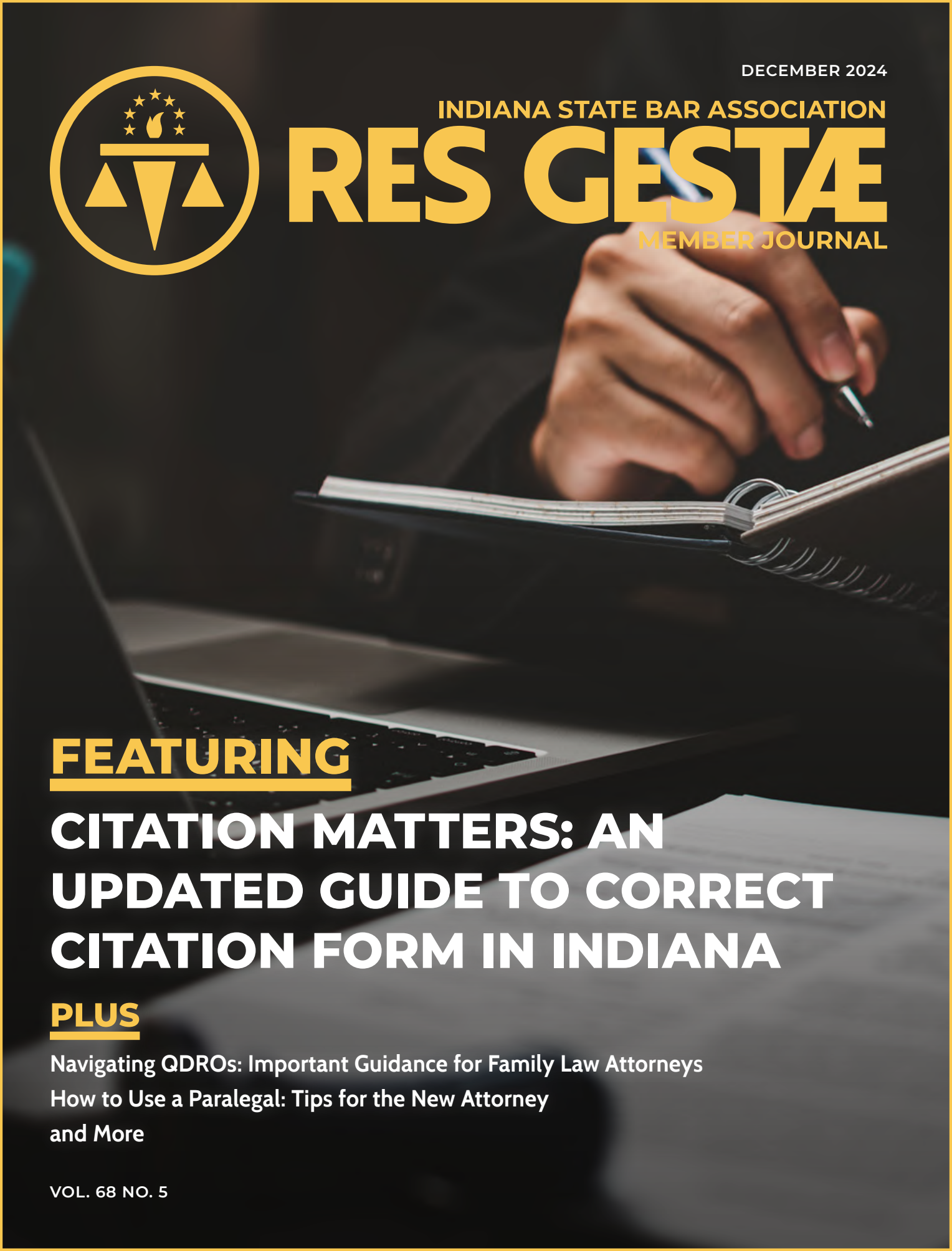
DECEMBER 2024

INDIANA STATE BAR ASSOCIATION

# RES GESTÆ

MEMBER JOURNAL



## FEATURING

# CITATION MATTERS: AN UPDATED GUIDE TO CORRECT CITATION FORM IN INDIANA

## PLUS

Navigating QDROs: Important Guidance for Family Law Attorneys

How to Use a Paralegal: Tips for the New Attorney

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VOL. 68 NO. 5

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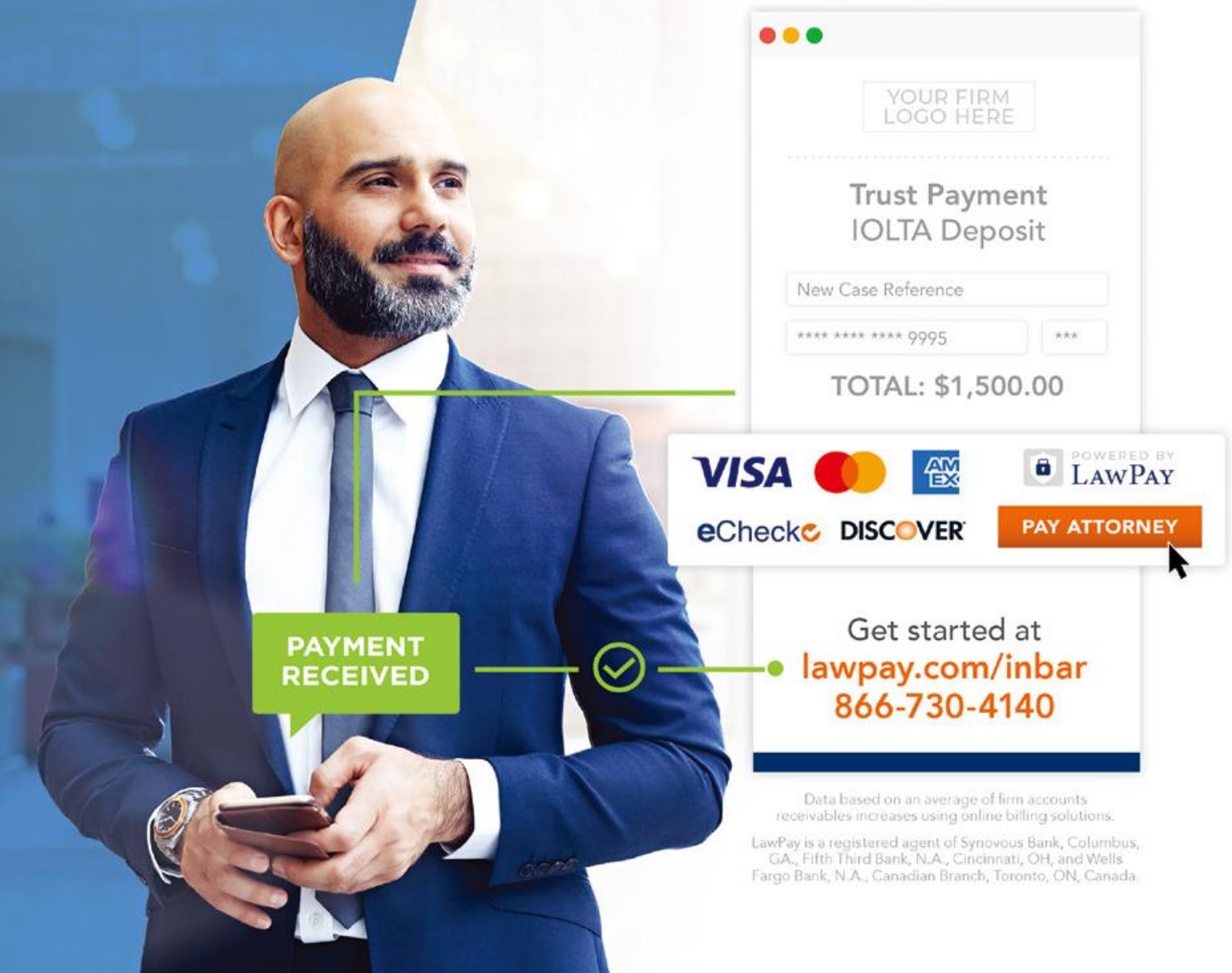


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# RES GESTÆ

VOL. 68 NO. 5
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# *In Memoriam*

We remember the following members of the Indiana State Bar Association who passed away in 2024. We strive to honor all members but recognize that we may have missed some individuals. If you'd like to notify us of a member's passing, please email communications@inbar.org.

| | |
|---|---|
| Dr. Michael L. Bogan | April 24, 2024 |
| Bruce A. Boje | June 25, 2024 |
| Dr. C. John Brannon | March 10, 2024 |
| Eugene M. Feingold | April 21, 2024 |
| William L. Fortin | May 16, 2024 |
| William E. Hedge | February 19, 2024 |
| Mag. Ronnie Huerta | June 10, 2024 |
| Hon. Robert P. Kennedy | October 12, 2024 |
| Katelynn A Kepler | March 29, 2024 |
| Bruce L. Kirchoff | February 17, 2024 |
| Hon. John D. Kitch | May 21, 2024 |
| Joni Larson | February 5, 2024 |
| Hon. William C. Lee | January 20, 2024 |
| Tricia A. Leminger | March 5, 2024 |
| Marcia L. Linsky | February 3, 2024 |
| Robert H. McKinney | September 29, 2024 |
| David E. Mears | January 7, 2024 |
| William H. Mullis | April 14, 2024 |
| Mitchell M. Pote | June 12, 2024 |
| Scott F. Scheynost | July 12, 2024 |
| Randall R. Sevenish | March 15, 2024 |
| Hon. John T. Sharpnack | March 25, 2024 |
| Philip H. Siegel | September 14, 2024 |
| Mary Black Thomas | March 26, 2024 |
| Charles Lee Triplett | April 1, 2024 |
| John C. Voorn | February 2, 2024 |
| Hon. Allen N. Wheat | August 10, 2024 |
| John W. Whiteleather | March 12, 2024 |
| Don E. Williams | February 25, 2024 |
| Damon B. Willis | July 30, 2024 |

*As of October 24, 2024

INDIANA STATE BAR ASSOCIATION

## President's Perspective

# VIGILANT GUARDIANS, CARING NEIGHBORS: A HOLIDAY MESSAGE ABOUT PROFESSIONAL COMMUNITY

***By Michael Jasaitis***

**PRESIDENT'S PERSPECTIVE**

As the holiday season approaches, I find myself thinking about my neighbor, whose actions embody the very essence of community. One evening, after a long day at the office, I came home to discover that my neighbor, Gerry, built a protective net with PVC pipe after noticing the kids' basketballs from my pitched driveway rolling into the street. When, unbeknownst to me, our Halloween decoration toppled over after strong winds, he appeared with a sandbag to secure it. Most recently, Gerry surprised me with a birthday cake, just because. These simple yet meaningful acts of kindness and community care by everyday guardians like Gerry mirror what I believe should be at the heart of our legal profession—looking out for one another, anticipating needs, and taking action without expectation of reward.

