendants on Melton's § 1983 claims in *Molly Ann Melton v. Indiana Athletic Trainers Board, et al.*,19A-CT-1972.

Specifically, the appellate court found that "because IPLA and the Board are not amenable to a Section 1983 lawsuit, the Board Members in their individual capacities have absolute quasi-judicial immunity for their adjudicative actions, and although Melton requested injunctive relief, she did not request such relief from the Board members in their official capacities."

"In keeping with our standard for reviewing agency actions that the facts are to be determined 'but once[,]' … we conclude Melton has failed to meet her burden of demonstrating the Board's action was invalid pursuant to the provisions of Indiana Code section 4-21.5-5-14(d), as the Board's decision is supported by substantial evidence and we will not substitute our judgment for that of the Board regarding the appropriate sanction for Melton's professional misconduct," Judge Margret Robb wrote for the appellate court.

The COA reversed the trial court's judicial review order deciding otherwise and affirmed the board's March 2017 decision.

Criminal — Reckless Homicide/ Rochester School Bus Crash

Alyssa Leigh Shepherd v. State of Indiana
20A-CR-134

A Rochester woman convicted in a school bus crash that killed three children and seriously injured a fourth had her misdemeanor reckless driving conviction vacated Sept. 14 on double jeopardy grounds. However, her felony convictions will stand.

A Fulton County jury last year convicted Alyssa Shepherd of three counts of reckless homicide, as well as criminal recklessness and passing a school bus, causing injury. Shepherd was sentenced in December to four years in prison for the October 2018 crash that killed 6-year-old twin brothers Xzavier and Mason Ingle and their 9-year-old sister Alivia Stahl and seriously injured another child.

Shepherd, who was also sentenced to three years of house arrest and three years of probation, appealed her convictions in *Alyssa Leigh Shepherd v. State of Indiana*, 20A-CR-134.

In a brief to the appellate court, Bargersville attorney Stacy Uliana wrote on behalf of Shepherd that the state "failed to present sufficient evidence" that Shepherd acted recklessly as opposed to negligently. The brief stated that because Shepherd was not drinking, texting or otherwise distracted, her actions were "an error in judgement," not reckless homicide.

The brief also asserted that the jury at Shepherd's trial was not given proper instruction on the distinction between criminal recklessness and negligence, and that her convictions of criminal recklessness and passing a school bus causing injury violated Indiana's double jeopardy statutes, meaning one of the two convictions must be vacated.

An appellate panel affirmed in part and declined to disturb the jury's verdicts, first finding that in light of *Beeman v. State*, 232 Ind. 683, 690, 115 N.E.2d 919, 922 (1953), and the totality of the evidence, the jury reasonably concluded that Shepherd recognized that the vehicle before her in the road was a stopped school bus or that she was aware of conditions that would have disclosed that fact to any reasonable person.

"Despite that knowledge, Shepherd made a conscious and voluntary decision not to stop or decrease her speed and, instead, to drive ahead and 'wait[] to get closer to the vehicle to determine what they were doing[.]," Judge Patricia Riley wrote for the appellate court. "… We conclude that the jury could have reasonably determined that a person who has decided to drive full highway speed toward a vehicle she knows is a stopped school bus has acted in conscious disregard of the harm that may result."

The appellate panel further found that the Fulton Superior Court did not abuse its discretion in rejecting Shepherd's proposed instruction on what evidence will not support a charge of reckless homicide.

"Here, Shepherd does not detail for us what evidence she argues supports the portions of her proffered instruction regarding inadvertence, lack of attention, forgetfulness, or thoughtfulness. Even if there were evidence to support Shepherd's defense theory that the collision resulted from an error of judgment on her part, she did not offer a separate instruction limited just to that wording. Given the lack of evidence to support the giving of Shepherd's proposed instruction, we find no abuse of the trial court's discretion in declining to give it," the panel concluded.

However, the appellate panel vacated Shepherd's Class A misdemeanor reckless driving conviction and left standing her Level 6 felony criminal recklessness conviction due to double jeopardy concerns.

"On appeal, the State acknowledges its concession and reiterates that 'both convictions are based on the same act of recklessly driving past the stopped school bus and injuring [M.L.], and both were

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established by the same evidence.' Had the State's concessions been based completely on its understanding that Shepherd's dual convictions violated (*Richardson v. State*'s, 717 N.E.2d 32 (Ind. 1999)) 'same evidence' test, we would conclude those concessions were no longer valid because, as a new rule of criminal procedure, (*Wadle v. State*, — N.E.3d —, 2020 WL 4782698, (Ind. Aug. 18, 2020)) was potentially applicable to this case," Riley wrote. "… However, since the State's concessions were also based upon common law double jeopardy principles, we will honor them."

As to Shepherd's suspended driver's license, the appellate court remanded with instructions to the trial court to issue a new sentencing order expressly indicating that her license suspensions are to be served concurrently, finding that it cannot be discerned from the record before it whether the trial court impermissibly imposed consecutive suspensions of Shepherd's driving privileges.

