NOV 2021

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THE INDIANA STATE BAR ASSOCIATION MEMBER JOURNAL

FEATURING:

TOP TEN TAKEAWAYS ABOUT INDIANA'S NEW HEALTH CARE ADVANCE DIRECTIVE

PLUS:

Celebration of 19th Amendment: Looking back and looking forward

COVID-19 Vaccinations: Employer Incentives and Other New Guidance from the EEOC

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10 **TOP TEN TAKEAWAYS**

Top Ten Takeaways About Indiana's New Health Care Advance Directive
By Jeffrey S. Dible

CONTENTS

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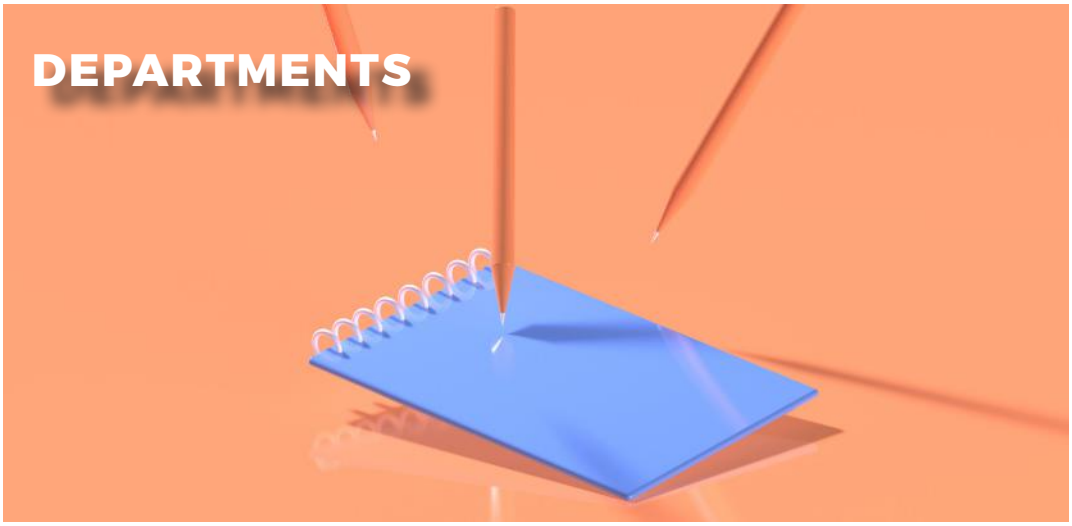

CONTENTS

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President's Perspective

THE RULE OF LAW AND THE ETHICAL LAWYER

By Clayton C. Miller

PRESIDENT'S PERSPECTIVE

My first full-time job after college was as a low-level staff member of the U.S. House of Representatives' Select Committee to Investigate Covert Arms Transactions with Iran (aka the Iran Contra Committee). I was part of a small team managing the storage and limited distribution of reams of classified documents. The committee's expansive suite of secure offices were carved out of windowless space in the attic of the U.S. Capitol next to the roof hatch. Throughout the day, congressional interns would run new U.S. flags up and down a cluster of flagpoles at the base of the dome for one minute each. The flags were then re-boxed so members of Congress could fill constituent requests for a flag that had been flown at the Capitol.

It was an exciting, if occasionally tedious, introduction to living and working in our nation's capital, and it was a privilege to be associated with the committee's work even if others had the more substantive roles. I was especially proud of our Hoosier leader, U.S. Representative Lee Hamilton, whose steady management of the contentious hearings and the drafting and issuance of the committee's report was a model of thoughtful, principled oversight. His repeated articulation of the fundamental importance of "the rule of law" left a powerful impact, even if at the time some of the more nuanced contours of that concept remained a bit nebulous to my inexperienced mind.

As lawyers, we presumably know something about the importance of the rule of law. Although we may never appear in court, even transactional attorneys advocate for our clients within a system that is based on the neutral application of legal precepts by dispassionate judges. That system includes mechanisms intended to

remove, or at least reduce, instances of undue influence and bias – even potential bias – we might encounter, whether from the bench, or in the jury pool, or in how and what types of evidence may be presented. And while we might each be able to identify examples when cogent legal reasoning appears to take a back seat to other considerations, making the rule of law more aspirational than demonstrable in such instances, I would hope that even the most hardened, informed cynic might agree that on balance our legal system more often than not reaches an objectively fair and correct result in matters ranging from the simplest to the most complex.

