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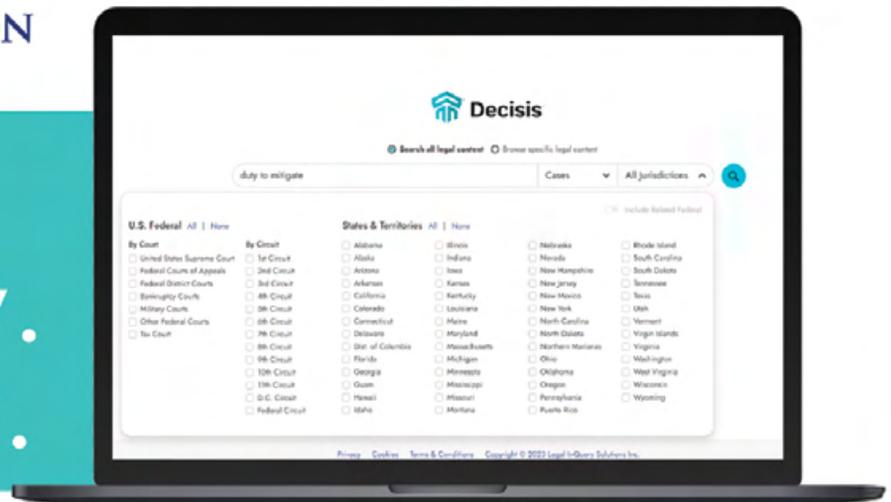
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12 SPEEDY TRIAL RIGHTS

Litigating Speedy Trial Rights in Indiana
By Christopher Keleher

CONTENTS

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20 LEVELING THE PLAYING FIELD

Leveling the Playing Field: Litigation Strategy and Business Consulting for Solo and Small Firms

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DEPARTMENTS



7 PRESIDENT'S PERSPECTIVE

28 ETHICS

10 ISBA UPDATE

34 CIVIL LAW UPDATES

24 CRIMINAL JUSTICE NOTES

38 MARKETPLACE

CONTENTS

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President's Perspective

THE PERFECT BLEND OF PROFESSIONAL DEVELOPMENT AND CULTURAL IMMERSION: THIS YEAR'S ISBA CLE ABROAD IN PORTUGAL

By Michael Jasaitis

PRESIDENT'S PERSPECTIVE

As my flight touched down following eight unforgettable days in Portugal, I found myself already missing the cobblestone streets of Lisbon, the rolling hills of the Douro Valley, and the passionate discussions about our respective legal systems that defined our recent ISBA CLE Abroad trip.

I had the privilege of joining ISBA colleagues (our group totaled 30) for a journey that transcended typical continuing legal education. Together, we explored Portugal's rich history and legal landscape while developing lasting professional connections. The carefully crafted itinerary balanced substantive legal education with authentic cultural experiences that could never be replicated in a conventional conference room.

Our adventure began in Lisbon at the charming Hotel Lisboa Plaza, a Portuguese-owned establishment that immediately immersed us in the country's distinctive

architectural style and hospitality. On our first afternoon, we gained valuable insights into Portugal's economic development and social challenges during a meeting with Paulo Lopes, CEO of Casaiberia, and Richard Clingen of The

Portugal News. This discussion provided crucial context for understanding the nation's legal framework, particularly regarding foreign investment and property rights.

The educational components were thoughtfully integrated throughout our journey. At the Campus of Justice, for example, we examined the Portuguese legal system through comparative analysis with American

jurisprudence. Little did I know that, unlike in the United States—where jury trials are a core part of both our criminal and civil practices—in Portugal, they are extremely rare and only used in very serious criminal cases upon request by the accused. Our visit to the Directorate-General for Justice Policy offered





"Whether discussing comparative legal war stories over dinner at Graham's Port Lodge or debating international business regulations during our lunch with Economic Unit Chief Anna Margolis from the U.S. Embassy, these conversations deepened our professional networks and perspectives."

illuminating perspectives on how Portugal approaches alternative dispute resolution and separation of powers—concepts that challenge us to reflect on our own legal traditions. During a panel discussion with leading practitioners Marta Sampaio Pinto and Diana Nunes, we explored gender equity in the legal profession and regulation of law practice, discovering both shared challenges and different approaches.

Particularly moving was our meeting with the Portuguese Association for Victim Support, where we discussed domestic

violence prevention and victim advocacy, a real reminder of our universal duty as legal professionals to protect vulnerable populations, regardless of jurisdiction. The presentation from the Portuguese Trade & Investment Agency complemented this by highlighting how business law intersects with social responsibility in Portugal's economy.

While the legal education was exceptional, perhaps equally valuable were the cultural experiences that deepened our understanding of Portugal's

societal context. Walking tours of Lisbon's historic Baixa and Chiado neighborhoods established a sense of place. We learned that Lisbon's Baixa district was completely rebuilt after the catastrophic 1755 earthquake and tsunami that destroyed 85% of the city. This reconstruction created one of the world's first examples of earthquake-resistant architecture and grid-pattern urban planning. Our sommelier-led wine masterclass at Palácio Chiado and the traditional Fado music performance in Alfama connected us to the soul of Portuguese culture.

The journey to Porto via the medieval town of Óbidos and coastal Nazaré showcased Portugal's geographical diversity and historical depth. In Óbidos, we sampled the delicious cherry liqueur Ginja served in chocolate cups, a local tradition dating back centuries. In nearby Nazaré, we learned that this small fishing village is home to some of the largest waves in the world, with a record-breaking 86-foot wave surfed there in 2020. Our visit to the breathtaking Douro Valley, where we toured Quinta do Vallado vineyard and cruised the river on a traditional rabelo boat, demonstrated the agricultural foundations of Portugal's economy and trade relationships.

A particular highlight in Porto was attending an FC Porto soccer match, where we witnessed the extraordinary passion of an entire city rallying behind their team. This came just one week after the death of Jorge Nuno Pinto da Costa, the most decorated president in Portuguese sporting history. The atmosphere was electric with enthusiastic chants echoing throughout the stadium, celebratory fireworks illuminating the night



"Seeing how another democracy structures its justice system, approaches legal education, and balances tradition with innovation inevitably sharpens our understanding of our own practice."

sky, and massive banners spanning across the stands. This cultural experience provided a window into the Portuguese spirit and sense of community that simply cannot be understood from textbooks.

Professor José Miguel Sardica's insights on Portugal's role in the European Union provided critical context for understanding how international treaties shape Portugal's modern legal environment.

Among the most profound experiences was our time at the University of Coimbra, where the

magnificent Biblioteca Joanina reminded us of the enduring importance of knowledge preservation in the legal profession. This 300-year-old library harbors a colony of tiny bats that emerge at night to eat insects that would otherwise damage the ancient books. Our visit to Sintra's fairy-tale-like Pena Palace illustrated how governance and cultural expression have intertwined throughout Portuguese history.

What made this journey truly exceptional, however, was the camaraderie developed among our group of ISBA members and guests.

Whether discussing comparative legal war stories over dinner at Graham's Port Lodge or debating international business regulations during our lunch with Economic Unit Chief Anna Margolis from the U.S. Embassy, these conversations deepened our professional networks and perspectives. The four dedicated staff members from CLE Abroad ensured seamless logistics, allowing us to focus entirely on learning and connection.

As I reflect on this experience, I am convinced of the invaluable professional growth that comes from stepping outside our familiar legal environment. Seeing how another democracy structures its justice system, approaches legal education, and balances tradition with innovation inevitably sharpens our understanding of our own practice.

I strongly encourage each of you to consider participating in future ISBA international CLE programs. These opportunities represent far more than conventional credits for continuing legal education, they are investments in professional perspective, cultural competence, and global connections that enrich both your practice and personal development. Watch for announcements of upcoming opportunities in ISBA communications.

My sincere gratitude goes to our traveling companions who made this journey so meaningful, the CLE Abroad team for their impeccable planning, and the Portuguese legal professionals who generously shared their knowledge and time with us. Obrigada (thank you) and Até a próxima vez (Until next time). ☺

By Res Gestae Editor



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LITIGATING SPEEDY TRIAL RIGHTS IN INDIANA



By Christopher Keleher

“Glacial” is one way to describe the pace of the American legal system. Although attorneys are hardened to this reality, for non-lawyers bound by litigation, such slowness can be dire. Civil litigants, such as a small business owner or personal injury victim, are rightly frustrated when their lives are upended and years pass stuck in legal limbo. However, the stakes are higher in the criminal realm. The inconvenience for defendants sitting in jail while awaiting trial can become an injustice, implicating the federal and Indiana constitutional rights to a speedy trial.

Still, there are dangers in rushing to judgment. Ensuring evidence is properly collected, witness testimony is secured, and cogent legal arguments are conveyed are things that do not happen overnight. Thorough representation from the bar, along with a bench that adequately evaluates the litigants’ contentions, takes time. But as continuances pile up, the weeks turn into months, and the months become years, the virtues of completeness and contemplation fade, especially for criminal defendants. The disconnect between counsel and client is stark in the speedy trial context. As the detainee endures harsh correctional confines, counsel struggles to balance a heavy caseload and multitude of deadlines. A combination of forces—crowded dockets, harried government lawyers, strategy, and scheduling fortuities—conspire against the accused, who, languishing in jail, can become an afterthought.

Curbing such inequity is the right to a speedy trial, enshrined in the United States and Indiana Constitutions. These protections have inspired statutory counterparts, the federal Speedy Trial Act, 18 U.S.C. § 3161, and Indiana Criminal Rule 4. This article explores the speedy trial guarantee and how federal and Indiana courts enforce it. Understanding this right and how it effectuates the efficient administration of justice is crucial as pretrial incarceration is a severe deprivation of liberty.