This spirit of community has been particularly evident throughout our profession this fall. Our Annual Summit brought together attorneys from every corner of Indiana to address crucial challenges facing our profession. On October 9 and 10, we collaborated on three critical areas: paths to licensure, alternative licensure models, and solutions for rural practice. The Indiana Supreme Court's participation and its Commission's presentation regarding its initial recommendations set a clear tone—change is coming, and we have the opportunity to help shape it.

The engagement during our three-hour concurrent sessions, led by professional facilitators and enriched by national experts, demonstrated our profession's commitment to positive change. In discussing paths to licensure, colleagues explored innovative ideas such as apprenticeship models. Our law school representatives offered particularly creative solutions, including semester-long externships in rural areas with tuition incentives. The alternative licensure models discussion emphasized the importance of lawyer supervision, while our rural practice conversations highlighted the need for community-wide solutions, from monetary incentives to innovative law school

**"These simple yet meaningful acts of kindness and community care by everyday guardians like Gerry mirror what I believe should be at the heart of our legal profession—looking out for one another, anticipating needs, and taking action without expectation of reward."**

partnerships. It was particularly satisfying to witness the more experienced lawyers of our bar imparting their wisdom to ensure the enhancement of our profession for the benefit of the younger generation of lawyers coming up the ranks.

Just a week later, on October 17, I experienced the warmth of our legal community in a more personal way when the Lake County Bar Association hosted a celebration. The event, which traditionally honors one of our region members becoming the state bar president, exemplified the best of our profession's spirit. Chief Justice Loretta Rush, Indiana's first female chief justice, delivered an inspiring keynote address that reminded us all of the progress we have made and the work still ahead. In a moment I will always cherish, my twelve-year-old daughter, Stella, spoke about not only her pride in her father but also the powerful example set by the accomplished women in that room which also included Judges Nancy Vaidik, Margret Robb, and Elizabeth Tavitas from the Indiana Court of Appeals. Her words underscored how our actions as legal professionals ripple beyond our immediate community to inspire the next generation.

This spirit of community extended beyond our state borders when I joined fellow bar leaders at the Great Rivers Bar Conference in San Antonio from October 22–24. There, presidents and executive directors from nine Midwest state bar associations gathered to share insights, challenges, and solutions. This collaboration reminded me that while our specific circumstances may differ, our commitment to improving the legal profession unites us across state lines.

Now, as we enter this holiday season, I am particularly mindful of another vital aspect of our community: our responsibility to look out for one another. As guardians of justice, we cannot forget to be guardians of each other's well-being. Our profession demands extraordinary resilience as we navigate the daily challenges of advocacy and client representation. Every day, we move from one high-stakes situation to another, carrying not only the weight of our clients' concerns but also the pressure of professional expectations. The constant cycle of preparation, performance, and scrutiny can take a significant toll on our mental and physical well-being.

The practice of law uniquely positions us in adversarial situations, where the margins between success and setback can seem razor-thin. Each case, each hearing, and each negotiation demands our full emotional and intellectual engagement. Over time, this sustained intensity can affect even the most seasoned professionals. The statistics are sobering—our profession experiences higher rates of depression and substance use disorders than the general population. Even more concerning, a 2023 study in the journal Healthcare revealed that lawyers are twice as likely as non-lawyers to think about suicide.[1] While 4.3% of all adults in the U.S. have thought about suicide according to the Centers for Disease Control and Prevention, 8.5% of lawyers reported thoughts that they would be better off dead or of hurting themselves. Yet too often, we hesitate to seek help, perhaps viewing it as a sign of weakness rather than what it truly is: an act of courage.

This is why I want to emphasize the crucial role of our Judges and Lawyers Assistance Program (JLAP). Just as the holiday season can magnify both joy and stress, our professional challenges can impact our mental health and well-being throughout the year. JLAP offers confidential, compassionate support to all judges, lawyers, and law students. Whether you are feeling overwhelmed, caring for others, grieving, or concerned about a colleague, JLAP provides free, confidential assistance.

It is time we remove the stigma surrounding mental health and substance use disorders in our profession. Seeking help is *not* a sign of weakness—it is a sign of wisdom and professional responsibility.

Just as we would not hesitate to seek medical care for a physical ailment, we should not hesitate to seek support for mental health challenges. Our effectiveness as advocates depends on our well-being, and our clients and communities deserve our best selves.

**"Yet too often, we hesitate to seek help, perhaps viewing it as a sign of weakness rather than what it truly is: an act of courage."**

The outcomes of our Annual Summit, the warmth of community celebrations, the collaboration with our Midwest colleagues, and the vital support services of JLAP all point to a common truth: our strength lies in our connections to one another. Like holiday traditions that bring families together, our professional community provides support, guidance, and inspiration throughout the year.

As we get ready to look toward 2025, I encourage each of us to be more like my neighbor in our professional community. Just as Gerry notices needs and takes action—whether it's protecting children at play, securing fallen decorations, or sharing the warmth of a homemade cake—we too can be more observant and proactive in supporting our colleagues. Coaching a new attorney, reaching out to a colleague who seems overwhelmed, or simply showing up for one another in both celebration and challenge, all strengthen the fabric of our legal community.

As guardians of our profession's future, let us make it our mission to notice when a colleague's "ball is rolling into the street" and take action before harm occurs. Be ready with our professional equivalent of a "sandbag" when we see someone struggling to stay upright. And let's never underestimate the impact of simple gestures of kindness in building the kind of supportive professional community we all deserve.

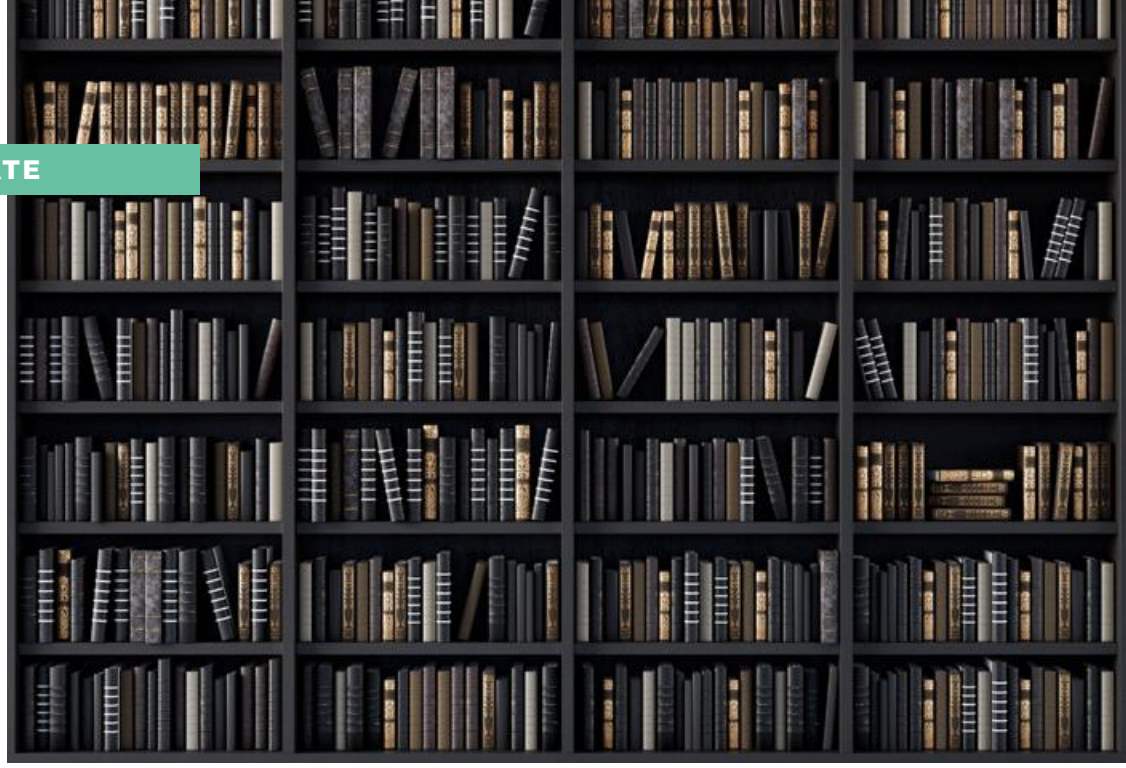
As we gather with loved ones this holiday season, remember that our professional family stands ready to support you. Remember, in our profession as in life, we are all neighbors.

## ENDNOTE

1. Patrick R Krill, Hannah M. Thomas, Meaghyn R. Kramer, Nikki Degeneffe, and Justin J. Anker, *Stressed, Lonely, and Overcommited: Predictors of Lawyer Suicide Risk*, 11 Healthcare 536 (February 2023), https://pmc.ncbi.nlm.nih.gov/articles/PMC9956925/.

ISBA UPDATE

*By Res Gestae Editor*



# CLE TIPS AND FAQS

It's time to wrap up your CLE requirements for the year. Here's what you need to know to stay on track.

## YOUR ANNUAL CLE REQUIREMENTS

Indiana attorneys must complete six hours of approved CLE credit annually, and a total of 36 hours by the end of their three-year educational cycle. Those 36 hours should include at least three hours of ethics and no more than 12 hours of NLS credit.