It is in lawyers' and society's interest to protect and promote the rule of law and, ultimately, the accountability it represents. This is not to suggest that lawyers should try to act as judge and jury in their clients' cases; we have an important and privileged function as advocates for the causes entrusted to us. Zealous advocacy on behalf of our client's interests certainly requires thorough preparation and strategic thinking, and for some attorneys that includes deploying "sharp" lawful tactics. Part of our obligation as professionals, however, is to resist the temptation to adopt a win-at-all-costs approach.

Unmoored from the rules of professional conduct, an anything-you-think-you-can-get-away-with interpretation of the lawyer's craft reduces such strictures as the prohibition on suborning perjury, or the duty of candor to the tribunal, or the expectation to return unread obviously misdirected emails from opposing counsel, to quaint theories which in practice might be applicable to thee but certainly not to me. Mendacity never lacks for justification in the mind of the mendacious, whether you're Oliver North, Rod Blagojevich, or a president pressuring a state election official to change the official vote count. Disciplinary cases are replete with examples of lawyers who either through their pursuit of self-interest or overzealous advocacy crossed ethical lines. The temptation to cut ethical corners can be especially hard to resist for our solo colleagues, who sometimes have less ready access to dispassionate sounding boards, but even lawyers in the largest firms are not immune from the pressures brought by demanding clients and financial imperatives.

This periodical regularly features columns by others more qualified than I to review and analyze disciplinary opinions and present their lessons to this audience. One way your bar association can help is through our offerings of continuing legal education satisfying the Supreme Court's ethics requirement. Although the Indiana State Bar Association is hardly the only entity offering CLE courses, under our newly adopted strategic plan we are ramping up efforts to add value with our programs. The best CLE doesn't happen by chance, and the ISBA staff is committed to identifying and working with presenters and programs that keep attendees engaged and enthused. Our growing

"Doing your job ethically is one way to promote the rule of law, but doing the right thing is not always self-evident."

database of well-received ethics speakers and topics is also available to our sections as they plan programs tailored for their members.

Other ways the ISBA can help Indiana attorneys navigate occasionally murky ethical waters is through our many section list serves, and through advisory opinions. Practice-specific list serves have proven to be an invaluable resource to members, including as a forum to address thorny ethical dilemmas. The ISBA Legal Ethics Committee issues formal written opinions from time to time, either in response to specific inquiries from ISBA members, or as a result of its determination that an opinion on the particular topic would be useful. These opinions are available for review at *www.inbar.org/ethics.*

Doing your job ethically is one way to promote the rule of law, but doing the right thing is not always self-evident. When presented with circumstances that leave you stumped, don't forget: You are not alone. Your bar association is here to help.

TOP TEN TAKEAWAYS ABOUT INDIANA'S NEW HEALTH CARE ADVANCE DIRECTIVE

FEATURE

By Jeffrey S. Dible

Beginning July 1, 2021, Hoosiers became able to sign a single, new type of health care advance directive to replace three older types under pre-2021 law: The durable power of attorney containing health care powers under I.C. 30-5, the appointment of a health care representative under I.C. § 16-36-1-7, and the living will declaration or life-prolonging procedures declaration under I.C. § 16-36-4-10 and -11.

The new-style advance directive was created by Senate Enrolled Act 204 (P.L. 50-2021), signed by Governor Holcomb on April 15, 2021, and took effect July 1, 2021. SEA 204 is the result of a project which began in June 2018 with the formation of a working group led by State Representative Cindy Kirchhofer that included estate planning attorneys, academic experts on medical ethics and advanced-care planning, palliative care physicians, nurses, hospital risk managers and administrators, nursing facilities, patient-advocacy organizations, and social service agencies.

SEA 204 is 75 pages long, but its core provisions are the 26 pages that comprise the 44 sections of a new chapter 7, which has been added to I.C. 16-36 (in the same article 36 where the living will, out-of-hospital DNR, and POST statutes are located). Indiana lawyers should know the following about SEA 204 and the new-style advance directive.

1. Hoosiers can continue to sign and rely on advance directives under pre-2021 law through December 31, 2022. Sections 37 and 74 of the act amend I.C. §§ 16-36-1-7 and 30-5-5-16, respectively, so an appointment of health care representative(s) and/or a durable power of attorney conferring health care powers can be signed at any time on or before December 31, 2022. And if a Hoosier who had signed either or both documents chose not to replace them on or after January 1, 2023, those documents under pre-2021 law would remain valid and enforceable. However, *after 2022*, if a Hoosier wants to sign a new or updated advance directive that names one or more health care representatives (surrogate decision-makers), that Hoosier will have to sign a new-style advance directive. If a broad, durable POA is signed after December 31, 2022, and if that POA contains health care powers, the health care powers will be void, but the rest of the POA will remain effective and enforceable. *See* amended I.C. § 30-5-5-16(c). Finally, during the 18-month transition period from July 1, 2021, through December 31, 2022, Hoosiers can sign advance directives under *both* the new act and pre-2021 law, but as explained under Point 9 below, the latest signed advance directive will supersede and revoke all earlier-signed advance directives not explicitly preserved under the new document.