THE UNITED STATES CONSTITUTION

The Sixth Amendment to the United States Constitution bestows multiple protections on the criminally accused. The speedy trial guarantee is the first right in the Sixth Amendment: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial ...”¹ Placement aside, the interests fostered by this protection



"A combination of forces—crowded dockets, harried government lawyers, strategy, and scheduling fortuities—conspire against the accused, who, languishing in jail, can become an afterthought."

are vital. While other aspects of the Sixth Amendment address the process by which a defendant is tried, the speedy trial right ensures a trial occurs.

The significance of this right is reflected by the gravity of its remedy, dismissal of the indictment with prejudice.² The Sixth Amendment limits the time during which prosecutors can allow criminal charges to loom over the accused.³ Postponements also hurt a jailed defendant as extended incarceration is incompatible with the presumption of innocence. Delays can gut a defendant's

defense when: (1) witnesses die, leave the jurisdiction, or become impeachable; (2) memories fade; or (3) exonerating evidence is lost or destroyed. A speedy trial alleviates these concerns by prohibiting "prolonged detention without trial" and unreasonable "delay in trial."⁴

Further, this right transcends the defendant as societal interests favor efficiency.⁵ Lengthy delays sow chaos by burdening jails and enabling recidivists on bail to reoffend. They strain public and private resources by taxing the legal system.⁶ Crime victims, witnesses, and the community also suffer.

Evidence deterioration can equally impact the prosecution and, coupled with postponements, may erode the prosecutor's trial motivations. A robust right to a speedy trial thus promotes order, efficiency, and economy. It also thwarts tyranny. In extreme instances an exceedingly long wait can constitute indefinite incarceration without trial. The speedy trial protection secures a defendant's day in court, and sooner rather than later.

THE INDIANA CONSTITUTION

The Fourteenth Amendment to the United States Constitution enforces the speedy trial right against the

states.⁷ Still, Article 1, Section 12 of the Indiana Constitution provides that “[j]ustice shall be administered ... speedily, and without delay.”⁸ Despite the federal and state constitutional similarities, the Indiana Supreme Court suggests the Indiana Constitution is more expansive as it may not require defendants to raise a speedy trial right before asserting a violation. In other words, a defendant’s speedy trial demand under the Indiana Constitution “is effectively made for him.”⁹

INDIANA CRIMINAL RULE 4

State court defendants can also rely on Indiana Criminal Rule 4, which seeks “to provide functionality” to the constitutional speedy trial right.¹⁰ Rule 4(A) mandates that for detained defendants, a trial must begin 180 days from the date the criminal charge is filed, or the arrest, whichever is later.¹¹ Rule 4(B) goes a step further by permitting detained defendants to pursue an early trial. When such a motion is filed the trial must begin 70 days from the filing date.¹² Dismissing and refileing the same charges do not reset the Rule 4(B) clock.¹³ As for non-detained defendants, Rule 4(C) requires a trial to begin one year from the later of the filing of charges or the arrest.¹⁴

To prevail on a Rule 4 challenge, defendants must establish they were not brought to trial within the requisite timeframe and that any delay was not attributable to their conduct, docket congestion, or emergency.¹⁵ Such an outcome occurred in *Bradley v. State*, where the failure to discharge a defendant after the expiration of his Rule 4(B) 70-day period caused the Court of Appeals to vacate his convictions.¹⁶ Instructive in the Rule 4(C) context is *Wellman v. State*.¹⁷ Although the *Wellman* defendant filed multiple continuances, they were due to the

state’s failure to produce evidence and were thus not attributable to him. Since the state failed to bring the defendant to trial within the one-year deadline of Rule 4(C), the Court of Appeals ordered the defendant’s discharge.¹⁸

Rule 4 was amended effective January 1, 2024. The new speedy trial provisions echo their predecessors, but with different wording for ease of application. Rule 4.1 also clarifies the computation of time. To streamline Rule 4 calculations, trial courts beginning in 2024 must designate whether a continuance is excluded from the Rule 4 time period “due to the act of the defendant, court congestion, or emergency.”¹⁹

Finally, since Rule 4 does not mirror its broader constitutional counterparts, its invocation is distinct from a constitutional claim.²⁰ This is important in the habeas corpus context as federal courts will dismiss petitions if a petitioner did not alert the Indiana Supreme Court to a federal constitutional issue.²¹

THE SPEEDY TRIAL ANALYSIS

Given the amorphous nature of case management, the constitutional right to a speedy trial is conceptually more vague than other procedural protections. This guarantee is enforced differently because it is an individual and societal right as well as acutely fact sensitive. Uncertainty thus abounds. Indeed, the seminal United States Supreme Court case on the issue, *Barker v. Wingo*, acknowledges this right is “necessarily relative” as well as “slippery.”²² The *Barker* court thus devised a four-factor balancing test for a speedy trial claim: (1) the length of delay; (2) the reason for delay; (3) whether

the right was raised; and (4) the prejudice to the defendant.²³ Indiana courts use the federal *Barker* factors when construing a state constitutional claim.²⁴ But these factors, particularly the defendant’s invocation of the right, may not reflect the variance between the Sixth Amendment and Article 1, Section 12 of the Indiana Constitution. Again, the latter states, “[j]ustice shall be administered ... speedily, and without delay.”²⁵ This wording prompted the Indiana Supreme Court in *Watson v. State* to observe that for a state speedy trial claim “an analysis distinct from *Barker* may be more suitable.”²⁶

THE LENGTH OF DELAY

The *Watson* deviation notwithstanding, the first *Barker* component—time spent bringing an accused to trial—triggers the *Barker* balancing inquiry. The clock starts with the defendant’s arrest and ticks until trial.²⁷ The wait between arrest and trial becomes presumptively prejudicial and thus implicates *Barker* when it approaches one year.²⁸ If the defendant establishes the time elapsed exceeds the minimum required for a full inquiry, the court then considers “the extent to which the delay stretches beyond the bare minimum.”²⁹ The case’s complexity is the touchstone: “the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.”³⁰ Citing cases with comparatively longer waits proves little as there are instances where short intervals such as eight or nine months can demonstrate prejudice.³¹ A compare-and-contrast approach also elevates form over substance. Numbers tell only part of the story, and the time lapse courts deem prejudicial turns on “the peculiar circumstances of the case.”³²

"This wording prompted the Indiana Supreme Court in *Watson v. State* to observe that for a state speedy trial claim 'an analysis distinct from *Barker* may be more suitable.'"

THE REASON FOR DELAY

For the second *Barker* factor, the cause of the postponement, courts analyze the prosecution's explanation for the delay. Deliberate stalling to stymie the defense is weighed most heavily against the prosecution.³³ Neutral causes, such as crowded calendars or prosecutorial negligence, are counted against the prosecution, but less so.³⁴ Time spent locating a witness or answering pretrial defense motions are more justified and may be excluded.³⁵ Finally, continuances acquiesced to or requested by defense counsel may not apply if the defendant is kept in the dark, so as to not punish defendant for counsel's maneuvers.³⁶

The second *Barker* element proved pivotal in *Logan v. State*, where the Indiana Supreme Court vacated a child molestation conviction because the defendant waited 1,291 days for trial.³⁷ The *Logan* court found the second element favored the defendant because a congested court calendar "must be viewed as the responsibility of the government and an impediment to a defendant's constitutional right to a speedy trial."³⁸ *Logan* echoed *Barker*, which counted a busy docket against the prosecution since it bears the ultimate responsibility for such circumstances.³⁹

Documenting the delays can be as important as the reasons for them. That is the lesson of *Grimes v. State*, where the defendant requested an early trial.⁴⁰ Two weeks before the scheduled trial, the court entered

a continuance which pushed the date past the 70-day early trial deadline. The court curtly cited "Court congestion" as the basis.⁴¹ After the 70-day period expired, the defendant moved for discharge, highlighting a printout showing the court's calendar for the week of his original jury trial had no trials with priority over his case.⁴² Yet the discharge motion was denied, without elaboration on the congestion. The defendant argued on appeal that he had established a *prima facie* showing that the congestion finding was inaccurate, and the trial court failed to satisfy its burden of proof by justifying the delay.⁴³ The Indiana Supreme Court considered whether the trial court's arid explanation was enough. It applied a burden-shifting framework, first finding that the defendant's submission of the court docket established a *prima facie* case that the trial court's congestion finding was erroneous.⁴⁴ The trial court's subsequent failure to provide any explanation meant it failed to rebut the defendant's claim. The Supreme Court advised this problem could be avoided by issuing a congestion order which enumerates the conflicting cases scheduled for trial.⁴⁵ Ultimately, *Grimes* highlights the importance of documentation and transparency in continuance rulings, while reinforcing the speedy trial guarantee.

INVOKING THE SPEEDY TRIAL RIGHT

The third *Barker* factor involves whether the defendant raised the speedy trial right. Like other constitutional protections, courts

employ a use it or lose it approach. A defendant's demand for expediency is given "strong" evidentiary weight.⁴⁶ And while a defendant must maintain the right, courts do not insist on a *pro forma* invocation. More important is "the frequency and force" of the assertion.⁴⁷ The inquiry is fluid—whether the prosecution and court were notified of the defendant's objection.⁴⁸ Underlying this point is that a defendant "has no duty to bring himself to trial."⁴⁹

The analysis gets murkier when the paths of defense lawyer and client diverge. Due to their different perspectives, conflict on continuances is inevitable. Some courts thus absolve a defendant for counsel's conduct as they construe situations where the defendant knowingly fails to object differently from those where counsel agrees to extensions without notifying the defendant.⁵⁰ But a recent Seventh Circuit decision shows this approach is not uniform. In the habeas corpus case of *Lewicki v. Emerson*, the defendant wrote several letters to the court seeking a speedy trial while his lawyer obtained continuances.⁵¹ The Seventh Circuit found the state court could disregard submissions from a represented litigant and therefore this *Barker* factor did not favor the defendant. This, despite *Barker* instructing an affirmation of the speedy trial right deserves "strong evidentiary weight."⁵²

Lewicki contrasts with the Indiana Supreme Court's approach to

a pro se challenge in *Watson v. State*.⁵³ The *Watson* defendant was represented when he wrote to the court protesting the delays.⁵⁴ Although the trial court was not required to respond, the letters placed the prosecution on notice, especially given their “frequency and force.”⁵⁵ Similarly, the Indiana Supreme Court in *Logan* found the defendant’s seven requests to be released on bail heavily favored him.⁵⁶ The defendant’s own invocation, regardless of counsel’s actions, is the operative consideration, at least in Indiana courts. Pro se objections intuitively should hold some sway, otherwise defendants become voiceless pawns.