SEPT. 15

Criminal — Probation/ Community Service

James T. Knight v. State of Indiana
20A-CR-268

A northern Indiana lawyer who pleaded guilty to battering his wife has been relieved of a community service condition imposed on his probation.

In October 2017, Logansport attorney James T. Knight was charged with Level 5 felony domestic battery, two counts of Level 5 felony criminal confinement and Class A misdemeanor domestic battery involving an incident with his wife. The first count was elevated to a Level 5 felony based on Knight's 2014 conviction for domestic battery against his wife, for which the Indiana Supreme Court publicly reprimanded him in *In re Knight*, 42 N.E.3d (Mem.) (Ind. June 5, 2015).

In the current case, Knight entered into a plea agreement in which he agreed to plead guilty to the misdemeanor battery count in exchange for the state's dismissal of the remaining four counts. Specifically, Knight admitted to touching his wife in a rude, insolent or angry manner when he grabbed her and dragged her by her leg, resulting in her bodily injury.

A senior judge presiding over the combined guilty plea and sentencing hearing imposed probation conditions that did not include community service. Knight was sentenced then in accordance with the plea agreement to one year in the Carroll County Jail, all suspended.

But shortly thereafter, the regular presiding judge on its own motion set a new hearing to modify the probation, adding two new conditions, including a condition that required Knight to perform 600 hours of community service during his probationary period and to report his hours to probation on a monthly basis.

Knight appealed, arguing the Carroll Circuit Court did not have authority to add the community service condition because the condition was "punitive of nature" and not contained in the plea agreement. He also successfully moved for a stay of the community service condition, arguing the imposition of community service was an "onerous burden on Knight who must bill hours of work as a lawyer and maintain his legal practice and pay his staff."

The Indiana Court of Appeals likewise reversed the trial court's imposition of the new community service condition, but not without first finding that the trial court complied with the requirements of Indiana Code § 35-38-2-1.8(c) when it held a new probation hearing.

"However, at the time the trial court imposed this Community Service Condition, Knight had already completed his substance abuse counseling and had paid restitution, costs, and fees. Thus, per the terms of Knight's plea agreement, his probation was nonreporting. Because the specific language of Knight's plea agreement controls the general language, the trial court did not have authority under Knight's plea agreement to impose the Community Service Condition," Judge Rudolph Pyle III wrote for the appellate court.

Thus, upon finding that the imposition of the community service condition was beyond the trial court's discretion, the appellate court reversed in *James T. Knight v. State of Indiana*, 20A-CR-268.•

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PUBLIC NOTICES

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PUBLIC NOTICE FOR APPOINTMENT OF NEW MAGISTRATE JUDGE

The Judicial Conference of the United States has authorized the appointment of a full-time United States Magistrate Judge for the Southern District of Indiana at Indianapolis, effective **April 1, 2021**. The essential function of courts is to dispense justice. An important component of this function is the creation and maintenance of diversity in the court system. A community's belief that a court dispenses justice is heightened when the court reflects the community's racial, ethnic, and gender diversity.

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To be qualified for appointment, an applicant must:

(1) Be, and have been for at least five years, a member in good standing of the bar of the highest court of a state, the District of Columbia, the Commonwealth of Puerto Rico, the Territory of Guam, the Commonwealth of the Northern Mariana Islands, or the Virgin Islands of the United States, and have been engaged in the active practice of law for a period of at least five years (with some substitutions authorized);

(2) Be competent to perform all the duties of the office; be of good moral character; be emotionally stable and mature; be committed to equal justice under the law; be in good health; be patient and courteous; and be capable of deliberation and decisiveness;

(3) Be less than seventy years old; and

(4) Not be related to a Judge of the District Court.

A Merit Selection Panel composed of attorneys and other members of the community will review all applicants and recommend to the Judges of the District Court, in confidence, the five persons it considers best qualified. The court will make the appointment following an FBI full-field investigation and an IRS tax check of the applicant selected by the court for appointment. The individual selected must comply with the financial disclosure requirements pursuant to the Ethics in Government Act of 1978, Pub. L. No. 95-521, 90 Stat. 1824 (1978) (codified at 5 U.S.C. app. 4 §§ 101-111) as implemented by the Judicial Conference of the United States. An affirmative effort will be made to give due consideration to all qualified candidates without regard to race, color, age (40 and over), gender, religion, national origin, or disability. The current annual salary of the position is $199,088. The term of office is eight years.

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Application packets should include: one original completed and signed application, a cover letter, and resume. Applications are to be marked "CONFIDENTIAL" and submitted only by the applicant personally to the address below and must be received by **4:30 p.m. (ET) on Friday, October 16, 2020**.

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In addition, **also by 4:30 p.m. (ET) on Friday, October 16, 2020, an electronic version of the application, cover letter, and resume must be sent to MagJudgeApp@insd.uscourts.gov.**

Questions regarding the position can be referred to Roger A. G. Sharpe, Clerk of Court, at MagJudgeApp@insd.uscourts.gov or 317-229-3700.

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