2. The new-style advance directive can be either "springing" or immediately effective, can name one or more health care representatives with or without stating an order of priority, and/or can disqualify named individuals from serving as health care representatives or from receiving delegated authority. *See* I.C. §§ 16-36-7-28(a) and 16-36-7-29(2) through (5). In these and other respects, the act preserves the planning and drafting flexibility Indiana lawyers and their clients have under the current power of attorney statute.

3. The new-style advance directive can contain an unlimited range of health care decisions, wishes, and treatment preferences about palliative care, life-prolonging procedures, and other specific treatment situations. On and after July 1, 2021, Hoosiers are not limited to signing the statutory living will declaration and then attaching

"Both witnesses must be able to authenticate the declarant's identity and satisfy themselves that the declarant is of sound mind and has capacity to sign the advance directive."

other instructions to it. The act places no limits on the kinds of wishes and treatment preferences that can be stated in a new-style advance directive. *See* I.C. § 16-36-7-28(a)(3). Health care providers have no greater leeway to refuse to carry out a stated wish or treatment preference (as contrary to the individual's best interests) as providers have under pre-2021 law. *See* I.C. §§ 16-36-7-35(c) and 16-36-7-37(c). Although the act does not repeal or limit the effect of Indiana's current living will statute (I.C. 16-36-4), a Hoosier would have no rational incentive to sign a new, separate living will declaration on or after July 1, 2021: It will be better and easier to state wishes and treatment preferences with the desired freedom and detail *within* the new-style advance directive.

4. There is no mandatory or official form of new-style advance directive that must be used. The act requires the Indiana State Health Department (ISDH) to update its "advance directive resources" webpage to provide links to other sites which offer advance directive forms that comply with the act's requirements, but ISDH will not be required to develop or publish an "official" form. *See* I.C. § 16-36-7-30. Hoosiers have signed and used durable powers of attorney for more than 30 years without a statutory form, and the working group determined that having a mandatory form of advance directive would stifle innovation. Bar associations, patient-advocacy organizations, and hospital chains will be free to develop and distribute advance directive forms during and after the 18-month transition period that ends on December 31, 2022. Three sample advance directive forms (shortest, medium-length, and longer) are available free upon request from Jeff Dible, jdible@fbtlaw.com.

5. The act provides two general methods for signing and completing a new-style advance directive. An individual with capacity (the declarant) can sign an advance directive electronically or on paper and can either sign personally or direct some adult to sign for the

declarant in the declarant's direct presence. *See* I.C. § 16-36-7-36(b)(1) and (2). This signing by or for the declarant must occur in the "presence" of either two adult witnesses or a notarial officer (such as a notary public), and the advance directive is complete and valid only when the two witnesses also sign or when the notarial officer completes and signs a notarial certificate. *See* I.C. § 16-36-7-28(c). In new chapter 16-36-7, the act includes specific definitions of "presence" and "observe" (which are similar to the definitions included in House Enrolled Act 1255 (P.L. 185-2-2021) with respect to the signing of wills with "remote witnessing." *See* I.C. § 16-36-7-18 and 19.

6. The act provides several methods for how the declarant and the two witnesses or the notarial officer can interact to complete the valid signing of a new-style advance directive. For new-style advance directives under the act, the requirement for "presence" between a competent declarant and the two witnesses or between the declarant and the notarial officer can be satisfied in the following ways, under subsections (c) through (h) of new I.C. § 16-36-7-28:

- The declarant and the two witnesses or the notarial officer have line-of-sight interaction in each other's direct, physical presence and sign the advance directive on paper.
- The declarant and the two witnesses meet in the same space (direct, physical presence) and electronically sign the advance directive using separate devices or the same device.
- The declarant is not physically able to pass a paper original to the two witnesses or to the notarial officer, but the declarant can maintain two-way real time interaction with the witnesses or the notary using technology (*e.g.*, talking by phone and watching each other through a glass window, or using audiovisual software such as FaceTime, Zoom, MS Teams, etc.). The declarant and the witnesses or the declarant and the notary sign and complete identical paper counterparts of the advance directive, and within 10 business days after receiving the last signed counterpart, someone assembles those counterparts into a composite document containing all signatures. *See* I.C. § 16-36-7-28(d).
- The declarant is able to use electronic signing methods *and* two-way, real-time audiovisual technology to interact with two witnesses or with a notarial officer, and the declarant and the witnesses or the notary all electronically sign the advance directive in electronic form. If an Indiana notary public notarizes the advance directive, that notary must comply with the applicable statutes and regulations under I.C. 33-42 for valid notarial acts. *See* I.C. §§ 16-36-7-1(e), 16-36-7-19(b), and 16-36-7-28(c).
- Unusual circumstances prevent the competent declarant from having access to or using two-way audiovisual technology during the signing, and that declarant and two witnesses interact solely by telephone (audio only) and sign the advance directive during that phone call. A notarial officer cannot participate in the signing of advance directive through telephonic interaction, and both witnesses must be able to authenticate the declarant's identity *and* satisfy themselves that the declarant is of sound mind and has capacity to sign the advance directive. *See* I.C. § 16-36-7-24 and 16-36-7-28(e) through (i).

7. The statutory rules for the new-style advance directive are easier to find, easier to read, and easier to understand and apply than the pre-2021 rules that were contained in titles 16 and 30. In the single new chapter 16-36-7, the act has preserved essentially all the legal principles and presumptions that have applied to health care POAs (under I.C. 30-5) and health care representative appointments (under I.C. 16-36-1), but many rules are stated more clearly and explicitly, and long-standing inconsistencies between I.C. 16-36-1 and IC 30-5 have been eliminated. For the

Continued on page 37...

HOW CAN EMPLOYERS LEGALLY INCENTIVIZE THEIR EMPLOYEES TO BECOME VACCINATED?

By Elizabeth M. Roberson

Twenty months ago, employers could not have imagined the variety of questions that would arise during the COVID-19 pandemic concerning their workplaces and employees. But here we are, and the questions and issues continue. One question at the forefront is whether employers can incentivize their employees to get a COVID-19 vaccine? The answer is yes, in most cases; however, the type and amount of incentive could implicate a variety of laws. As with any decision, employers should be aware of the legalities of offering an incentive to their employees who receive the COVID-19 vaccine.

Given President Biden's recent Path out of the Pandemic COVID-19 Action Plan (the "Plan"), employers will need to rethink whether they want to offer vaccination incentives. The Plan directed the Department of Labor's Occupational Health and Safety Administration ("OSHA") to draft

an Emergency Temporary Standard ("ETS") to require all employers with 100 or more employees to ensure their workers are vaccinated or require weekly testing. Even if an employer has 100 or more employees it may still want to provide incentives for employees to be vaccinated because it will reduce the number of employees that would be required to be tested weekly. This would decrease the employer's record keeping responsibilities for this weekly testing and many other administrative burdens associated with tracking COVID-19 test results.

One of the biggest questions when creating an incentive program is what to offer. The answer depends, in part, on whether the employer is administering the vaccine or contracting for its administration, or if the employee receives the vaccine from an unaffiliated third party of the employee's choice.

1. Employer Vaccine Administration/ Contracted Party

If the vaccine is being administered by the employer or a party with which the employer contracts to administer the vaccine, it could be considered a wellness program governed by the Americans with Disabilities Act ("ADA"). The ADA applies to employer-sponsored voluntary wellness programs that include a medical examination or disability-related inquiry. In this case, the program must be reasonably designed to promote health or prevent disease, not overly burdensome, and not a subterfuge for discrimination. The program cannot be a "gateway plan", requiring employees to submit to a medical examination or inquiry in order to access an enhanced benefits package. The program must also offer reasonable accommodations to persons for whom it is medically inadvisable to participate. And participants must be provided with a notice informing them of why their information is being requested, how it will be used, and how it will be protected.

In addition, if such a program is created, the ADA and the Genetic Information Nondiscrimination Act ("GINA") limit what employers can offer as an incentive, however, currently that limit is unclear. On January 7, 2021, proposed regulations under the ADA and GINA provided that a de minimis standard for incentives must be followed; examples included a water bottle or gift card of modest value. However, that guidance was withdrawn by the Biden Administration and no additional guidance has been issued. It is likely that there will be limits to these incentives and thus employers that are administering vaccines or contracting with a party to do so should seek the advice of counsel before creating an incentive for vaccination.

2. Third Party Vaccination

If an employee receives the vaccine from a third-party of his or her choosing, the ADA and GINA incentive limits do not apply. However, employers must be cautious if collecting employee medical information. An employer can ask for proof of vaccination without implicating ADA standards regarding medical inquiries of employees, but asking additional questions, such as why an employee refuses to be vaccinated, could implicate the ADA. Further, employers need to ensure that any records regarding vaccination are kept confidential as any other medical record would be.