Newly admitted attorneys must also complete a six-hour Applied Professionalism course within their first three-year cycle. (This will include anyone admitted by exam in 2021 or later.)

For more details, see Indiana's Admission and Discipline Rule 29 (or Rule 28 for judges). If you have any specific questions about your CLE requirements, contact the Indiana Office of Admissions and Continuing Education (ACE) at www.in.gov/courts/ace or by calling 317-232-2552. ACE mandates and monitors CLE requirements for the state of Indiana.

## WAYS TO EARN CLE CREDIT

Still need to make up a few hours? Here are some options available through your ISBA membership:

- **Live CLE Events**: ISBA's sections and committees host virtual and in-person CLE sessions through December. Check out upcoming events at www.inbar.org/upcomingCLE.
- **On-Demand CLE Library**: Access nearly 100 CLE courses at any time at www.inbar.org/ondemand. Topics range from substantive law to ethics and everything in between, and the library is continuously updated with new CLE. Nearly half of the courses are available for free with your ISBA membership, too.

» Haven't checked out our new library yet? ISBA revitalized our on-demand catalog this summer, creating a more streamlined and accessible experience. You will need your ISBA log-in credentials to access the library. If you've forgotten your username or password, email us at memberconcierge@inbar.org, and we'll get you set up.

- **CLE Discount**: If you need several hours quickly, use code "BOGO" to get 50% off your cart when you buy two or more full-priced ISBA on-demand CLE.

## ADDITIONAL FAQ

**How do I check my CLE hours?**

You can access your full CLE transcript on the Indiana Courts Portal at portal.courts.in.gov. Sign in and click "Download your complete CLE history report" on the CLE summary page to see what credit has been reported.

**How late can I complete a CLE and still have it count for my 2024 requirements?**

You must complete your annual CLE hours by December 31. If you're watching an ISBA on-demand CLE, that means you must have watched the *entire* video and completed the course survey by December 31. As long as you've completed those steps by the date, the CLE will count for your 2024 requirements.

Please note: the ISBA office will be closed from December 24 through January 1. We will try to help you with CLE questions during that time but please be aware that your CLE course may not be reported to ACE until *after* December 31. Don't worry, though! As long as you've completed the CLE by December 31, it will count towards your 2024 requirements regardless of when it's reported by the ISBA.

**What should I do if a CLE isn't showing up on my transcript?**

ISBA reports CLE attendance to ACE within 30 days of program completion. If your attendance hasn't posted after that timeframe, email cle@inbar.org with your name and the CLE you attended.

For non-ISBA CLE, we recommend you reach out to the organization that hosted the CLE to verify your attendance.

**How can I verify my attendance for an ISBA on-demand CLE?**

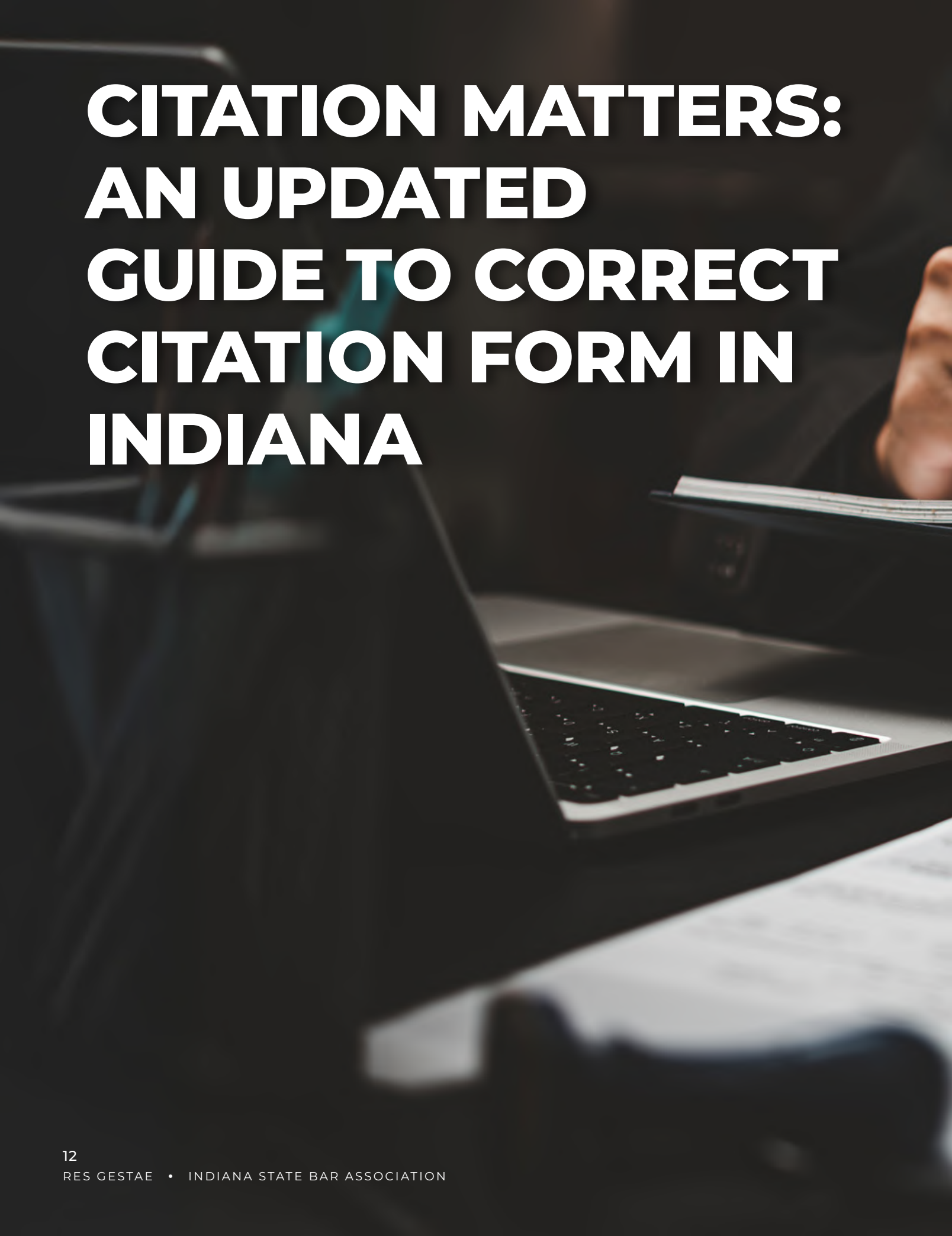
If you're watching a CLE on ISBA's on-demand platform, you must watch the entire video *and* complete the post-course survey (where you'll input your Indiana attorney number) to receive credit. Once both are completed, a green check mark will appear besides both elements, marking the course as completed on that date. ISBA will then report your credit to ACE within 30 days.

**What if I experience issues with ISBA's on-demand platform?**

Check out our on-demand FAQ at www.inbar.org/ondemandlibraryhelp for troubleshooting tips. If the problem persists, contact ISBA's CLE team at cle@inbar.org for assistance.

We wish you the best of luck this CLE season! For more information or to explore our CLE courses, visit www.inbar.org/CLE.

# CITATION MATTERS: AN UPDATED GUIDE TO CORRECT CITATION FORM IN INDIANA



FEATURE

***By Joel Schumm***

The November 2018 issue of Res Gestae included an article entitled *Citation Matters: A Quick Guide to Correct Citation Form in Indiana*. This article updates and incorporates recent changes to Appellate Rule 22(A),[2] including:

- parallel citations (to both the regional and Indiana reporters for older cases) are no longer required;
- a citation form for memorandum (sometimes known as unpublished) decisions is provided;
- pinpoint citations to the specific page of a case are now explicitly required; and
- when Rule 22 does not address the citation form, either the Uniform System of Citation (Bluebook) or the Association of Legal Writing Directors (ALWD) Guide to Legal Citation may be used.

Legal citation is critical to provide courts with essential information about your case. Incomplete or incorrect citations may make it difficult or impossible to find the source. Sloppy citations may also suggest carelessness that could lead some judges to be skeptical of other parts of a brief. The goal of this short article is to provide some fairly basic but important information about citations of the most common sources in Indiana.

Most Indiana court rules shed no light on citation, but Appellate Rule 22 discusses the topic at length and can reasonably be followed in trial courts. Beyond some specific topics discussed in the rule (and summarized below), citations should follow the Bluebook or ALWD Guide.[2]