As a final nuance, the *Watson* dicta—that a speedy trial challenge under the Indiana Constitution can be pursued despite not preserving it—would effectively remove the third *Barker* element, although no case has yet adopted this view. The plain language of Article 1, Section 12 presents a compelling case that state court defendants should be absolved from establishing the speedy trial right was invoked, increasing the viability of a speedy trial challenge. Formally breaking from *Barker* on the third element would represent an important shift, and one that better adheres to the Indiana Constitution. Leaving state court defendants with only three elements to prove, it behooves defense counsel to seize on *Watson*’s suggestion.

THE PREJUDICE FROM DELAY

The last *Barker* factor is prejudice. The catalyst for this element is that of the speedy trial right itself, minimizing fallout from oppressive pretrial incarceration.⁵⁷ A detainee jailed for a long interval is hindered in gathering evidence and securing witnesses.⁵⁸ But prejudice



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transcends trial preparation: “arrest is a public act that may seriously interfere with the defendant’s liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources ... and create anxiety.”⁵⁹ The ordeal of arrest is thus the prejudice.

A defendant experiencing pretrial incarceration and its host of harms is undeniably prejudiced. Given

such intangibles, courts typically do not require defendants to prove actual prejudice. The Supreme Court notes that excessive postponement undermines a trial’s reliability “in ways that neither party can prove or, for that matter, identify.”⁶⁰ Thus, the position that no prejudice stems from prolonged detention defies Supreme Court precedent, including *Barker*. Another example is *United States v. Marion* which held that “the major evils protected against



"Clearly conveying the realities of scheduling, caseloads, and strategy to defendants will put the speedy trial issue in focus and perhaps bridge the gap between lawyer and client."

by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense."⁶¹ Nor should a defendant be penalized for the inability to argue evidence was lost or destroyed during the wait. Though *Watson's* delay had an imperceptible impact on evidence, the Indiana Supreme Court was not concerned because "it is well settled" that a showing of prejudice is not required.⁶² This aligns with the speedy trial's aim to reduce pre-trial incarceration, not eliminate prejudice, which is the domain of the Due Process Clause.⁶³ The prejudice prong is thus a misnomer as prejudice need not be proved per se, but rather hinges on the length of the delay.

THE SPEEDY TRIAL RIGHT IN PRACTICE

Pressing the speedy trial argument is ultimately defense counsel's call.

This pursuit will depend on the case. The speedy trial issue does not exist in a vacuum, and when litigation realities are factored in, a fixation on expediency may need to be tempered. As both sides of the criminal bar are repeat players, goodwill and professional courtesy are essential. Defense lawyers who insist on fast tracking cases will draw the ire of prosecutors, possibly jeopardizing favorable plea terms or more lenient pretrial protocols, whether in the underlying matter or future cases. A defendant could thus secure a quicker trial but sabotage efforts on other fronts. Yet placating prosecutors may mean little to defendants stewing in jail. Clearly conveying the realities of scheduling, caseloads, and strategy to defendants will put the speedy trial issue in focus and perhaps bridge the gap between lawyer and client. Still, lawyers' foremost duty is to

their client, not career advancement or future cases.

Justice should be swift but deliberate. Harmonizing such concepts is difficult and there is no panacea, as *Barker* recognizes and its progeny reflects. Couple the fact-driven paradigm with divergent constitutional and statutory provisions, and a patchwork of precedent ensues. Further fueling the unpredictability is the emerging view that the Indiana Constitution may be less demanding than *Barker*.

Case law distinctions aside, reducing the need for speedy trial challenges may prove a more worthwhile aim for the justice system. Litigation can be delayed for various reasons including holdups in evidence disclosures by police and backlogs at investigatory laboratories. Along with law enforcement

inertia, the bench and bar must confront excessive caseloads and insufficient staffing. Such a milieu makes achieving the statutory and constitutional speedy trial objectives formidable.

A proactive judiciary can ease this burden. For example, in matters where a defendant files a Rule 4(B) motion for an early trial, judges should immediately ascertain the status of discovery and disclosures. If incomplete, a hearing should be scheduled in 14 days to ensure no outstanding evidence issues exist. Another hearing at the halfway mark of 35 days should verify all discovery is resolved. While more court calls seem counterintuitive, they should spur everyone—judge, prosecutor, defense lawyer, and defendant—to tie up loose ends and confirm the impending trial date is feasible and desired. Courts should also prioritize matters for those defendants detained the longest. Working with correctional officials to tabulate such information would be easier for the judiciary than individual defendants. Processing such data benefits the entire justice system by minimizing the likelihood of speedy trial challenges and the possibility of vacated convictions.

Prosecutors can also play an important role. Cooperation with defense counsel can lessen the confusion and contention that mire the speedy trial issue. Recognizing that a fast-approaching trial date is equally foreboding for both sides of the bar, collaboration on extensions and other pretrial matters will alleviate the process. The prosecution’s institutional knowledge can also help. Transcending the individual case, such knowledge can forecast congested calendars months out. While dockets are notoriously

fickle, the prosecution will have insight into deciphering how its myriad of cases might influence each other. Ultimately, prosecutors, defense lawyers, and judges can all contribute to ensuring efficiency, and the best way to respect the speedy trial guarantee is to avoid its implication in the first instance.

In sum, a balance between expedient resolution and adequate preparation time is necessary. And while congested dockets, evidence processing, and scheduling concerns can legitimately stall litigation, these obstacles should not foreclose the plight of defendants whittling away their time in pretrial detention. Such scenarios will otherwise prove the adage “justice delayed is justice denied” is not an abstraction. ☯

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ENDNOTES

1. U.S. Const. Amend. VI.
2. *Strunk v. United States*, 412 U.S. 434, 439-40 (1973).
3. *United States v. Clark*, 754 F.3d 401, 405 (7th Cir. 2014).
4. *Klopfer v. North Carolina*, 386 U.S. 213, 224 (1967).
5. *Barker v. Wingo*, 407 U.S. 514, 519 (1972).
6. *Id.* at 519-20.
7. *Klopfer*, 386 U.S. at 223.
8. Ind. Const. Art. 1 § 12.
9. *Zehrlaut v. State*, 230 Ind. 175, 183-84, 102 N.E.2d 203, 207 (1951).
10. *Austin v. State*, 997 N.E.2d 1027, 1037 (Ind. 2013).
11. Ind. Crim. R. 4(A).
12. Ind. Crim. R. 4(B).
13. *Bradley v. State*, 223 N.E.3d 701, 706 (Ind. Ct. App. 2023).
14. Ind. Crim. R. 4(C).
15. *Hoback v. State*, No. 23A-CR-411, 2023 WL 8793245 (Ind. Ct. App. Dec. 20, 2023).
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17. *Wellman v. State*, 210 N.E.3d 811 (Ind. Ct. App. 2023).
18. *Id.* at 817.
19. Ind. Crim. R. 4.1(A)(4).
20. *Blake v. State*, 176 N.E.3d 989, 993 (Ind. Ct. App. 2021).
21. *McGowan v. Miller*, 109 F.3d 1168, 1172-73 (7th Cir. 1997) (holding petitioner did not fairly raise Sixth Amendment claim when pressing an Indiana Criminal Rule 4 contention).
22. *Barker*, 407 U.S. at 522.
23. *Id.* at 530.
24. *Sweeney v. State*, 704 N.E.2d 86, 102 (Ind. 1998).
25. Ind. Const. Art. 1 § 12.
26. *Watson v. State*, 155 N.E.3d 608, 619, n. 2 (Ind. 2020).
27. *United States v. Marion*, 404 U.S. 307, 320 (1971).
28. *Doggett v. United States*, 505 U.S. 647, 651-52 n.1 (1992).
29. *Id.* at 652.
30. *Barker*, 407 U.S. at 531.
31. *See, e.g., United States v. White*, 443 F.3d 582, 589-90 (7th Cir. 2006) (9 months); *United States v. Jordan*, 747 F.2d 1120, 1127 (7th Cir. 1984) (8 months).
32. *Barker*, 407 U.S. at 530-31.
33. *Id.* at 531.
34. *Id.*
35. *Id.*
36. *Id.* at 529.
37. *Logan v. State*, 16 N.E.3d 953, 964-65 (Ind. 2014).
38. *Id.* at 963.
39. *Id.* (quoting *Barker*, 407 U.S. at 531).
40. *Grimes v. State*, 235 N.E.3d 1224 (2024).
41. *Id.* at 1229.
42. *Id.*
43. *Id.* at 1230-31.
44. *Id.*
45. *Id.* at 1235.
46. *Barker*, 407 U.S. at 531-32.
47. *Id.* at 531.
48. *United States v. Loud Hawk*, 474 U.S. 302, 314 (1986).
49. *Barker*, 407 U.S. at 527.
50. *Id.* at 529.
51. *Lewicki v. Emerson*, 103 F.4th 472, 474 (7th Cir. 2024).
52. *Id.*
53. *Watson v. State*, 155 N.E.3d 608 (Ind. 2020).
54. *Id.* at 619.
55. *Id.*
56. *Logan*, 16 N.E.3d at 963.
57. *Barker*, 407 U.S. at 532-33.
58. *Id.*
59. *Marion*, 404 U.S. at 320.
60. *Doggett*, 505 U.S. at 655.
61. *Marion*, 404 U.S. at 320.
62. *Watson*, 155 N.E.3d at 620.
63. *MacDonald*, 456 U.S. at 8.