After determining what to offer, employers must make the incentives available to all employees. This could involve accommodating those employees who are unable to be vaccinated because of either a disability or a religious objection.

Employers should also consider the impact of a vaccine incentive program on employee morale. There are many other ways to encourage employees to be vaccinated without providing financial incentives, such as management leading by example, education, and offering paid time off to receive the vaccine.

Overall, employers need to consider what is best for their business and whether incentives would encourage employees to become vaccinated. Further, as this is an ever-evolving area of the law, employers should ensure they are consulting legal counsel prior to creating a vaccine incentive program for their business.

DISCLAIMER

The contents of this article should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult with counsel concerning your situation and specific legal questions you may have.

FOOTNOTES

1. Path Out of the Pandemic, President Biden's COVID-19 Action Plan, at https://www.whitehouse.gov/covidplan/.

CELEBRATION OF 19TH AMENDMENT:

Looking Back and Looking Forward

By Rebecca Berfanger

About a year after the centennial of the 19th Amendment, passed in June 1919 and ratified August 18, 1920, a who's who of pioneering women judges and lawyers from around Indiana gathered in Indianapolis on August 23 to celebrate not only how far women have come in the last 100 years, but also to share candid conversations about work that is yet to be done.

U.S. District Court Senior Judge Sarah Evans Barker kicked off the event with a tribute to Judge V. Sue Shields. Next, a one-woman show, "Digging in their Heels," honored the women who worked for the right to vote. Then, Indiana Supreme Court Chief Justice Loretta Rush honored various women, particularly women of color, and their fight for equality. Finally, a panel of current and former judges and appellate judges shared candid stories of being the first, only, or one of a few women in their respective law classes and benches.

Starting at lunch, Judge Evans Barker compared the event to sitting around a family dinner table, having recognized so many familiar faces in the room. She gave a brief overview of the role of the suffragette movement, starting with the Seneca Falls Convention in July 1848. She also shared that in looking back on history, it is important

to consider three lessons from the suffragettes' experience:

Success depends on having like-minded partners, "women know this, women live this, and we do it well;" that success doesn't happen in a straight line, often it's "one step at a time, a meeting at a time, a rally at a time," and there will likely be obstacles along the way; and any worthwhile cause is truly deserving of our time and efforts, and will likely take a long time, said Judge Evans Barker.

"If you expect to see the final fruits of your labor in your lifetime, your goal is too small," she added, making the point that many of those early trailblazers didn't live to see the fruits of their labor, but that didn't make their work any less important.

Judge Evans Barker also shared the life story of Judge Shields, the first woman to be elected judge of a general jurisdiction trial court in Indiana, the first woman to serve as a judge on the Indiana Court of Appeals, and the first female U.S. magistrate judge in Indiana.

But instead of only sharing Judge Shields' accolades on the bench, Judge Evans Barker described how Judge Shields' life included many opportunities to adapt to new situations. Judge Shields attended more than a dozen schools while she was growing up, worked as a server, and was recruited to attend law school while she was a student majoring in History and French at Ball State Teachers College (now Ball State University). Judge Shields was the only woman in her law school class at IU School of Law in Bloomington (now IU Maurer), where she graduated in 1961.

Also at the lunch, a portrait of Judge Shields, by Munster artist Michael Chelich, was unveiled before the audience.

After lunch, many of the attorneys, judges, and law students, some of whom received a scholarship to attend the event, moved into the auditorium to continue the day's festivities.

Storyteller and performer Sally Perkins presented her one-woman show, "Digging in their Heels." The show is an entertaining and informative retelling of the history of the suffragettes' movement.

Perkins compared the suffragettes to modern day celebrities and well-known literary figures, starting with the Crimke sisters in the 1820s (Venus and Serena Williams), Elizabeth Cady Stanton (Sherlock Holmes), Susan B. Anthony (Dr. Watson), and Sojourner Truth (Whoopi Goldberg), among others. Perkins was able to break down the century-long efforts, including the various factions, how and why the suffragettes would ramp up or slow down their efforts during war times, and didn't gloss over the efforts of the many women of color who are often overlooked by history books.

Following Perkins' performance, Chief Justice Rush continued the


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discussion of the role of women in their work for voting rights. Her presentation included slides featuring Mary Ann Shadd Carey, one of the first Black female lawyers in the United States, who spoke about women and voting rights in 1878; Ida B. Wells-Barnett, a Black investigative journalist who walked in the first suffragist parade in Washington, D.C., in 1913; Marie Louise Bottineau Baldwin, an indigenous suffragette and lawyer who met with President Woodrow Wilson in 1914 to promote women's suffrage; and Dr. Mabel Ping-Hua Lee, the first Chinese woman to earn a Ph.D. in Economics from Columbia University.