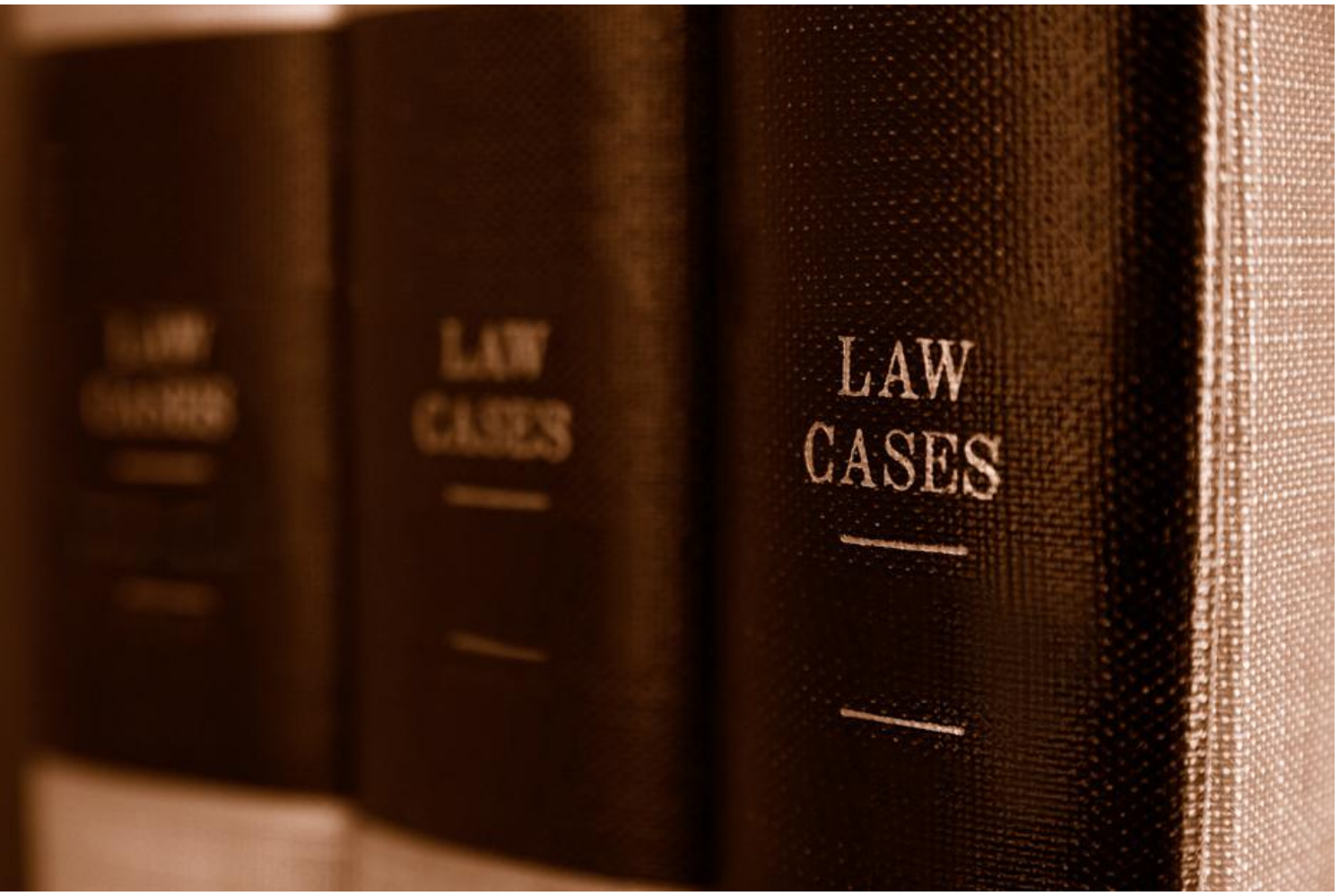
## TYPEFACES

Citations in legal briefs should use only one of the following two typefaces: Roman (regular type) or *italics*. Do not use **bold**, LARGE AND SMALL CAPS, or other typefaces.[3]

## INDIANA CASES

Citation of a case should include the name of the case, the Reporter and pages on which it is located, and the court and year it was decided. For example:

*K.F. v. St. Vincent Hosp. & Health Care Ctr.*, 909 N.E.2d 1063, 1066 (Ind. Ct. App. 2009).




**Abbreviating Words**

Bluebook Rule 10.2.1 provides a litany of rules for case names, which are often abbreviated when used in a citation but usually spelled out in textual sentences.[4]

Table 6 of the Bluebook provides a detailed list of abbreviations for many words that commonly appear in case citations, such as Corp. (Corporation) or N. (North[ern]).

Geographic terms, like "State of" or "City of," should almost always be omitted.

**Reporter and Pinpoint**

Indiana cases appear in the Northeastern reporter, currently N.E.3d. If referring to information taken from a specific page of the case, be sure to include the pinpoint citation. For example, the citation to the *K.F.* opinion tells the judge the case begins on page 1063, but counsel is relying on information from page 1066.[5] Omitting the pinpoint citation will require the court to scour the entire opinion; a busy judge without time for such a journey may simply disregard the source.[6] Failure to include the pinpoint citation is now, with the 2024 amendment, a violation of Appellate Rule 22(A)(3).

**Court and Year**

The last part of the citation should include the court deciding the opinion (Ind. for Indiana Supreme Court or Ind. Ct. App. for the Indiana Court of Appeals) followed by the year of the decision.

**Subsequent History/ Transfer Denied**

Be sure a case has not been overruled or disapproved before citing it. A red stop sign or flag does not necessarily render a case off-limits. Often an opinion addressing multiple issues will be overruled on a narrow point related to one issue. Advocates are free to use the case for the other issues but should acknowledge the subsequent history of the case. For example: *K.F. v. St. Vincent Hosp. & Health Care Ctr.*, 909 N.E.2d 1063, 1066 (Ind. Ct. App. 2009), *disapproved on other grounds by Civil Commitment of T.K. v. Dep't of Veterans Affairs*, 27 N.E.3d 271, 274 (Ind. 2015).

Unlike the Bluebook, which requires inclusion of discretionary denials of review during only the past two years, Indiana attorneys are required to note if transfer was denied in every case, regardless of its age. Rule 22(A) provides these examples: *State ex rel. Mass Transp. Auth. of Greater Indianapolis v. Ind. Revenue Bd.*, 242 N.E.2d 642 (Ind. Ct. App. 1968), *trans. denied by an evenly divided court* 244 N.E.2d 111 (Ind. 1969); *Coplan v. Miller*, 179 N.E.3d 1006 (Ind. Ct. App. 2021), *trans. denied*.[7]

**Memorandum (Unpublished) Decisions**

Before 2023, Appellate Rule 65(D) permitted citation of memorandum decisions only "to establish *res judicata*, collateral estoppel, or law of the case." The amended rule, however, provides that "a memorandum decision issued on or after January 1, 2023, may be cited for persuasive value to any court by any litigant."[8]

Appellate Rule 22 now provides a citation form when counsel cites a memorandum decision. As the rule states and shows in its example, the designation "mem." must be includes at the end of the citation: *Steele v. Taber*, No. 22A-CT-925 (Ind. Ct. App. Jan. 17, 2023) (mem.).

**Non-Indiana Cases**

Most of the same principles described above apply to citations of court opinions outside Indiana. Tables 1, 7, and 10 of the Bluebook provide specific guidance for appropriate abbreviations.

## CONSTITUTIONAL PROVISIONS

Bluebook Rule 11 addresses citations to constitutional provisions. In text, spell out the words Fourth Amendment; citations abbreviate "U.S. Const. amend. IV." Citations

to the Indiana Constitution may be similarly abbreviated: Ind. Const. Art. 1, Sec. 11.[9]

## STATUTES

Appellate Rule 22(B) provides the following format for an initial citation to a statute: "Ind. Code § 34-1-1-1 (20xx)."

In practice, years are seldom included in appellate opinions or briefs—especially when the current version of the statute applies to the issue raised.[10] In cases where the statute has changed, however, counsel should be sure to include the year and discuss what has changed.

Subsequent citations to statute may be abbreviated as follows: "I.C. § 34-1-1-1." Thus, I.C. replaces "Ind. Code" and no year is required.

In a textual sentence, spell out the words. For example, "Indiana Code section 34-1-1-1."

## COURT RULES

Appellate Rule 22(B) includes a comprehensive list of the citation form to use when first citing a court rule and for each later citation. A few examples include:

| INITIAL | SUBSEQUENT |
|---|---|
| Ind. Trial Rule 56 | T.R. 56 |
| Ind. Criminal Rule 4(B)(1) | Crim. R. 4(B)(1) |
| Ind. Post-Conviction Rule 2(2)(b) | P-C.R. 2(2)(b) |
| Ind. Evidence Rule 301 | Evid. R. 301 |

County Local Rules should be cited using "the county followed by the citation to the local rule, e.g. Adams LR01-TR3.1-1."[11]

## MAGAZINES/BOOKS/ INTERNET SOURCES

Briefs generally rely on the primary authorities descried above, but some will also cite secondary sources such as books or internet sources.

The back cover of the Bluebook provides examples of how to cite these sources. For example:

- Deborah L. Rhode, *Justice and Gender* 56 (1989)
- Andrew Rosenthal, *White House Tutors Kremlin in How a Presidency Works*, N.Y. Times, June 15, 1990, at A1.
- Eric Posner, *More on Section 7 of the Torture Convention*, Volokh Conspiracy (Jan. 29, 2009, 10:04 AM), http://www.volokh.com/posts/1233241458.shtml.[12]

## SUBSEQUENT CITATIONS

The earlier paragraphs focus on the initial/first citation of a source. Later citations may be shortened. Appellate Rule 22 provides specific examples for statutes and court rules, and Bluebook Rule 4 discusses cases and other sources.

When citing a case, if there are no intervening citations to another source, use *Id.* (if the information appears on the same page) or "*Id.* at [page]," if taken from a different page. If there is an intervening citation to another case or source, use the short form, which includes the shortened name of the case and its location without the court or year. For example: *K.F.*, 909 N.E.2d at 1065.

Subsequent citations to books, magazines, etc. generally require the author's last name, *supra*, and the page. For example: Rhode, *supra*, at 54.

## THE RECORD

Although counsel will rarely, if ever, be faulted for spelling out a word, Rule 22(E) provides several abbreviations that may be used without further explanation: Addend. (addendum to brief), App. (appendix), Br. (brief), CCS (chronological case summary), Ct. (court), Def. (defendant), Hr. (hearing), Mem. (memorandum), Pet. (petition), Pl. (plaintiff), Supp. (supplemental), Tr. (Transcript).[13]

## CONCLUSION

Following these basic rules will help ensure the court can locate your cited sources and leave a positive impression about your attention to detail. Some online research services include tools to ease inclusion of citations. For example, Westlaw users can highlight text and choose "Copy with Reference" to copy and paste text with quotation marks into a Microsoft Word document, usually with the correct citation form.[14] Taking a few seconds to double-check citations, regardless of how they were generated, is always time well-spent.