LEVELING THE PLAYING FIELD: LITIGATION STRATEGY AND BUSINESS CONSULTING FOR SOLO AND SMALL FIRMS

By Jason M. Massaro



One of my favorite quotes is by former President Teddy Roosevelt: “It is not the critic who counts... The credit belongs to the man who is actually in the arena, whose face is marred by dust and sweat and blood; who strives valiantly; who errs, who comes short again and again, because there is no effort without error and shortcoming...”¹ This excerpt from Roosevelt’s speech is known as “The Man in the Arena.” It is an homage to character and fortitude in the face of adversity. It seeks to honor those who put it all on the line, sometimes succeeding, sometimes failing, but always persevering.

IN THE “ARENA”

This is how I view some aspects of the practice of law, especially for those who, for whatever reason, have chosen to either go it alone or venture out with a select few. These are the “solos” and the “small firms,” respectively, of which I became one in approximately 2011 after about 15 years of “firm life.” Solos and small firms are the quintessential example of legal entrepreneurs. They generally share common attributes such as resilience, adaptability, vision, creativity, persistence, and passion. They are likely very good at being resourceful and skilled at problem-solving.

THE INFLUENCE OF FEAR

However, I would wager that, if you were to ask the question and were to receive an honest answer, every single one of them would tell you that they share one primary, guttural, and incessant frailty: fear. Probably the biggest in this long list of “fears” is the fear of failure. The risk of losing one’s reputation and finances. The constant, nagging fear of letting family and friends down,

"I believe that collaboration on matters is always better. It fosters the development of alternate insights and strategies; a fresh, unbiased perspective; objective assessment of strengths and weaknesses; and opportunities that might be overlooked by those 'too close' to the case."

of instability, of making the wrong decisions, and the internal struggles of feeling "not good enough," whatever that may mean. My biggest fear was the fear that, if I did fail, I would not only let my family down but that there would be no other legal options for me. Failure meant, in my mind, that my legal career was over.

These fears both consumed and drove me. I harnessed my creativity and problem-solving qualities. At every turn I leveraged networking, operational efficiency, time management, and, most importantly, rock-solid, trustworthy (and I mean *really* trustworthy) relationships with other lawyers who excelled in their own practices and practice areas. I was solution oriented because I had to be. However, the process was not flawless. I was discounted, taken advantage of, lied to, and did not always enjoy even remotely the degree of reciprocity that I had given.

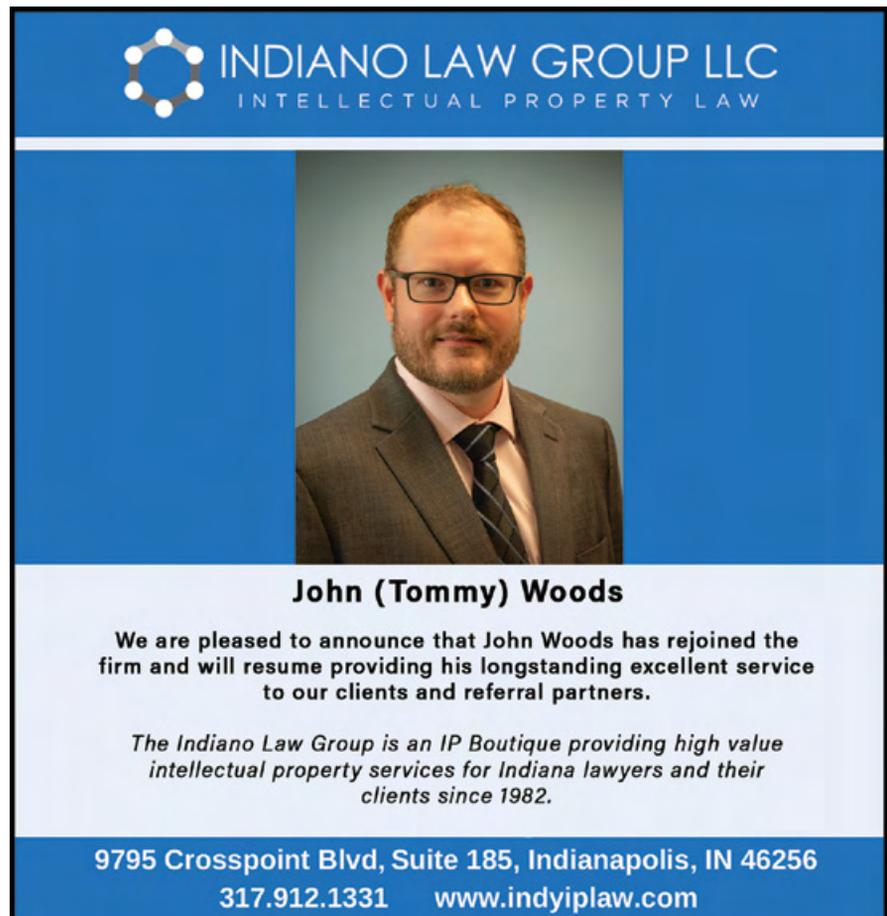
Eventually, I found that the more and more I became known as a trustworthy (and I mean *really* trustworthy) source for other lawyers looking for the same thing, the more my practice fell into place. I experienced a larger clientele, realized greater revenue, and became more confident. Ultimately, I became a "Man in the Arena" with a face marred and scarred by fears, tears, sweat, and blood but, at the end of the day, a practitioner "...who

at the best [knew] in the end the triumph of high achievement, and who at the worst, if he fail[ed], at least fail[ed] while daring greatly, so that his place shall never be with those cold and timid souls who know neither victory nor defeat."²

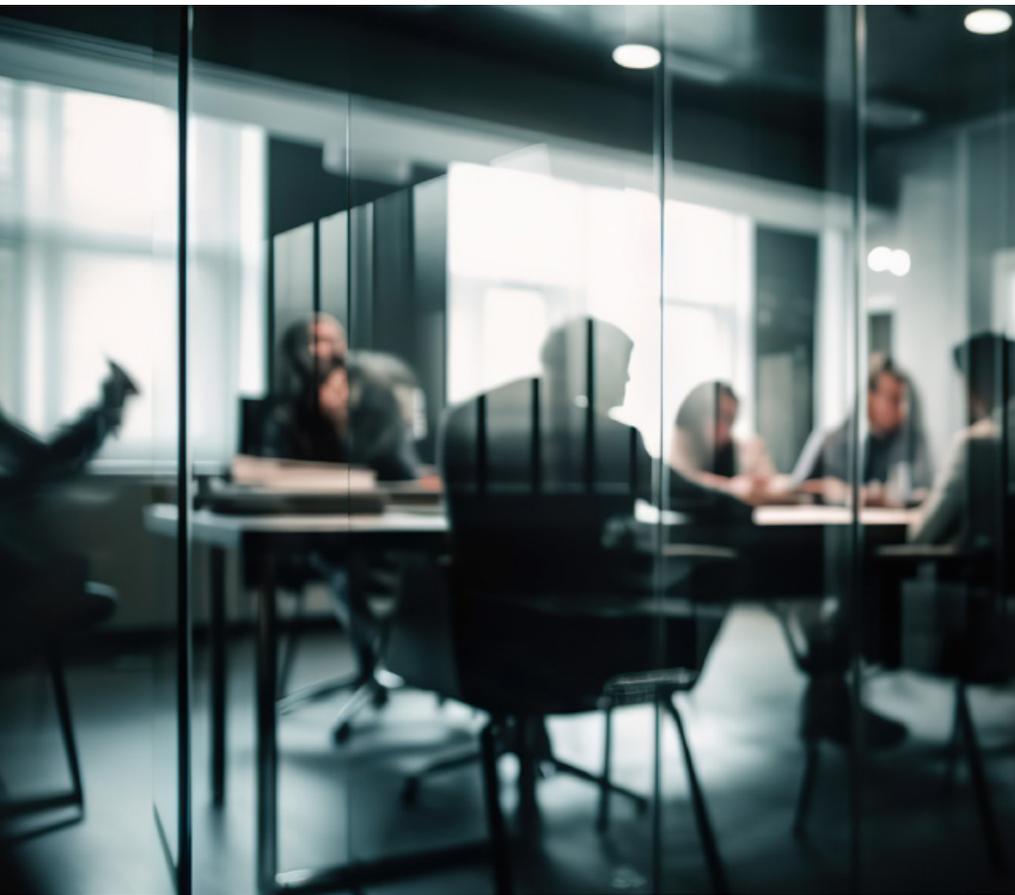
SO, WHERE DO YOU COME IN?

You are likely asking, "What does this have to do with me?" The answer is "everything." And the

audience of this article is not just current solo or small firm attorneys. It is also for anyone who would like to make a change but either hasn't the first clue how to do so or has let insidious fear choose their destiny. It is for those who want to practice in their hometown but may not be able to as their hometown is a legal desert. It is also for those who want to leverage an asset that was simply not available before.