Chief Justice Rush's presentation also included inspiring stories of women fighting to get the Voting Rights Act passed during the Civil Rights Era. Among them were Fanny Williams, who operated a suffrage school in St. Louis to help women overcome the various barriers put in place to vote, such as literacy tests and poll taxes; Fannie Lou Hamer's televised speech, where she talked about losing her job and home for trying to register to vote in Mississippi; and Diane Nash's work on the Selma Voting Rights Campaign and time Nash spent in jail for teaching about non-violent protests and refusing to sit in the back of the courtroom.

To wrap up the day, Indiana Court of Appeals Judge Nancy Vaidik moderated a sincere discussion including a handful of current and former women judges: Judge Shields; Indiana Court of Appeals Senior Judge Betty Barteau; Indiana Court of Appeals Judges Elaine Brown and Elizabeth Tavitas; and former Indiana Supreme Court Justice Myra Selby.

"Several panelists also encouraged women in the audience to consider running for judge in their own counties and not to be intimidated by incumbent judges."

The women talked about their experiences being in the extreme minority as the only or one of a small percentage of women in their law school classes; the impact raising a family had on their work both as attorneys and as judges; and how they were portrayed by local newspapers and in their campaigns. For instance, Judge Shields was referred to as a "tall svelte blond" when she was up for election for Superior Court judge in Hamilton County. Judge Barteau was "Women's Exhibit A." Judge Brown shared that she wore a tie for a photo, because "I thought I'd have a better chance if I looked more masculine."

Several panelists also encouraged women in the audience to consider running for judge in their own counties and not to be intimidated by incumbent judges. As a couple of them explained, they thought their success wasn't due to constituents voting for them, but voting against the other candidate. They also said on balance, running in a

Watch a video of Judge Barker giving her remarks or read the transcript at www.inbar.org/19th-amendment-salute

campaign, win or lose, helped get their names out to their respective communities, along with giving away cookbooks or sponsoring community organizations, like little league teams.

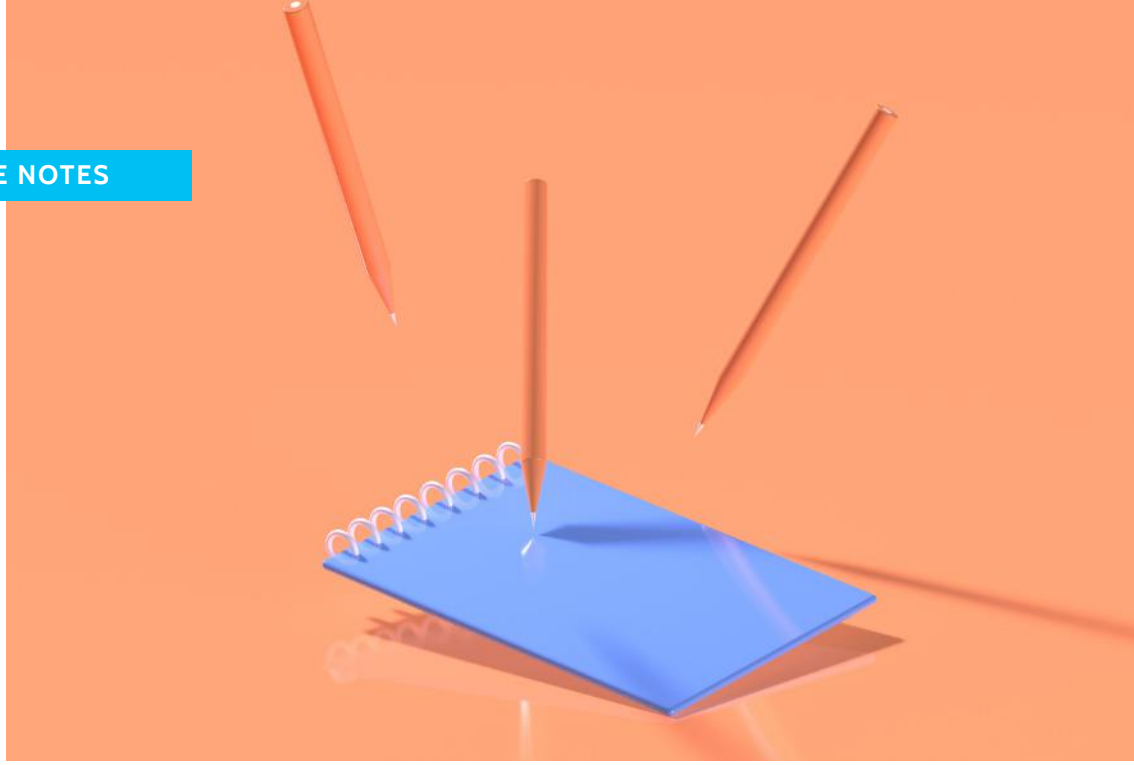
The judges also provided anecdotes of having their gender come into question. Judge Barteau shared an example of a male attorney who questioned her judgment on his motion during a hearing, and later told her to go home to take care of her children. She also explained how having children around at political functions could be an asset to her campaign.