## ENDNOTES

1. The Indiana Supreme Court order amending the rule is available at https://www.in.gov/courts/files/order-rules-2023-1005-appellate.pdf (last visited October 28, 2024).
2. The Bluebook is currently in its Twenty-First Edition, and little has changed in recent editions. Moreover, the current (Seventh) edition of the Association of Legal Writing Directors (ALWD) Guide to Legal Citation, which was added to Appellate Rule 22, employs the same citation format as the Bluebook. Most references in the footnotes that follow are to the Bluebook, but use of the ALWD Guide yields the same citations. Needless to say, citations are placed in the text of a brief and not in footnotes or endnotes as recommended by some commentators. An "experiment" of this alternative by the Indiana Supreme Court was short-lived and not well-received. Kevin S. Smith, *2005 Survey of Recent Developments in Indiana Law: Appellate Procedure*, 39 Ind. L. Rev. 777, 815 (2006) ("An overwhelming majority (seventy-one percent) opposed the placement of citations in footnotes.").
3. Other typefaces may be appropriate in law review footnotes, but court documents should adhere to the rules shown in the Bluepages of the Bluebook and its back cover. Rule B2 explains

that "underscoring is the equivalent of italics." Appellate Rule 22 uses italics, as do recent opinions from the Indiana Supreme Court and Court of Appeals. Some writing experts believe underlining is a "throwback" to an era "when italics weren't possible. Nobody using a computer in the 21st Century should be underlining text." Antonin Scalia & Bryan Garner, *Making Your Case: The Art of Persuading Judges* 122 (2008).

4. Pay particular attention to Rules 10.2.1(c) (abbreviations in textual sentences) and 10.2.2 (case names in citations).
5. Most cases decided before the early 1980s appear in the Northeastern reporter volumes as well as the now-defunct Indiana (Ind.) or Indiana Appellate (Ind. App.) official state reporters. Before 2024, Appellate Rule 22 required citation to both reporters. As I wrote in 2018, that rule seemed antiquated with all opinions easily accessible through online research services. Fortunately, Rule 22(A)(1) now requires only citation to the regional (N.E. reporter) unless the case is only reported in the old, official Indiana reporters.
6. Numerous appellate opinions have chastised counsel for failing to use pinpoint citations. *See, e.g., Webb v. Schleutker*, 891 N.E.2d 1144, 1154 n.7 (Ind. Ct. App. 2008).
7. Counsel should also note if rehearing or transfer is pending in a case. If transfer has been granted, the case should not be cited. Ind. Appellate Rule 58 (A) ("If transfer is granted, the opinion or memorandum decision of the Court of Appeals shall be automatically vacated . . . .").
8. Kyle Gillaspie, *The Newly Persuasive Value of a Memorandum Decision*, Res Gestae, April 2023, at 21.
9. Articles of the United States Constitution use Roman numerals (such as Art. III), while Articles of the Indiana Constitution use Arabic numbers (Article 3). *See Bonner ex rel. Bonner v. Daniels*, 907 N.E.2d 516, 518 n.2 (Ind. 2009) ("Arabic numerals . . . were used by the framers.").
10. Bluebook Rule 12.3.2 discusses "Year of Code," and Table 1 advises to cite to the official "Indiana Code," rather than the annotated code from West or LexisNexis. The table cites to the General Assembly's website, which includes and regularly updates the Indiana Code. The 2024 code is accessible at https://iga.in.gov/laws/2024/ic/titles/1 (last visited October 28, 2024).
11. The rule also provides extensive information about how to cite the Indiana Administrative Code and Indiana Register, both before and after 2006. App. R. 22(B)(1).
12. The focus of this article is citation form and content—not the propriety of citing specific sources, such as Internet resources that may raise numerous concerns. *See generally* Sylvia H. Walbolt & Nicholas A. Brown, *Off the Record or Not?*, Fla. B.J., December 2016, at 30, 32 ("The Supreme Court is not the only court grappling with the propriety of judicial factual research on the internet.").
13. Bluepages B17 provides some additional abbreviations, such as Aff. for Affidavit or Ex. for Exhibit.
14. These programs are not infallible. For example, using the feature with statutes may only include the section and not subsections or more specific and necessary information.

# NAVIGATING QDROs: IMPORTANT GUIDANCE FOR FAMILY LAW ATTORNEYS

***By Dennis Groves***

For attorneys who have never practiced family law, it is a common belief that the most stressful aspect of handling a divorce case is dealing with quarrelsome and emotionally charged clients. Seasoned family law practitioners, however, will often say that they lose sleep over a much more mundane, but critically important, task: effectively drafting Qualified Domestic Relations Orders, or "QDROs."

For those "not in the know," a QDRO is a specific type of legal order mandated by federal law but issued by state courts that is primarily used to divide employer-sponsored retirement benefits between divorcing spouses. While QDROs are a necessary component of many divorce cases, an attorney who fails to properly draft and implement one may not only inflict substantial financial harm on his or her client, but also may risk committing malpractice. Because of this, it is important for attorneys to have a basic understanding of QDROs, and to recognize and avoid the most common mistakes associated with them.

## WHEN IS A QDRO REQUIRED?

A QDRO is generally required to divide the proceeds of an employer-sponsored retirement plan, such as a pension, 401(k), 403(b), 457(b), and some (but not all) annuities. QDROs are not applicable to Traditional or Roth IRAs, nor are they required to divide retirement assets not subject to the Employee Retirement Income Security Act (ERISA), such as most government-sponsored retirement plans.

If you are unsure whether a QDRO is required to divide a particular retirement account, you may always contact the appropriate plan administrator for clarification.

**"While QDROs are a necessary component of many divorce cases, an attorney who fails to properly draft and implement one may not only inflict substantial financial harm on his or her client, but also may risk committing malpractice."**

## HOW DO I DRAFT AN EFFECTIVE QDRO?

The first step in drafting an effective QDRO is to craft a comprehensive and well-written settlement agreement. The agreement should clearly outline how the retirement plan will be divided, using specific language to delineate the rights and obligations of both parties. By providing this clarity, you can minimize the likelihood of a future dispute arising between the parties.

Consider a scenario where divorcing spouses enter into a property settlement agreement that states only: "Husband shall receive 50% of the value of Wife's 401(k) as of September 29, 2024." This language leaves several critical questions unanswered. For example, it is not definitively stated whether Husband's 50% share will be affected by market gains or losses after the valuation date. Additionally, the agreement does not specify whether the portion being divided accounts for any loans taken against the account, nor does it indicate which party is responsible for drafting the QDRO. By addressing these issues directly in the settlement agreement, attorneys can safeguard their clients' financial interests and facilitate a smoother division of assets.

Once a settlement agreement is finalized, the next step is to draft a proposed QDRO that aligns with the terms of the agreement. Before submitting this QDRO to the court, however, it is highly advisable to seek preapproval from the plan administrator. This step ensures that the QDRO meets the specific qualification guidelines of the plan and helps prevent a situation where the court enters a QDRO only for it to be rejected by the plan. It is important to understand that a retirement plan is not obligated to comply with a QDRO that does not comply with its qualification guidelines.

Generally, the plan administrator will then provide a letter indicating whether the QDRO has been approved for court submission, or if specific changes are required for the plan to recognize it as a valid QDRO. If the QDRO is approved, you can proceed to submit it to the court. If modifications are requested, you may make the necessary changes and resubmit the QDRO to the plan for approval.

As an added layer of protection, once a QDRO has been approved by the plan administrator but before it is submitted to the court, it is advisable to have both parties and their counsel review and sign the document. This practice helps safeguard against potential disputes in which a party might later claim that there are errors or omissions in the QDRO.

Finally, and perhaps most importantly, it is crucial to submit the court-entered QDRO to the plan administrator as soon as possible and to obtain written confirmation of its acceptance. Some plans may require you to submit a certified copy of the QDRO, so be sure to review the plan's procedures before submitting any documents.

## KEY CONSIDERATIONS FOR EFFECTIVE QDRO DRAFTING

Now that a foundational understanding of the QDRO-drafting process has been established, it is important to highlight some of the more common mistakes attorneys make when drafting QDROs. Please note that this article does not aim to provide an exhaustive list of all possible QDRO errors; rather, it focuses on several frequent pitfalls that practitioners should be aware of as they navigate this complex area of family law.

One common oversight among practitioners is not fully grasping the distinction between defined benefit plans and defined contribution plans. Defined benefit plans, such as pensions, offer a guaranteed payout at retirement for a specified period—often for the lifetime of the retiree. In contrast, defined contribution plans, like 401(k)s, involve set dollar contributions that fluctuate based on market conditions. Once the funds in a defined contribution plan are depleted, the account will have no remaining balance.

This distinction is crucial because defined benefit plans often include preretirement death benefits, which can be payable to a divorcing

**"Given life's uncertainties—such as the participant's potential death, remarriage, or withdrawal of funds—timely submission becomes vital to protect your client's interests. Without a QDRO on file when these events occur, your client risks losing the benefits outlined in the settlement agreement or awarded in the divorce decree."**

spouse if the employee—referred to as the participant—dies prior to the commencement of monthly retirement benefits. However, QDROs frequently fail to clarify whether the spouse is entitled to these benefits. This oversight can lead to a client missing out on funds that he or she could have received had the issue been adequately addressed in the QDRO.

Similarly, when representing the participant with respect to the division of a defined benefit plan, it is often advisable to include a provision stating that if the alternate payee—i.e., the non-employee spouse—dies before benefit payments begin, his or her share will revert to the participant. Omitting this provision can lead to significant financial losses for your client. Some select plans even offer "pop-up" provisions, allowing the alternate payee's share to revert to the participant if the alternate payee dies after benefits have started but before the participant passes away. If such a provision is allowed by the plan, it may be crucial to incorporate it into the QDRO. By thoroughly reviewing the relevant plan documents, you can identify which provisions are permitted, ensuring the QDRO is crafted to effectively protect your client's financial interests.

With respect to defined benefit plans, it is also imperative to understand the difference between a separate interest QDRO and a shared interest QDRO. A separate interest QDRO enables the alternate payee to receive benefits that continue for his or her lifetime, regardless of whether the participant passes away first. In contrast, under a shared interest QDRO, the alternate payee's benefits generally terminate upon the participant's death. Accordingly, if you are representing the alternate payee, you will likely want to ensure that the QDRO utilizes a separate interest approach to secure ongoing benefits. Please be aware, however, that most plans will not allow the use of a separate interest QDRO once the participant has commenced receiving retirement benefits, making it essential to review the specific plan provisions. If the participant is already receiving benefits, you may have no choice but to draft a shared interest QDRO.