The advertisement for Indiano Law Group LLC features a blue header with the company logo and name. Below the header is a portrait of John (Tommy) Woods, a man with glasses and a beard, wearing a suit and tie. Underneath the portrait, the text reads: "John (Tommy) Woods", "We are pleased to announce that John Woods has rejoined the firm and will resume providing his longstanding excellent service to our clients and referral partners.", and "The Indiano Law Group is an IP Boutique providing high value intellectual property services for Indiana lawyers and their clients since 1982." At the bottom, the address "9795 Crosspoint Blvd, Suite 185, Indianapolis, IN 46256", phone number "317.912.1331", and website "www.indyiplaw.com" are listed.



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well that a lawyer is an advocate and not a witness, and that many cases simply mandate that a client retain and pay for such consulting services. Lawyers also routinely use consultants in other areas such as IT, marketing, insurance advisors, wealth advisors, time management, and billing. As such, it should come as no surprise that lawyers may need to retain a consultant for litigation strategy and/or internal business advice.

This is precisely where The Office Down the Hall (ODH Legal Consulting) becomes an invaluable asset. Remarkably, the existence of this service has evaded the legal community for far too long. No longer do you have to hope for or imagine a resource that can be utilized to assist in a case where one or more aspects make you question your "competency."

The Indiana Rules of Professional Conduct use "competence" as a term of art.³ Notably, the comments to IRPC 1.1 specifically reference that retention of outside counsel may be required to render competent representation:

In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include...whether it is feasible to... associate or consult with, a lawyer of established competence in the field in question...⁴

The Supreme Court has told all Indiana lawyers that you may be professionally required to consult and/or associate with another practitioner who possesses knowledge and skills that you simply do not. ODH Legal Consulting makes that association and consultation eminently "feasible." I believe that collaboration on matters is always better. It fosters the development of alternate insights and strategies; a fresh, unbiased perspective; objective assessment of strengths and weaknesses; and opportunities that might be overlooked by those "too close" to the case.

This also carries over to a firm's business practices, as well. There are so many moving parts to solo and small firms. Objective business consulting is crucial to client

obtainment, retention, satisfaction, and revenue. Ensuring both the implementation and adherence to best business practices is a game changer.

WHAT ODH LEGAL CONSULTING PROVIDES

ODH Legal Consulting can be retained to assist in a wide variety of litigation and business areas. For litigation strategy consulting, ODH Legal Consulting's services can vary from smaller to larger needs. Smaller project-based needs can include case assessment, pleading and discovery formation, and briefing and motion practice assessment and analysis. Larger project-based needs can include overall litigation strategy, case theme development, expert retention, witness identification and preparation, evidence assessment, marshalling, presentation, *voir dire*/ jury selection, opening and closing arguments, in-trial consulting, and post-trial strategy and briefing.

On the business consulting side, ODH Legal Consulting can assist in firm practice analysis, methodology, culture development, and overall business consulting.

ODH Legal Consulting "levels the playing field" by being a resource to not just compete with larger firms and firms in larger demographic areas, but also to obtain and retain clients otherwise thought to be out of reach. Clients that bring about a more well-rounded practice and that can yield consistent and increased revenue. There are few things better than offering quality representation and enjoying an economically fruitful practice. After all, not all of us want to "die at our desks."

ODH Legal Consulting specifically serves those "in the arena"—those who are unafraid to strive, dare, and

risk defeat. As a trusted partner, ODH Legal Consulting empowers Indiana attorneys and law firms to compete at the highest level by being the attorney in "the office down the hall." This was an asset and advantage largely exclusive to larger firms.

For those solos and small firms who want a strategic advantage, the time has come. For those wanting to make a change, welcome to the "arena" with the notable exception that you have a remarkable asset not previously available. Even for those working in legal deserts, ODH Legal Consulting allows you the ability to stay where you are, serve your community, and be more competitive, successful, and formidable. Ⓢ

Jason Massaro is the founder of both The Massaro Legal Group, LLC and The Office Down the Hall. ODH Legal Consulting provides innovative solutions designed to empower Indiana lawyers and law firms with the tools, strategies, and insights they need to succeed in and out of the courtroom. With nearly 30 years of experience, attorney Massaro offers support in litigation strategy, motion practice and discovery, firm business practices, and culture and client retention. He can be reached at jmassaro@odhlegalconsulting.com or www.odhlegalconsulting.com.

ENDNOTES

1. Theodore Roosevelt, *Citizenship in a Republic*, Address at the Sorbonne, Paris, (April 23, 1910).
2. *Id.*
3. See, Rule of Professional Conduct 1.1.
4. See, Rule of Professional Conduct 1.1, Comments 1 and 2.

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By Liz Houdek



JANUARY CASES ADDRESS DUE PROCESS FAIRNESS, CELL PHONE TRACKING, AND RIGHT TO COUNSEL

In January, courts at all levels addressed significant criminal law issues, from the U.S. Supreme Court’s guidance on fundamental fairness at trial to state decisions on digital surveillance and right to counsel protections. The decisions provide important guidance on privacy rights, indigent defendants’ rights, and evidentiary standards. The cases also demonstrate the courts’ ongoing efforts to balance defendants’ rights to present complete defenses with traditional evidentiary restrictions.

U.S. SUPREME COURT REINFORCES DUE PROCESS PROTECTIONS AGAINST PREJUDICIAL EVIDENCE

In *Andrew v. White*, No. 23-6573 (U.S. Jan. 21, 2025), the United States Supreme Court addressed when a principle articulated in prior precedent constitutes “clearly established Federal law” under the Antiterrorism and Effective Death Penalty Act (AEDPA). The case arose after an Oklahoma jury convicted Brenda Andrew of murdering her husband and sentenced her to death following a trial where the state introduced extensive evidence about her sex life and alleged failings as a mother and wife—evidence it later conceded was largely irrelevant.

In its per curiam opinion, the court held that by the time of Andrew’s trial, *Payne v. Tennessee* had clearly established “when evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause provides a mechanism for relief.” The court rejected the Tenth Circuit’s view that this language was merely a “pronouncement” rather than a holding, explaining that when the court relies on

a legal rule to decide a case, that principle becomes a holding for AEDPA purposes. The majority emphasized that “general principles can constitute clearly established law” if they are holdings, even if the court hasn’t previously applied them to invalidate a conviction based on prejudicial evidence.

Justice Alito concurred in the judgment, agreeing that case law establishes due process rights can be violated when properly admitted evidence is “overwhelmed by a flood of irrelevant and highly prejudicial evidence.” Justice Thomas, joined by Justice Gorsuch, dissented, arguing the majority improperly elevated a single sentence of dicta to the status of clearly established law.

The decision provides important guidance on the scope of due process protections against unduly prejudicial evidence, while emphasizing that courts must separately analyze prejudice at both the guilt and sentencing phases of capital trials.

INDIANA COURT OF APPEALS

WARRANTLESS CELL PHONE TRACKING AND THE EVOLUTION OF DIGITAL PRIVACY RIGHTS

In *Brooks v. State*, No. 23A-CR-2602 (Ind. Ct. App. 2025), the Court of Appeals addressed an important question left open by the U.S. Supreme Court’s decision in *Carpenter v. United States*, 585 U.S. 296 (2018): whether real-time cell phone tracking requires a warrant absent exigent circumstances. While *Carpenter* established that accessing historical cell-site location information constitutes a Fourth Amendment search requiring a warrant, it expressly declined to address real-time tracking.

The court took the significant step of extending *Carpenter*’s privacy protections to real-time tracking, finding “no logical reason” to treat real-time location data differently given the same fundamental privacy concerns about detailed tracking of physical movements. This holding aligns with the U.S. Supreme Court’s broader trajectory of modernizing Fourth Amendment doctrine for the digital age, from *United States v. Jones*, 132 S.Ct. 945 (2012) (GPS tracking) to *Riley v. California*, 134 S.Ct. 2473 (2014) (cell phone searches incident to arrest).

However, the court balanced these privacy interests against well-established emergency exceptions to the warrant requirement. Finding exigent circumstances justified the warrantless “ping” of the defendant’s phone when a 13-year-old disappeared, the court analyzed this conclusion under three frameworks:

- Indiana Code § 35-33-5-12(a)’s “exigent circumstances” requirement for cell phone tracking.
- The Fourth Amendment’s warrant requirement and emergency exception outlined in cases like *Brigham City v. Stuart*, 547 U.S. 398 (2006).
- Article 1, Section 11 of the Indiana Constitution’s unique reasonableness test from *Litchfield v. State*, 824 N.E.2d 356, 361 (Ind. 2005).

The court’s three-part analysis demonstrates how digital privacy rights must be balanced against traditional law enforcement needs, particularly in emergencies. Under Indiana’s constitutional analysis, the court weighed a moderate degree of suspicion that the phone was connected to the disappearance and a moderate privacy intrusion from the location tracking (acknowledging *Carpenter*’s recognition of the sensitive nature of location data) against an extremely high law enforcement need to find the missing teen quickly.

Importantly, while finding the warrantless tracking was reasonable in this emergency context, the Court of Appeals’ extension of *Carpenter* to real-time tracking means law enforcement will generally need a warrant for such surveillance absent exigent circumstances. This continues the trend of courts adapting Fourth Amendment doctrine to protect privacy rights in an era of increasingly sophisticated digital surveillance capabilities.

RIGHT TO COUNSEL FOR INDIGENT DEFENDANTS

In *Smith v. State*, No. 24A-CR-548 (Ind. Ct. App. 2025), the Court of Appeals addressed whether an indigent defendant’s right to counsel is violated when a trial court requires the defendant to choose between self-representation or continued representation by an attorney the defendant believes has undermined his claim of innocence. The defendant sought new appointed counsel after his attorney allegedly made comments to a jail officer suggesting the defendant would not “be doing too good” after trial.