Despite the many obstacles, the panelists agreed that for the most part, other attorneys and judges had been accepting of them on the bench, and that things were much improved in 2021 compared to when they were starting their careers as lawyers and judges. The judges then encouraged younger women attorneys in the audience to consider a future on the bench.

"This is history in the making," Judge Vaidik concluded. RG

CRIMINAL JUSTICE NOTES

By Suzy St. John



COURT OF APPEALS ADDRESSES SUFFICIENCY CHALLENGES, EVIDENTIARY AND SUPPRESSION ISSUES

In August, the Court of Appeals decided cases involving issues of statutory interpretation, the admissibility of police recordings and photographic evidence, and a rental car driver's privacy interest.

OLD PRESCRIPTION DEFEATED CHARGE FOR POSSESSION OF NARCOTIC DRUG

In *Page v. State*, No. 21A-CR-90 (Ind. Ct. App. Aug. 6, 2021), the Court of Appeals reversed a conviction for possession of a narcotic drug, finding that Oxycodone obtained under a since-expired prescription was a "valid prescription" under the statute. The court found nothing in the statute that suggested one's failure to take medication as prescribed makes a prescription

invalid. It reasoned the legislature would not have intended the harsh result of a criminal conviction for anyone who keeps a prescription for a narcotic drug beyond the prescribed period. Rather, the statute's reference to a "valid prescription" was meant to assure the prescription was not obtained by fraud, misrepresentation, or deceit. Because there was no dispute Page had obtained the Oxycodone under a validly issued prescription, it established a complete defense to the charge.

ERRONEOUS ADMISSION OF EVIDENCE REQUIRED REVERSAL

In *Stott v. State*, No. 20A-CR-1924 (Ind. Ct. App. Aug. 13, 2021), the Court of Appeals found reversible error in the trial court's decision to admit a recording of police radio traffic and photographs of surveillance footage in a resisting law enforcement prosecution. The recording of police radio traffic contained statements from anonymous witnesses. But the state did not prove these statements fell under the present sense impression exception to the hearsay rule. With no showing the statements were made close to the event or by those with personal knowledge, the court held they were inadmissible as hearsay. The court also held the silent-witness theory governed the admission of cell phone photographs of a restaurant's surveillance footage, finding no practical difference between photographs of the footage and still images extracted from it. Noting how easily images may be manipulated in the digital age, the court found no "strong showing of authenticity" because the state produced no evidence about the restaurant's security system or how it operated. *Id.*, Slip Op. at

*19. Concluding the erroneously admitted evidence contributed to the verdict, the court reversed Stott's conviction and remanded for further proceedings.

CRIMINAL RECKLESSNESS CONVICTION UPHELD FOR SHOOTING GUN INTO EMPTY HOUSE

In *Grannan v. State*, No. 20A-CR-1907 (Ind. Ct. App. Aug. 13, 2021), the Court of Appeals affirmed a conviction for criminal recklessness based on evidence that Grannan fired a gun into her neighbor's then-empty home. The neighbor had been on her back porch at the time, and her two children were not home. The statute prohibits "shooting a firearm into an inhabited dwelling or other building where people are likely to gather." Rejecting an argument of insufficient evidence because the neighbor's home was uninhabited when Grannan fired the gun, the court reasoned the empty home still qualified as a building where people are likely to gather.

WARRANTLESS SEARCH OF RENTAL CAR UPHELD FOR LACK OF STANDING

In *Wilson v. State*, No. 21A-CR-366 (Ind. Ct. App. Aug. 24, 2021), the Court of Appeals on interlocutory appeal upheld the denial of a motion to suppress following a warrantless search of a rental car, finding the driver lacked standing to challenge the search. Although the state did not raise standing in the trial court as it usually must before raising the issue on appeal, the court considered it under the review standard that allows for affirming the denial of a motion to suppress on any theory supported by the record. While acknowledging a sole occupant and unauthorized driver of a rental car might have a reasonable expectation of privacy, *Byrd v. United States*, 138 S. Ct. 1518 (2018), the Court of Appeals held the driver must still present some affirmative evidence of lawful possession and control. Because Wilson presented no such evidence at the suppression hearing, he could not prove the requisite privacy interest in the rental car.