Putting aside the specific provisions contained in a QDRO, it is especially important that attorneys act promptly in drafting and submitting the QDRO. This process includes preparing the QDRO, filing it with the court, and ensuring that the court-entered QDRO is promptly submitted to the retirement plan. Obtaining written confirmation from the plan that it has accepted and will implement the QDRO is also important. Given life's uncertainties—such as the participant's potential death, remarriage, or withdrawal of funds—timely submission becomes vital to protect your client's interests. Without a QDRO on file when these events occur, your client risks losing the benefits outlined in the settlement agreement or awarded in the divorce decree.

## CONCLUSION

Mastering the complexities of QDROs can be challenging, and this article is not intended to cover every possible issue or pitfall that you may encounter. Instead, it aims to highlight key considerations and common issues, helping you to better identify potential problems as they arise. If specific QDRO challenges come up, it is always advisable to conduct thorough research or consult with a knowledgeable person in the field. Being proactive and informed will significantly enhance your ability to navigate the intricate landscape of QDROs, ultimately protecting and maximizing your clients' interests in divorce proceedings.

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# HOW TO USE A PARALEGAL: TIPS FOR THE NEW ATTORNEY

***By Lottie Wathen***

I have been working as a paralegal for nearly 35 years. Most of that time has been spent in the trenches of litigation in one form or another. I have worked in other areas of law, but I seem to be drawn back to litigation over and over. Perhaps it is because as a brand-new legal assistant many years ago, litigation is the area of law where I "cut my teeth" so to speak. While paralegal skillsets are different in each area of the law, one thing remains the same: developing and maintaining a working relationship with your supervising attorney.

I have worked with brand-new attorneys (some of them both before and after passing the bar), experienced attorneys, and with attorneys who are slowing things down and looking to close their practice. Each level of experience comes with unique characteristics, challenges, and rewards. When you work with an experienced attorney, finding your working groove sometimes takes a little while, but generally both of you have worked previously with other legal professionals so neither of you is getting used to the dynamics of this type of relationship for the first time. For a new attorney, working with an

experienced paralegal may be a bit more challenging and it may take a little longer to get used to working together, but it will happen.

From the paralegal perspective, working with a new attorney has a unique set of circumstances. Many times, newly minted J.D.s have never worked in a law office other than as a law clerk and, depending on the way the office is set up, law clerks fall somewhere between the staff and the most junior associates. They may or may not have had an office, a cubical, or may have been placed in a bull-pen type of setting with several other law clerks. So, in addition to learning the practical aspects of practicing law, they also must navigate a new community, much like moving from your parents' home to a large apartment complex. Suddenly you have a lot of people milling around and the mere task of figuring out who does what and which name goes with which face may be daunting. To all the paralegals and legal assistants out there, be kind to these fresh faces. They may not yet fully appreciate all that you bring to the table, but offering a kind word and having a smile on your face will make the transition a lot easier for everyone. Practice the Golden Rule: Treat others as you want to be treated. To the new attorneys, that goes for you too!

Having completed my paralegal studies a long time ago, I sometimes forget that being a new graduate makes you feel like you are a superhero ready to take on the world and that your exuberance may be a little off-putting to some. Especially when, while you are well educated in being an attorney, you may not know that the actual practice of law comes with a lot of nuances that are not taught in law school. This is where your paralegal may be the best asset on your tool

**"To all the paralegals and legal assistants out there, be kind to these fresh faces."**

belt. For example: Do you know how to do electronic filing? Do you know which forms are required and how to avoid the dreaded deficiency notice from the court? I bet your paralegal does. Do you know which courts have special requirements that are not necessarily listed in the local rules? Do you know which courts have the technology you are accustomed to using when doing a presentation, which ones don't, and what workaround is available? Do you know which of the clerks in that small county you will be traveling to is the most helpful when it comes to what a specific judge wants concerning jury instructions, exhibits, and decorum? Do you know all the little things that should go in your trial box (if you aren't lucky enough to have a paralegal go to court with you)? Do you know how to get on the good side of the accounts payable department when you urgently need a billing itemization for the affidavit to go along with your motion for fees that you forgot you needed when you left for court? I bet your paralegal does.

Paralegals are very much jacks of all trades. In addition to drafting documents; reviewing files; preparing discovery requests and responses; locating expert witnesses; doing research; communicating with clients, opposing counsel, and courts; we also are conditioned to pay attention to details, take notes, proofread, listen, analyze, and organize a treasure trove of *information that you do not even know you will need*. Yes, it is important enough to italicize. It will take some time for you to learn everything that your paralegal is able to do, but do not be afraid to ask. Rest assured, no paralegal worth his or her salt wants to take on a project and fail, so they will absolutely let you know if they are not comfortable doing something, have never done it but are willing to learn, or can suggest a different way of doing it that you may not have considered. I have worked for attorneys who would use me as a sounding board for a case. We would talk about case details, theories, witness issues, evidence issues, and how to turn those details into a map for our case. Sometimes I

**"Paralegals are very much jacks of all trades. In addition to drafting documents; reviewing files; preparing discovery requests and responses; locating expert witnesses; doing research; communicating with clients, opposing counsel, and courts; we also are conditioned to pay attention to details, take notes, proofread, listen, analyze, and organize a treasure trove of *information that you do not even know you will need*."**

was able to offer insight the attorney had not considered. Sometimes, I was simply a set of ears so they could work through it out loud. The key is to think of your paralegal as an integral part of your team and not simply a part of the office décor.

I have been very lucky in my career. Over the years, I have learned so much from the attorneys with whom I have worked, but I am willing to bet that many of them learned as much from me as I did from them. I also have been fortunate to work alongside attorneys with a variety of personalities. I have worked with very down-to-earth attorneys, attorneys who lived by a hierarchy both in the office and out, attorneys who were shy (not typically litigators), easy-going attorneys, and attorneys who were deemed difficult (and sometimes ones who were not nearly as difficult as the office gossip would lead you to believe). All those personalities contribute to the office dynamic, but they do not have to dictate how your working relationship will mature. As a new attorney, you are in a perfect position to watch how these seasoned professionals interact with their peers, colleagues, and staff. Pay attention, but understand that how you, as an individual, treat your paralegal will determine how conducive that relationship is to your success.

My job as a paralegal is to do whatever I can to make you look good and to help the firm succeed. It may take some time but trust your paralegal and treat him/her with respect. There will be times when your legal education may not have prepared you for the day-to-day aspects of practicing law. Your paralegal will be there to help you when the books can't.

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CRIMINAL JUSTICE NOTES

*By Joel Schumm*

# SEPTEMBER CASES ADDRESS CONTEMPT, CRIMINAL RULE 4, PERJURY, AND MORE

**In September the Indiana Supreme Court decided a life parole direct appeal and a transfer case involving the insanity defense in contempt proceedings. The Court of Appeals issued opinions addressing perjury, Criminal Rule 4, and substantive double jeopardy.**

## INDIANA SUPREME COURT

### INSANITY STATUTE DOESN'T APPLY IN CONTEMPT PROCEEDINGS

In *Finnegan v. State*, 240 N.E.3d 1265, 1270 (Ind. 2024), the defendant was found in indirect contempt of court because of his vulgar letters to the trial court. His counsel's request for a mental-health evaluation under the insanity statute was denied. The Court of Appeals reversed, concluding that alleged indirect contempt defendants are "entitled to the same statutory protections afforded other criminal defendants," but the Indiana Supreme Court granted transfer. It affirmed "the trial court on the narrow ground that the insanity defense statutes, as codified in Indiana Code chapter 35-36-2, et seq., do not apply to indirect contempt proceedings." *Id.* Although "an alleged contemnor is always free to argue his mental state to excuse, explain, or mitigate his contemptuous behavior, the statutes simply do not compel a judge to treat him precisely like a criminal defendant." *Id.*

The majority carefully parsed statutory language to support its narrow holding. For example, criminal insanity statutes use the phrase "criminal case" to describe a defendant or trial, see I.C. § 35-36-2-1&-2, but "the phrase 'criminal case' does not appear in the indirect contempt procedure statutes." *Id.* at 1270-71. More broadly, the "General Assembly also distinguished the procedures governing indirect contempt by placing it under Title 34, which governs civil procedures, while Title 35 governs criminal proceedings." *Id.* at 1271.

Nevertheless, the final words of the opinion signaled a looming and stronger argument for the future: whether the inability to raise insanity claims in contempt proceedings offends "due process must wait for a case where it is raised." *Id.* at 1272.

Justice Goff dissented in part, signaling his support for greater protections when the issue next arises. In his view, "indirect criminal contempt is a crime, and a defendant faced with such a charge is entitled to the same protections enjoyed by other criminal defendants, including the right to opinion testimony from mental-health experts to show evidence of insanity." *Id.* at 1273.

### LIFE WITHOUT PAROLE (LWOP) SENTENCE AFFIRMED

As previously discussed in this column and elsewhere, the Indiana Supreme Court is required by its own rules—not the Indiana Constitution—to decide LWOP cases, most of which present routine issues that could easily be addressed by the Court of Appeals.[1]

*Cramer v. State*, 240 N.E.3d 693 (Ind. 2024), is the latest LWOP direct appeal case, and like most of its predecessors was affirmed unanimously in a straightforward opinion. Challenges to the appropriateness of a sentence are frequently raised but seldom successful; revisions are reserved for "exceptional" cases. *Id.* at 698.

> It is up to the defendant to persuade the appellate court that his or her sentence has met the inappropriateness standard of review. The trial court's sentence is afforded considerable deference and will stand unless compelling evidence portraying in a positive light the nature of the offense (such as accompanied by restraint, regard, and lack of brutality) and the defendant's character (such as substantial virtuous traits or persistent examples of good character).

*Id.* (cleaned up). That standard wasn't met in *Cramer*, where the nature of the offense involved "extreme brutality" and even his modest criminal history—five juvenile adjudications, three of which are felonies if committed by an adult—weighed against relief under Rule 7(B). *Id.* at 699-700.

## INDIANA COURT OF APPEALS

### PERJURY CONVICTION REVERSED

Perjury occurs when a person "makes a false, material statement under oath or affirmation, knowing the statement to be false or not believing it to be true. . ." Ind. Code § 35-44.1-2-1(a)(1). The statute is limited to "a statement of fact and not a conclusion, opinion, or deduction from given facts." *Basso v. State*, No. 24A-CR-500, 2024 WL 4271668, at *3 (Ind. Ct. App. Sept. 24, 2024) (citations omitted).