The court distinguished the case from *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018), where the U.S. Supreme Court found structural error when counsel explicitly conceded guilt against the defendant’s wishes. Unlike *McCoy*, the attorney’s comment was not made to a jury, was ambiguous, and was not part of a deliberate trial strategy. The court reaffirmed that while indigent defendants have a right to counsel, they do not have an absolute right to counsel of their choosing.



Notably, the court also rejected the argument that Article 1, Section 13 of the Indiana Constitution requires appointment of new counsel based on a defendant’s “sincere belief” that their attorney undermined their innocence claim. While acknowledging that Indiana’s constitutional protections can be broader than federal ones, the court found no support for such a subjective standard that “would effectively provide indigent criminal defendants with an absolute right to replace counsel.”

POLYGRAPH EVIDENCE ADMISSIBILITY EXPANDED

In *Graff v. State*, No. 23A-CR-2546 (Ind. Ct. App. 2025), the Court of Appeals addressed whether excluding all evidence of a polygraph examination that preceded a confession violated the defendant’s right to present a defense. While reaffirming that polygraph results themselves remain inadmissible without stipulation, the court held that defendants must be allowed to present

evidence about the circumstances of a polygraph examination when it bears on the credibility of a subsequent confession.

Citing the U.S. Supreme Court’s decision in *Crane v. Kentucky*, 476 U.S. 683 (1986), the court reasoned that evidence about “the physical and psychological environment” surrounding a confession is crucial for jurors to evaluate its reliability. The court found that preventing the defendant from presenting any evidence about a polygraph examination conducted minutes before his confession, in the same room and with the same officer, would improperly restrict his ability to challenge the confession’s credibility.

The decision also relied on Indiana Evidence Rule 106, which allows an adverse party to require the introduction of other parts of a statement that “in fairness ought to be considered at the same time.” While leaving the exact parameters to be determined

on remand, the court emphasized that such evidence should be admitted for the limited purpose of providing context about the circumstances of the confession.

SELF-DEFENSE BURDEN-SHIFTING CLARIFIED

In *Cutler v. State*, No. 24A-CR-1458 (Ind. Ct. App. 2025), the Court of Appeals addressed whether a trial court's comments during closing argument suggested an improper burden-shifting in a self-defense case. During a golf outing, a dispute over shattered glass panels that Cutler had installed escalated into a physical altercation in the parking lot. Cutler claimed he acted in self-defense when he punched another golfer then pulled the victim's jacket over his head and continued striking him.

During closing arguments, when defense counsel stated that "once [Cutler] raises self-defense, the burden shifts back to [the State]," the trial court remarked "Uh-huh. If you've proven it." The Court of Appeals found this comment, while "imprecise," did not establish that the trial court misapplied the burden of proof and affirmed Cutler's conviction. The court distinguished the case from *Justice v. State*, 237 N.E.3d 1154 (Ind. Ct. App. 2024), where reversal was warranted when the trial court explicitly stated in its ruling that it "do[es] not find that the Defendant met the burden to—for self-defense."

The opinion reaffirms that a defendant claiming self-defense must first satisfy an initial burden of production to place self-defense at issue. Once met, the state bears the burden of negating at least one element beyond a reasonable doubt. For non-deadly force cases, the



defendant need only show evidence that he was protecting himself from what he reasonably believed to be imminent unlawful force. ☹

Liz Houdek is a research attorney for the Indiana Public Defender Council. The IPDC is a state agency that trains, supports, and advocates for public defenders across the state to ensure their clients receive the highest quality defense. The agency provides direct research and litigation support to attorneys as well as an extensive library of manuals and other resources to support their practice. The IPDC provides hundreds of hours of CLE training each year, focusing on the needs of indigent defenders representing criminal, juvenile, and child welfare clients.

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**By Meg Christensen and
Katie Jackson**



GENERATIVE AI AND ATTORNEY ETHICS: A CONVERSATION FOR INDIANA ATTORNEYS

In today's rapidly evolving legal landscape, generative artificial intelligence (GAI) tools are reshaping the way attorneys draft and review documents, organize and respond to communications, conduct research, and interact with clients.

Using artificial intelligence in the practice of law is nothing new. For example, any lawyer who has used a search engine or electronic research database has benefited from AI culling results to offer the most relevant results at the top of the page. When asked whether they have used AI in their practices, many lawyers will vigorously shake their heads and say, "Never!" Perhaps these lawyers do not use tools such as Gmail or Microsoft Outlook, both of which generate proposed responses to emails to improve efficiency in communicating. Or perhaps these lawyers do not realize that when Outlook prompts them to respond, "Thanks, you too," that proposed response is AI-generated.

There's nothing inherently wrong with using GAI tools, so long as practitioners uphold their professional obligations to clients, courts, and third parties. While the Indiana Bar has not yet issued any advisory opinions on GAI, several other jurisdictions, including California¹ and New York,² as well as the American Bar Association (ABA),³ have begun addressing these issues. Bar opinions and commentators warn lawyers to safeguard their duties of competence, confidentiality, candor to courts, loyalty to clients, and fairness to third parties when using GAI.

"There's nothing inherently wrong with using GAI tools, so long as practitioners uphold their professional obligations to clients, courts, and third parties."

Substantive Competence: Readers are no doubt aware of hapless lawyers who relied too heavily on generative AI bots to prepare legal briefs and filed them without reviewing the work product.⁴ Before any lawyer signs their name to a pleading, they must take responsibility for the content, including the factual assertions and legal arguments.⁵ While it could be acceptable to ask a GAI tool to prepare a first draft of a document, the lawyer signing the document must check the work and be satisfied that it is accurate, thorough, and compliant with the attorney's professional obligations. (This is no different than an attorney's obligation when signing or filing work prepared by co-counsel, law clerks, and paralegals.)

Technological Competence: In addition to providing competent legal analysis and understanding of facts and issues, lawyers must "keep abreast of changes in the law and its practice, including the benefits and risks associated with the technology relevant to the lawyer's practice."⁶ Thus, before using any form of AI in the practice of law, lawyers must understand how the tool will maintain information and whether the GAI product is reliable. (It's worth repeating that regardless of the indications of reliability, lawyers must review and adopt any GAI work product before taking responsibility for it.)

Confidentiality: GAI engines typically generate their output by drawing from publicly available

data and user-provided inputs. Lawyers must not disclose confidential client information to a GAI engine without assurance that the engine will not disclose the information to another user. (This assurance could be obtained, for example, through a contract with a paid AI software service.)

Client Control: Indiana lawyers "shall abide by a client's decisions concerning the objectives of representation and ... shall consult with the client as to the means by which they are to be pursued."⁷ Some clients might prohibit their attorneys from using any AI tools in their representation, while others may encourage or even require it, as a means of reducing cost. Either way, lawyers must understand the risks and benefits of the technology and explain it to their clients. And, in the case of clients who broadly prohibit the use of AI during representation, it is worth clarifying the definition of "AI" and ensuring that the clients do not prohibit the use of common search engines, legal databases, and email programs.

Candor, Loyalty, and Fairness: Lawyers using AI (generative or predictive) cannot ethically represent that they performed the work themselves. Vis-à-vis clients, this means that a lawyer cannot bill for the time it would have taken them to prepare something an AI tool prepared; the lawyer can bill for the time preparing the prompt and then revising and continuing to draft the AI-generated draft. As for courts and third parties, a lawyer

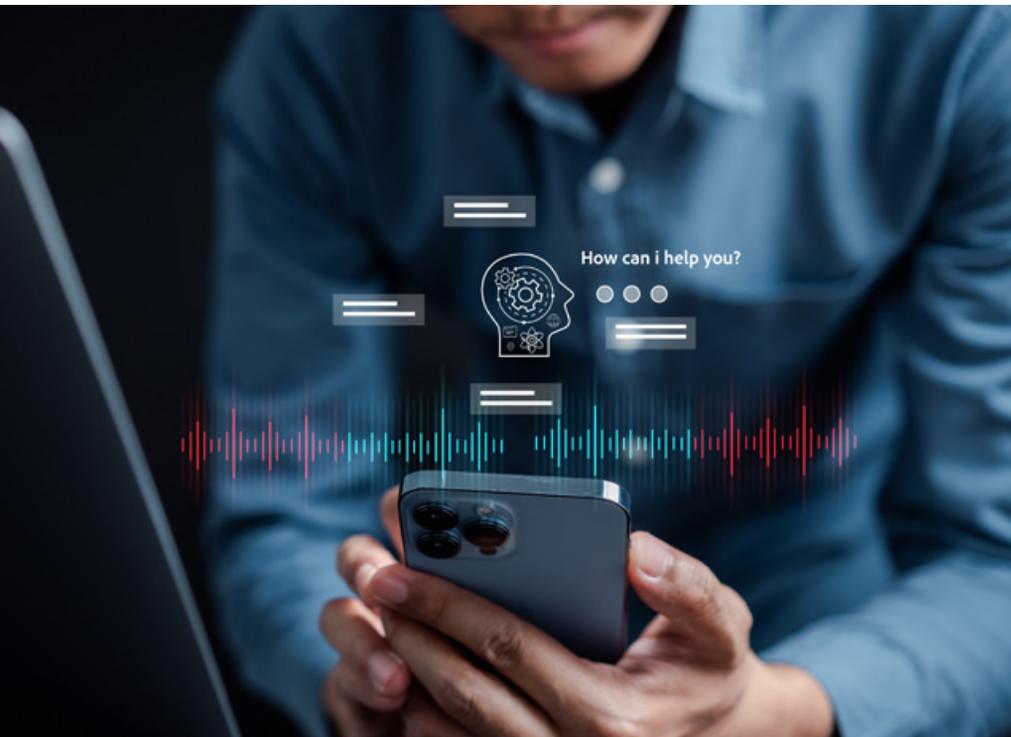
cannot represent that he or she performed tasks that AI performed. For instance, a lawyer cannot represent that they personally reviewed all potentially responsive documents in a production set if they used a predictive AI tool to facilitate efficient review.

To have a little fun, the authors of this article engaged in a conversation with ChatGPT to explore these issues and offer guidance tailored to Indiana attorneys. To be clear, the authors of this article did not provide confidential information to ChatGPT, and reviewed ChatGPT's sources and conclusions before passing this information along to *Res Gestae's* readers.

A CONVERSATION WITH CHAT GPT

ATTORNEY: ChatGPT, I'm increasingly interested in how AI can assist my practice, especially for research and drafting. But I'm concerned: When I share even general case details with an AI tool, what are the risks regarding attorney-client privilege under Indiana law?

CHATGPT: That's a very important question. Attorney-client privilege is designed to protect confidential communications between an attorney and their client, ensuring you receive all necessary information to provide competent advice. When using AI, one key risk is that if you input information that could be linked back to a specific client or case, that data might be



stored or processed in ways that could potentially compromise confidentiality. Indiana’s Rules of Professional Conduct—particularly Rule 1.6—require you to safeguard all information related to the representation of your client. Similar concerns have been raised in advisory opinions from states like California and New York, where guidance emphasizes the need to prevent any inadvertent exposure of confidential information when using technology.

ATTORNEY: Understood. Rule 1.6 clearly mandates that no confidential information should be revealed without informed consent. But practically speaking, what steps should I take if I want to use AI for research without violating these ethical rules?

CHATGPT: You should start by ensuring that any input into the AI is thoroughly de-identified. Remove or alter any client-specific details that could later be traced

back to an individual case. In California, for instance, advisory opinions on technology stress the importance of de-identification and data minimization as essential steps. Additionally, you should look for AI platforms that incorporate robust data security measures and are specifically designed for legal professionals. Finally, as recommended by the ABA’s technology ethics guidelines, obtaining your client’s informed consent in writing—even if the information you share is non-specific—will help ensure that you comply with your ethical obligations under Rule 1.6.

ATTORNEY: Right. And while discussing these risks, I’m also curious about the interplay between AI-generated suggestions and my obligation to act competently under Rule 1.1. How do I ensure that any advice or drafting help provided by ChatGPT remains consistent with the high standards required by the Indiana Rules?

CHATGPT: Excellent point. Rule 1.1 mandates that you provide competent representation by having the necessary legal knowledge, skill, and preparation. When using AI, remember that the tool is an aid—not a substitute for your professional judgment. Review and verify any AI-generated content before relying on it in your practice. This “human in the loop” approach is also reflected in advisory opinions from New York, where the emphasis is placed on critical evaluation of AI suggestions to ensure they meet professional standards. In practice, this means using AI for preliminary research or drafting and then applying your expertise to finalize the document.

ATTORNEY: It sounds like maintaining that “human in the loop” is crucial. Another concern I have is about conflicts of interest. Indiana Rule 1.7 deals with conflicts that might arise when representing multiple clients. If I use an AI tool that processes data from various sources, could that inadvertently create a conflict or cause cross-contamination of confidential information between client matters?

CHATGPT: That’s a valid concern. The use of AI does not automatically create a conflict, but there is potential for data cross-contamination if confidential information isn’t strictly controlled. For example, if the AI platform aggregates data across multiple users, you need to be extremely careful to ensure that no client’s information inadvertently becomes accessible when working on another matter. Advisory opinions from states like California recommend using dedicated, secure instances of AI platforms for each client file to prevent such risks. Adopting firm-wide protocols that restrict data

sharing and ensure strict access controls is essential to meet both Rule 1.6 on confidentiality and Rule 1.7 regarding conflicts of interest.

ATTORNEY: What about informed consent? Given the Indiana Rules place a heavy emphasis on securing the client's informed consent for any disclosure of confidential information, in the context of using AI, should I explicitly inform my clients about how and why an AI tool is being used, and then obtain their written consent?

CHATGPT: Absolutely. Transparency is key. Since using AI involves transmitting certain information outside of traditional attorney-client communications, it's advisable to inform your clients about the nature of the technology and its potential risks and benefits. Some states that have issued advisory opinions—such as California—suggest that attorneys clearly explain to their clients that while AI is only used to aid in research or drafting, all measures will be taken to protect client confidentiality. Obtaining their informed consent in writing not only satisfies ethical requirements under Rule 1.6 but also reinforces client trust. This is a proactive step that aligns with recommendations from the ABA and other jurisdictions.

ATTORNEY: That makes sense. Another area of concern is the permanence of information. Many AI systems store data indefinitely, which could pose risks for client confidentiality in the long term. How should I address this issue?

CHATGPT: Your concern is well-founded. When using an AI tool, it's crucial to understand its data retention and deletion policies. Look for platforms that either do not store your queries or provide clear,

verifiable methods for deleting data. Some advisory opinions from California stress that attorneys should use AI tools that allow for prompt data purging to minimize any long-term exposure of client information. Additionally, consider using secure, on-premise solutions that offer greater control over data retention. This ensures that you remain compliant with the ethical obligation to protect client confidences as outlined in Rule 1.6.

ATTORNEY: Taking these precautions will likely require updating my firm's internal policies. Given that Indiana Rules, particularly Rule 1.1, stress maintaining competence in emerging technologies, should I also pursue continuing legal education on the use of AI in legal practice?

CHATGPT: Definitely. Continuing legal education is essential, especially as technology rapidly evolves. Staying informed about the latest developments in AI, cybersecurity, and related legal ethics will not only help you comply with ethical standards but also enhance your practice. Many legal education providers, including those influenced by the ABA's guidance on technology ethics, now offer seminars and courses on the responsible use of AI. This education will give you practical insights and tips for integrating AI tools into your practice while upholding your ethical commitments.

ATTORNEY: It seems that while AI offers great potential for innovation, it also demands increased vigilance and robust internal controls. With

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"Ultimately, AI should be seen as a complement to, rather than a substitute for, the thoughtful analysis, sound judgment, and personal responsibility that define ethical legal practice."

proper safeguards in place, do you think AI can be integrated into our legal practice without compromising ethical obligations?

CHATGPT: Absolutely. AI tools like ChatGPT can be extremely useful for tasks such as drafting, legal research, and strategic brainstorming. The key is to integrate them responsibly. This means implementing measures such as de-identification of client data, using secure platforms, obtaining explicit client consent, and continuously educating yourself and your team on emerging risks. Advisory opinions from other states and guidance from the ABA underscore that with these safeguards in place, AI can enhance legal practice without undermining the sanctity of the attorney–client privilege.

ATTORNEY: Before we wrap up, I'd like to summarize our discussion for our readers. Using

AI in legal practice isn't inherently unethical, but it does require careful adherence to established ethical standards. We must ensure that confidential client data is de-identified and securely handled, review AI-generated content with professional scrutiny, avoid conflicts of interest, and secure informed consent. Additionally, insights from jurisdictions like California and New York, along with ABA guidance, offer valuable strategies for navigating these challenges. Does that capture the essence of our conversation?

CHATGPT: Yes, that's a perfect summary. Embracing technology is a natural progression in modern legal practice, but it must be done in a way that protects client confidentiality and upholds professional standards. By following the guidance provided by the Indiana Rules of Professional Conduct, supplemented by advisory

opinions from other states and the ABA's recommendations, you can effectively integrate AI tools into your practice while safeguarding your clients' interests.

ATTORNEY: Thank you, ChatGPT. This conversation has given me a clearer picture of how to balance innovation with ethical obligations. I hope my fellow Indiana attorneys find our dialogue as enlightening as I have.

CONCLUSION

The integration of AI into legal practice presents exciting opportunities for enhanced efficiency and innovation. However, as this "conversation" has highlighted, the ethical obligations that form the cornerstone of the attorney–client relationship remain paramount. Although neither the Indiana State Bar Association nor the Indiana Supreme Court

Disciplinary Commission have issued advisory opinions on AI, perspectives from other jurisdictions—such as California and New York—along with guidance from the ABA, offer a roadmap for responsibly using technology while maintaining client confidentiality.

By ensuring that client information is de-identified, using secure AI platforms, and obtaining informed consent, attorneys can harness AI tools effectively without compromising ethical standards. Furthermore, continuous education on emerging technologies and regular updates to firm policies are key strategies for navigating the evolving legal landscape. Ultimately, AI should be seen as a complement to, rather than a substitute for, the thoughtful analysis, sound judgment,

and personal responsibility that define ethical legal practice. ⁽¹⁾

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ENDNOTES

1. The State Bar of California Standing Committee on Professional Responsibility and Conduct, *Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law*, available at https://www.calbar.ca.gov/Portals/0/documents/ethics/Generative-AI-Practical-Guidance.pdf?utm_source=chatgpt.com.
2. New York City Bar Association Professional Ethics Committee, *Formal Opinion 2024-5: Generative AI in the Practice of Law*, (August 7, 2024), available at https://www.nycbar.org/reports/formal-opinion-2024-5-generative-ai-in-the-practice-of-law/?utm_source=chatgpt.com.
3. American Bar Association Standing Committee on Ethics and Professional Responsibility, *Formal Opinion 512: Generative Artificial Intelligence Tools*, (July 29, 2024), available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/ethics-opinions/aba-formal-opinion-512.pdf.
4. *See, e.g., Mata v. Avianca*, 2023 U.S. Dist. LEXIS 108263, at *2 (S.D.N.Y. June 22, 2023) (sanctioning attorneys for submitting fictitious judicial opinions generated by ChatGPT and continuing to defend them despite court orders questioning their validity).
5. *See, e.g., In re Wilkins*, 777 N.E.2d 714 (Ind. 2002) (holding that an attorney serving as local counsel violated Ind. R. Prof. Conduct 8.2(a) by impugning judicial integrity in a court filing and was jointly responsible for the statements in a brief he signed and filed, even if he did not author them).
6. Ind. R. Prof. Conduct 1.1, Cmt. 6.
7. Ind. R. Prof. Cond. 1.2.