Basso, a state trooper, was injured after his vehicle was struck by a drunk driver. During a pretrial deposition, he testified that he believed the driver "deserve[d] jail time." *Id.* at *1. The driver later pleaded guilty, and Basso testified at sentencing that he favored "home detention" instead of jail time.

An investigation ensued, and Basso was later charged with perjury. He

filed a motion to dismiss the charge, which was denied and then raised on interlocutory appeal.

The Court of Appeal held that a crime victim does not commit perjury simply by changing his opinion about the proper punishment for the defendant. *Id.* at *3. Perjury can ordinarily not be based on a statement of opinion, which "is not a statement of fact that can be proven false in a perjury prosecution." *Id.*

Acknowledging the important role that victims play in criminal prosecutions, the Court of Appeals explained that it is not unusual for crime victims to change their opinion about punishment as "time passes, heated feelings cool, and old wounds heal." *Id.*[2]

## CRIMINAL RULE 4(A) & (C)

Criminal Rule 4 sets different deadlines and imposes different consequences for speedy trial violations depending on whether a defendant is in custody and whether a speedy trial is requested. Two cases decided in September highlight the importance of the rule and its nuances.

First, as reiterated in *Ko v. State*, No. 24A-CR-98, 2024 WL 4246023, at *3 (Ind. Ct. App. Sept. 20, 2024), it is well-settled "that a defendant held in jail for more than six months is not entitled to discharge from prosecution or dismissal of charges under Ind. Criminal Rule 4(A); rather, the defendant is merely entitled to prompt release on his own recognizance." Pursuing a writ is the proper procedure to secure a defendant's prompt release. *Id.* (citing *S.L. v. Elkhart Superior Ct. No. 3*, 969 N.E.2d 590, 591 (Ind. 2012) (granting "relief in part by ordering that Relator be promptly released on his own recognizance, though he still may be held to answer for the criminal charge against him")).

But Ko waited until after his trial concluded to raise the issue, and the Court of Appeals found the "issue is moot as no effective relief can be granted." *Id.*

The defendant in *Crabb v. State*, 242 N.E.3d 539, 542 (Ind. Ct. App. 2024), however, brought a challenge under Rule 4(C), which "places an affirmative duty on the State to bring a defendant to trial within one year of being charged or arrested, but allows for extensions of that time for various reasons." The State bears the burden of bringing a defendant to trial within a year; defendants have no obligation to remind the State of its duty or remind the trial court of that duty. *Id.*

Crabb involved a special judge, a request for a competency, and emails that included court staff, defense counsel, and the special judge. The parties agreed that, as of October 25, 2022, the State had 118 days—or until February 20, 2023—to bring Crabb to trial. The State argued from the "context" of a January 2023 email that defense counsel met with the special judge on January 23 and agreed to an October 2023 trial date. But the State offered no evidence that the Rule 4(C) clock stopped running on January 23. Moreover, the State took no action in the case between October 2022 and February 22, 2023, when a trial date was set. Because the 4(C) time had expired, Crabb had no duty to object and was entitled to discharge. *Id.* at *543.

## DOUBLE JEOPARDY DIVIDES PANEL

Court of Appeals' opinions are usually unanimous, and rarely do cases generate three separate opinions. But *McGraw v. State*, No. 24A-CR-16, 2024 WL 4032968 (Ind. Ct. App. Sept. 4, 2024), divided the three judges on the issue of substantive double jeopardy.

Judge Bradford concluded that dual convictions for Level 5 felony and Level 6 felony domestic battery did not violate Indiana's prohibitions against double jeopardy under *Wadle v. State*, 151 N.E.3d 227, 237 (Ind. 2020). Judge Tavitas dissented, finding a violation under *Wadle*'s step three.

Judge Crone wrote a concurring opinion lamenting "our supreme court's abandonment of the 'actual evidence' test from *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999), in favor of the *Wadle* test," which he believes did not provide clarity but "instead sowed confusion." *McGraw*, 2024 WL 4032968 at *6. He concluded with the hope that the recent "fine tuning" of *Wadle* in *A.W. v. State*, 229 N.E.3d 1060 (Ind. 2024), continues in future cases.

## ENDNOTES

1. *See, e.g.*, Joel M. Schumm, *Recent Developments in Criminal Law*, 57 Ind. L. Rev. 891, 911-14 (2024).
2. The Court of Appeals also rejected the State's argument that Basso committed perjury by misrepresenting that his changed opinion was not based on a civil case he had filed against the driver. Rather, the "confusingly worded" question that Basso was asked was not what the State contends he was asked. *Id.* at *4.



*By Adrienne Meiring*

# THE DISQUALIFICATION DILEMMA

**Congratulations! You have recently been elected as judge and are facing your first request for change of judge based on your current, prior professional, or social contacts. What do you do? Not surprisingly, the most common ethical question judges ask staff of the Office of Judicial and Attorney Regulation (OJAR) is whether they should disqualify due to prior activities or connections.**

The Indiana Supreme Court's recent opinion in *Seabolt v. State*[1] provides guidance in this area and highlights other considerations to be aware of. In *Seabolt*, four appellants—Seabolt, Dillard, Tyson, and Robinson—sought to overturn a trial judge's denial of their motions for change of judge on post-conviction cases in which they each allege various misconduct by the same police department and prosecutor's office.[2] Appellants argued that reasonable cause exists to question the judge's impartiality because of (1) the judge's prior professional and social relationships with several potential witnesses, and (2) the judge's finding in another case, which they contend demonstrates prejudgment of similar allegations in their cases.[3]

The court's opinion turned on the fact that the judge previously had disqualified from another post-conviction case for the same reasons asserted by the appellants and not whether the appellants'

**"Not surprisingly, the most common ethical question judges ask staff of the Office of Judicial and Attorney Regulation (OJAR) is whether they should disqualify due to prior activities or connections."**

asserted bases independently mandated disqualification. Focusing on that past recusal, the court held that when a judge determines that disqualification is required in one case, the judge must also disqualify from other cases that raise the same material concerns unless the judge indicates how circumstances have changed or explains that the judge erred in disqualifying in the previous case.[4]

## ASSERTED BASES FOR CHANGE OF JUDGE

To fully understand the court's holding and reasoning in *Seabolt* requires some explanation of the facts in *State v. Royer*[5] in which the trial judge previously granted a change of judge. Royer, like the *Seabolt* appellants, sought to have his conviction overturned due to misconduct by the police department and prosecutor's office. After filing a motion to vacate judgment in 2018, one of Royer's attorneys held a press conference and stated that there was a "systemic failure" and "epidemic" in the county that resulted in individuals like Royer being "wrongfully convicted because of police corruption, uninspiring defense counsel and an overzealous prosecutor."[6] The attorney also remarked during the press conference that "we have proven that [Royer's] conviction was an absolute fraud and the conviction was based on intentional misconduct."[7]

The state moved for a gag order, and after a hearing, the judge issued an order enjoining Royer's attorney from extrajudicial commentary inconsistent with Professional Conduct Rule 3.6 while the matter was

**"It was the trial judge's silence in the *Royer* recusal and her failure to elaborate what had changed when ruling on the subsequent motions for change of judge that led the Supreme Court to conclude that the *Seabolt* appellants were entitled to a new judge."**

pending.[8] In her analysis that the attorney's prior public statements were inconsistent with Rule 3.6, the judge described the remarks as "highly inflammatory, defamatory, inaccurately stat[ing] the law as it exist[ed] at th[e] time regarding Royer's conviction, and draw[ing] legal conclusions about matters not yet adjudicated."[9]

Royer subsequently moved for a change of judge, arguing two essential bases for disqualification. First, Royer indicated he would be calling witnesses who the judge previously worked with when she was a deputy prosecutor, and alleged she could not be impartial when evaluating their credibility or when evaluating Royer's allegations of systemic police and prosecutorial misconduct that spanned when the judge worked as a deputy prosecutor.[10] Second, Royer argued that the judge's finding that his attorney's comments were "defamatory" demonstrated that she had prejudged his allegation of systemic abuse before hearing any evidence.[11] The trial judge granted, without comment, Royer's recusal motion.[12]

It is against this backdrop that the *Seabolt* appellants in 2020 and 2021 sought the trial judge's recusal on their post-conviction cases, asserting essentially the same reasons as Royer did.[13] In detailed orders, the judge explained why those asserted reasons did not support a rational inference that the judge has a personal bias or prejudice against Seabolt, Dillard, Tyson, or Robinson.[14] As to why she recused in Royer's case, the judge indicated she did so "to cure any lingering concerns in that case" but did not specify what those concerns were.[15]

## THE PERIL OF SILENCE

It was the trial judge's silence in the *Royer* recusal and her failure to elaborate what had changed when ruling on the subsequent motions for change of judge that led the Supreme Court to conclude that the *Seabolt* appellants were entitled to a new judge. The court noted that judges have a duty to preside over assigned cases unless disqualification is required.[16] Disqualification is mandated when either a judge subjectively doubts her



impartiality or "when an objective observer, familiar with all the relevant circumstances, would have a reasonable basis for doubting the judge's impartiality."[17]

The court then noted that the following individual considerations, *without more*, do not generally warrant disqualification under the objective standard:

- The judge formed an opinion over proceedings which she has presided or based on prior proceedings over which she presided.
- The fact that a judge previously served as a prosecutor or deputy prosecutor does not necessarily require disqualification in all cases involving her former office or the people with whom she formerly worked.
- The judge is socially acquainted, or friends with a party, attorney, witness, or other interested person.
- The judge worked in some previous professional capacity with prosecutors or police officers who may now be alleged to have committed some act or omission that could render evidence inadmissible or challenge the validity of a conviction.
- The judge made a statement that an attorney's conduct violated the Rules of Professional Conduct.[18]

**"But *Seabolt* makes clear that a silent record is difficult for a reviewing court on appeal. A judge, however, can make a record by 'saying it without saying it.'"**

However, because the trial judge disqualified herself from the *Royer* case, the court reasoned that she determined that the circumstances mandated disqualification.[19] Further, because the judge did not give her reason for disqualifying in *Royer* and did not specify how circumstances were different for the *Seabolt* appellants, the court reasoned that it was left to conclude that those circumstances continued to require disqualification.[20]

## THE DILEMMA

The court's holding is logical. Matters presenting the same areas of concern should be treated the same with respect to disqualification to preserve the impartiality of the judiciary. But for several reasons, the decision is a reminder to be cautious for judges wrestling with whether to disqualify from a case. First, the court did not elaborate (wisely so) what constitutes the "same material concerns." This leaves room for the law to develop, but as it does so, trial judges must conduct a thorough case-by-case evaluation of whether prior recusals present the same concerns as the current matter pending before them.