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COURT DISCUSSES PRODUCTION OF A SMARTPHONE IN DISCOVERY, MEDICAL MALPRACTICE ACT, AND MORE IN JANUARY

The Indiana Court of Appeals issued nine published civil opinions in January 2025. The Indiana Supreme Court issued three civil opinions during this time.

INDIANA SUPREME COURT

SUPREME COURT MAJORITY ESTABLISHES STANDARD FOR PRODUCTION OF A SMARTPHONE IN DISCOVERY

After a defendant-motorist struck and injured a plaintiff-pedestrian, plaintiff received cellphone records revealing defendant had *not* been talking or texting at the time of the accident. Plaintiff later sought access to defendant's iPhone itself to support plaintiff's reconstruction expert's report that defendant was "inattentive and/or distracted" at the time of the collision and that defendant had been using a navigation app during the day. The trial court denied the access.

In *Jennings v. Smiley*, 249 N.E.3d 1071 (Ind. 2025) (Goff, J.), a majority of the Supreme Court held that access to a party's smartphone device presents "a unique challenge to balancing...privacy interests against the disclosure of information." Accordingly, as a matter of first impression, the court held "that the party seeking production of a smartphone must provide *some* evidence of the device's use at a time when it could have been a contributing cause of the incident litigated and must describe the data sought with reasonable particularity."

The court continued, "In so holding, we stress three things: (1) that, unlike certain privileged information exempt from disclosure, privacy concerns are not a per se bar to discovery of relevant information; (2) that the 'some evidence' standard poses a relatively low burden on the requesting party, leading to disclosure in most cases when that party makes the required showing through sources obtained by less-invasive means; and (3) that, given the highly deferential standard of review, we will affirm a trial court's discovery ruling so long as it's sustainable on any legal basis in the record."

Applying these standards, the court concluded plaintiff had not established that defendant's smartphone should be produced. Justice Molter agreed with the framework established by the court, but dissented as to its application, concluding, "cell phone data revealing whether [defendant] was using her phone when the accident occurred was critical to a central issue in the case—whether [defendant] was a distracted driver—and the benefit of that information to resolving the case far outweighed [defendant's] privacy concerns, which could have easily been addressed through a protective order."

SUPREME COURT MAJORITY HOLDS THAT A PARTY MAY NOT USE TRIAL RULE 60(B) IF THE GROUNDS FOR RELIEF COULD HAVE BEEN RAISED IN A MOTION TO CORRECT ERROR

After a business defaulted on a loan, the lender filed an action against the business and its guarantors. One of those guarantors, Liu, represented herself pro se and ultimately final summary judgment was entered against the business and the guarantors. Within 30 days of that judgment, an unsigned letter was filed with the court stating that another guarantor, Ao, wished to "appear in court to prove that he forged the signature[s]" on the contracts. No motion to correct error was filed. Six months later, Liu sought relief under Trial Rule 60(B), arguing Ao's testimony amounted to "newly discovered evidence of fraud."

A majority of the Supreme Court in *Automotive Finance Corporation v. Liu*, 250 N.E.3d 406 (Ind. 2025) (Rush, C.J.), concluded that Trial Rule 60(B) cannot be a substitute for a timely motion to correct error and a subsequent appeal when the evidence at issue was known prior to the motion to correct error deadline.

The court concluded the trial court erred by granting relief under Trial Rule 60(B)(3) "(1) by considering grounds that could have been raised by a timely motion to correct errors and a timely direct appeal; (2) by applying the Trial Rule 56 summary judgment standard instead of the Trial Rule 60(B)(3) standard; and (3) by granting relief without Liu showing that fraud prevented her from designating evidence in opposition to summary judgment."

Justice Goff dissented, stating "Liu should never have been liable for this debt in the first place because she never signed the loan documents. Liu is not a native English speaker, lives in Florida, was unrepresented during most of the proceedings, and was defrauded by her own (now former) husband. The trial court and Court of Appeals used their authority to correct this outcome and grant Liu relief as the victim."

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SUPREME COURT PLURALITY HOLDS THE INDIANA MEDICAL MALPRACTICE ACT IS NOT LIMITED TO BODILY INJURY CLAIMS AND REVISITED THE "OVERLY NARROW APPROACH" TO A TRIAL COURT'S PRELIMINARY-DETERMINATION JURISDICTION TAKEN IN *GRIFFITH V. JONES*, 602 N.E.2D 107 (IND. 1992)

After a hospital sent letters to over a thousand of their patients informing them that a technician failed to fully sterilize surgical instruments, potentially exposing the patients to infectious diseases, a class-action complaint was filed against the hospital for negligent infliction of emotional distress, negligence, and medical malpractice. Plaintiffs then relied upon the preliminary determination of law process to seek class certification. The Indiana Patient's Compensation Fund intervened and moved for partial summary judgment because the plaintiffs' emotional distress claims did not involve "bodily injury" as that term is used in the Indiana Medical Malpractice Act.

A plurality of the Supreme Court in *Gierek v. Anonymous 1*, 250 N.E.3d 378 (Ind. 2025) (Goff, J with C.J. Rush concurring and J. Mass concurring in result) first held the Malpractice Act applied to the emotional distress claims. The court noted the Act allows "a patient or the representative of a patient who has a claim under [the Act] for bodily injury or death on account of malpractice" to file "a complaint in any court of law having requisite jurisdiction," but held there is "nothing in the Statute that restricts a patient from suing for such other claims." Instead, the Act as a whole provides for a "malpractice" action, which is defined to include "a tort" and is not limited to just "bodily injury."

The court held this interpretation "aligns with Indiana case law, the Act's legislative history, and the Act's overarching purpose" as opposed to the "strict textualist approach" set out by the dissent which "places an unnecessary burden on legislators, forcing them to anticipate a virtually limitless range of implications from the choice of words they settle on in the drafting process."

After concluding the claims fell within the Act, the court then held the trial court had jurisdiction to preliminarily determine class certification, revisiting “an overly narrow approach” to preliminary-determination jurisdiction taken in *Griffith v. Jones*, 602 N.E.2d 107 (Ind. 1992).

Justice Slaughter, joined by Justice Molter, concurred in part and dissented in part, opining the Act does not apply because the plaintiffs are not alleging “bodily injury or death” and grounding this “conclusion in the act’s plain meaning, which prevails over rival considerations like legislative history and statutory purpose.”

INDIANA COURT OF APPEALS

- *Indiana Land Trust #3082 v. Hammond Redevelopment Commission*, 2025 WL 351997 (Ind.Ct.App. 2025) (Brown, J.) (“[T]he compensation allowed under an eminent domain action clearly does not include all damages available from a tort claim for abuse of process. Accordingly, we conclude that an eminent domain action is inadequate to address the abuse of process claim.”).
- *Kay v. Irish Rover Inc.*, 2025 WL 338938 (Ind.Ct.App. 2025) (Mathias, J.) (“The designated evidence established as a matter of law that The Irish Rover [newspaper] acted in good faith and in reasonable basis in law and fact. Therefore, the trial court properly dismissed Dr. Kay’s complaint under Indiana’s anti-SLAPP statute.”).
- *Waggoner v. Anonymous Healthcare System, Inc.*, 250 N.E.3d 1091 (Ind.Ct.App. 2025) (Baker, S.J.) (“AHS [Hospital] argues that any acts or omissions that may have fallen below the accepted standard of care and proximately caused Elmer’s injury or death were related to ‘the provision or delay of health care services or emergency medical services’ arising from Governor Holcomb’s declaration of a COVID emergency. As a result, AHS claims immunity from Waggoner’s suit. We disagree. The question of whether all or some of the defendants’ provision of services to Elmer for his pressure wound ‘arose’ out of the state disaster emergency hinges upon causation, a matter for the medical review panel to decide” and not ripe for determination at preliminary determination of law stage.)
- *Fike Investments, LLC v. Wilson*, 2025 WL 271759 (Ind.Ct.App. 2025) (Najam, S.J.) (“The first requirement in the [Indiana Fair Housing Act] exemption statute is that the house must be rented by the owner. See I.C. § 22-9.5-3-1(a)(1). While the evidence shows that Fike Investments, LLC is the record owner of the Hamilton Street house, the evidence does not show that the house was rented by Fike Investments.”).
- *Senter v. Kosciusko Cnty. Board of Zoning Appeals*, 2025 WL 249074 (Ind.Ct.App. 2025) (Tavitas, J.) (“The BZA clearly erred by prohibiting Senter from conducting retail gasoline sales to boaters on the Property. The sale of gasoline to boaters is a retail business, and Senter did not require BZA approval to operate a retail business on the Property because such use is a permitted use of the Property. The sale of gasoline does not constitute a motorized vehicle service, which is an exceptional use that would require the prior approval of the BZA. We, therefore, reverse the trial court’s denial of Senter’s petition for judicial review and remand with instructions for the trial court to grant Senter’s petition.”).
- *Cardenas v. Hook-SupeRx, L.L.C.*, 249 N.E.3d 1100 (Ind.Ct.App. 2025) (Mathias, J.) (“[A] reasonable fact-finder could conclude from the designated evidence that a security guard at a CVS location, whose responsibilities included customer support, brand promotion, managerial support, and record-making for CVS, was an employee of CVS rather than an independent contractor for purposes of holding CVS liable for the security guard’s on-duty tortious conduct.”) ^(f)

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