Second, this case highlights the dangers of a silent record in disqualification matters. Indiana court rules do not require a judge to state the reason for recusing from a case. Sometimes, there may be a legitimate rationale why the judge does not want to state the reason. For example, a judge may have an acrimonious relationship with the attorney for a party. In the interests of fairness, the judge decides to disqualify so there is no appearance that the judge unfairly allowed the judge's feelings about the attorney to influence a ruling against the attorney's client, but the judge may not want to publicly highlight the judge's feelings about the attorney. In other situations, the basis for recusal may involve personal matters that the judge does not want publicly stated.

But *Seabolt* makes clear that a silent record is difficult for a reviewing court on appeal. A judge, however, can make a record by "saying it without saying it." For instance, if a judge recuses from a litigant's case because of unfavorable feelings about the litigant's attorney, and then the same party comes before the judge on an unrelated matter represented by different counsel, the judge may simply indicate in the new request for recusal that the judge "has no bias against the party, who is represented by different counsel than the previous matter." Fortunately for judges navigating these ethical issues, staff at OJAR are available for advice.

So, good luck, new judge. We're here to help.

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*Adrienne Meiring is the executive director of the Office of Judicial and Attorney Discipline.*

## ENDNOTES

1. 240 N.E.3d 1249 (Ind. 2024).
2. *Id.* at 1255-57.
3. *Id.* at 1257-58.
4. *Id.* at 1259.
5. 20D03-0309-MR-00155.
6. *See Seabolt*, 240 N.E.3d at 1253.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 1254
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at 1257. As to the first assertion, appellants specifically argued that the judge cannot be impartial because they intend to call witnesses who the judge formerly worked with as a deputy prosecutor from 1998 to 2002; they intend to call as a witness, the judge's ex-husband, a former reserve police officer from the investigating police department (and who the judge divorced nearly 20 years ago); and they intend to seek discovery directly from the judge regarding her knowledge of the prosecutor's office's practices relating to their allegations (even though she never worked on the appellants' cases and three of the prosecutions occurred after the judge left the prosecutor's office).
15. *Id.* at 1265.
16. *Id.* at 1258.
17. *Id.*
18. *Id.* at 1262-63.
19. *Id.* at 1263.
20. *Id.* at 1263-64.

CIVIL LAW UPDATES

***By Dakota C. Slaughter and Curtis T. Jones***


# SEPTEMBER CASES DISCUSS TIKTOK, DUTY OF CARE, AND MORE

**In September 2024, the Indiana Supreme Court issued one opinion that it has categorized as "civil" on its website. The court did not grant transfer for any civil cases. This article also highlights two decisions from the Court of Appeals.**

## INDIANA SUPREME COURT

### PROFANITY AND PROCEDURE: SUPREME COURT RULES INSANITY DEFENSE NOT APPLICABLE TO CONTEMPT PROCEEDINGS

*Finnegan v. State*, 240 N.E.3d 1265 (Ind. 2024)—The respondent in a case for a protection order filed two documents pro se in which he demanded a hearing but used explicit language (that we will refrain from reproducing here) directed at the judge personally in conveying an ultimatum for his request. This conduct led to the opening of a separate cause number for an indirect contempt proceeding. After a hearing, the special judge presiding over the matter found the respondent in contempt of court, which prompted additional contumacious correspondence from the respondent. In turn, this led to the special judge creating *another* cause number for *another* indirect contempt proceeding.

In connection with this second contempt hearing, the respondent filed a notice of intent to interpose a defense of insanity pursuant to Indiana Code § 35-36-2-1 (which applies in criminal proceedings) and requested the appointment of medical professionals to evaluate his mental health, as the statutory scheme requires when the defense is properly raised. The trial court (in the second contempt proceeding) did not appoint any medical professionals as requested but found the respondent in contempt. The respondent appealed, asserting that the failure to appoint medical professionals was an abuse of discretion. The Court of Appeals concluded that an indirect contempt proceeding was a "trial of a criminal case" within the meaning of the insanity-defense statutes, and thus the respondent was entitled to the same protections as criminal defendants.

On transfer, the Supreme Court disagreed. The court explained that contempt is neither a criminal nor a civil offense, but rather a proceeding of its own kind. In that sense, indirect contempt is not an "offense" for which the statutory insanity defense applies. The court also pointed out that the procedure for indirect contempt proceedings falls under a different statutory title—Title 34 for civil procedures—instead of Title 35 for criminal proceedings. The court affirmed the trial court on the narrow grounds that the trial court was not compelled to appoint medical professionals pursuant to the insanity-defense statutes.

## INDIANA COURT OF APPEALS

### TIKTOK TAKEDOWN: DCSA CLAIMS REVIVED ON APP'S CONTENT AND PRIVACY PROMISES

*State v. TikTok Inc.*, 2024 WL 4340387 (Ind. Ct. App. Sept. 30, 2024)—The state, through the attorney general, filed two complaints against TikTok, Inc., a California corporation that operates a free and immensely popular social media application (TikTok) that algorithmically curates a stream of short-form videos for interaction with end users. Both complaints asserted violations of Indiana's Deceptive Consumer Sales Act (DCSA): In one complaint, the state alleged that TikTok misrepresented to users the risk that their personal data collected by the app could be accessed by the Chinese government (based on TikTok's relationship with its Chinese parent company); and in the other, the state alleged that TikTok misrepresented (i.e., understated) the availability of mature content on the app to induce parents and young audiences to download and access the app.

The trial court dismissed both complaints for lack of specific personal jurisdiction over TikTok and for

failure to state a claim under the DCSA. Without formal consolidation, the Court of Appeals nonetheless decided both appeals in a single opinion.

The court first held that specific personal jurisdiction exists over TikTok, finding the company's contacts with Indiana substantial and continuous through the millions of end users of the app in Indiana and the constant transmission of data to and from each of those users. Next, the court concluded that the exchange of user personal data for access to TikTok's content library is a "consumer transaction" within the meaning of the DCSA, rejecting TikTok's argument that the statutory term requires an exchange of money. Finally, the court concluded that both complaints stated a claim under the DCSA, reasoning that reasonable persons might have relied on the alleged misrepresentations in downloading TikTok.

Notably, the court examined the DCSA's legislative history against our Supreme Court's opinion in *Kesling v. Hubler Nissan, Inc.*, 997 N.E.2d 327 (Ind. 2013), which held that the used car dealership's advertisement of a vehicle as a "Sporty Car at a Great Value Price" was mere puffery,



and not a "deceptive" representation of fact under the DCSA. The following year, the General Assembly amended the DCSA, expanding its scope to include both implicit and explicit misrepresentations. The court concluded that it interprets the legislature's response as intending to supersede the court's analysis in *Kesling*, and that the distinction therein between actionable representations of fact and nonactionable assertions of opinion is no longer good law under the DCSA.

### DELIVERY DANGERS: DUTY OF CARE EXTENDS TO HAZARDOUS OFF-PREMISES CONDITIONS AT AMAZON FULFILLMENT CENTER

*Kaur v. Amazon, Inc.*, 2024 WL 4312615 (Ind. Ct. App. Sept. 27, 2024); *Oukbu v. Amazon*, 2024 WL 4312619 (Ind. Ct. App. Sept. 27, 2024)—The court issued these companion cases contemporaneously with nearly identical facts and analysis. In *Oukbu*, Amazon contacted an independently contracted truck driver to deliver goods to an Amazon fulfillment center in Greenfield. The fulfillment center has three entrances accessible from the county roadway, but as approached from the west, the first two entrances are marked with "no truck" signs. When the truck driver attempted his delivery one morning before sunrise, the driver got confused by the two prohibitory signs, and unable to discern any other available entrance, stopped his truck in the middle bi-directional turn lane. Upon exiting his truck and stepping onto the road to determine an access point, an eastbound motorist struck the truck driver. In *Kaur*, the same thing happened at the same fulfillment center the following month, but with another truck driver.

On a premises liability claim, the trial court granted Amazon's motion for judgment on the pleadings, determining that Amazon did not owe a duty of care to guard against the off-premises injuries. The Court of Appeals reversed, persuaded by the rationales advanced in *Lutheran Hospital of Indiana, Inc. v. Blaser*, 634 N.E.2d 864 (Ind. Ct. App. 1994). In that case, a hospital visitor walking up the hospital's parking lot driveway was struck by a vehicle. The court concluded that the hospital had a duty to guard against subjecting invitees to dangers which it might have reasonably foreseen and found that funneling of pedestrian and vehicular traffic into the parking lot driveway created such foreseeable danger.

Applying that rationale, the court concluded that the complaints sufficiently alleged that Amazon used its premises (through the layout and signage) in a manner that harbored a dangerous condition on the county


road. The court also reasoned that this condition was foreseeable. In the first instance, the motorist told investigating law enforcement that he saw truck drivers routinely stop and get out at that location, and that first instance of injury in turn alerted Amazon of the condition prior to the second occurrence.

Moreover, the court found the Restatement (Third) of Torts § 54 instructive, which provides that possessors of land owe a duty of reasonable care for artificial conditions or conduct on the land that poses a risk of physical harm to persons not on the land. Judge Mathias wrote a concurring opinion urging our Supreme Court to adopt this section of the Restatement.

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