ISBA OFFERS IMPROVED DOCUMENT AUTOMATION SOFTWARE, INDIANADOCS

By Res Gestae Staff

Automate routine tasks. Capture data once. Every law practice management seminar discusses these twin precepts. Large firms design systems to do just that. But solo and small firms lack the resources to develop proprietary software for document automation. Therefore, we continue to use outdated forms, using the "find and replace" features. This results in errors in data entry and time lost updating or editing for pronouns and other changes. Solo and small firms cannot afford that lost time, either.

The leading document automation software has a steep learning curve that solo and small firms do not have time or money for. The Indiana State Bar Association came across a document automation system several years ago that takes the learning curve and expense out of the equation for solo and small firms. It was called IndianaDocs.

Recently the ISBA migrated IndianaDocs to a new provider, XpressDox. This document automation system allows users to enter commonly used data and then reuse it for subsequent documents. This saves time and money and improves the accuracy of the data entry. In addition, IndianaDocs requires no special software to purchase and maintain, making it available anywhere, anytime, on any device.

Here's how it works. Purchase a subscription (available at a discounted rate for ISBA members) and enter your firm's information, including attorney names, addresses, and notary info. Once this information is added, it can be preloaded into any document template so it doesn't have to be manually entered for subsequent uses.

When you're ready to assemble a document, select the template from the appropriate folder in the library, which is categorized by practice area. IndianaDocs will guide you through an intuitive interview process through which you will enter the necessary data for the form you need. Once all required information has been entered, you will have the option to download the completed form as either a Word doc or PDF. You may name the file using any naming convention you'd prefer and store it anywhere on your computer. Once it's downloaded you can edit the document further if needed.

You will also have the option of downloading the answer file, i.e., an Excel spreadsheet of all the data you entered during the interview process. This answer file can be used when assembling other forms, allowing that information to be pre-loaded so you don't have to enter the same data again manually. (To do so, start a new form and click the blue "Load Information" button at the top right of the page, and select the saved answer file you wish to use. It will be saved as a .xddata file type).

Sometimes the data needed for subsequent documents was not requested on the first document, so you will need to enter it on the new form to fill in any blanks. This is also how you can change something if it was entered incorrectly the first time or changed during the representation, such as opposing counsel's name. Any new information entered will be updated on the answer file if you save it with the same file name at the end of the assembly process.

You can easily see how this can save time in not having to enter repetitive data. The software also adjusts pronouns automatically. The system contains hundreds of commonly used documents and more are being added as members request them. They are reviewed by lawyers who practice in the area in which the documents are used. In fact, the newest forms can often be found in IndianaDocs first, such as when the new Advanced Directive for Health Care was released in J uly 2021. RG

ISBA offers IndianaDocs as a member benefit at a low, yearly subscription price of $210—that's less than one billable hour! If you want to try the product before you subscribe, IndianaDocs also offers a free 30-day trial.

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ETHICS

By Hon. G. Michael Witte

LAWYER AND LAW FIRM TRADE NAMES

At the beginning of this year, a major change was made to one of the professional conduct rules regulating lawyer advertising. Interestingly, the bar's reaction to the rule change has been somewhat quiet so far.

In the March 2021 edition of *Res Gestae*, this writer briefly commented on the amendment of Indiana Professional Conduct Rule 7.5(a). This column will discuss the amendment in more detail.

Prior to January 1, 2021, Indiana Professional Conduct Rule 7.5(a)(4) permitted a law firm to operate under a trade name. However, the trade name was tightly confined as follows:

> (i) the name shall not imply a connection with a government agency or with a public or charitable legal services organization and shall not otherwise violate Rule 7.1.
> (ii) the name shall include the name of a lawyer

(or the name of a deceased or retired member of the firm, or of a predecessor firm in a manner that complies with subparagraph (2) above).
(iii) the name shall not include words other than words that comply with clause (ii) above and words that:
(A) identify the field of law in which the firm concentrates its work, or
(B) describe the geographic location of its offices, or
(C) indicate a language fluency.

Under the former rule, Let's Talk Divorce Law Clinic would not be a permissible trade name for an Indiana law firm. However, The Spanish Speaking Kokomo Divorce Law Office of Otis B. Driftwood, would be an acceptable trade name. The restrictions tended to dissuade use of law firm trade name. After all, how could one fit all that advertising text on a promotional ballpoint pen?

THE NEW AND IMPROVED 7.5(A)

So, what changed? The restrictions to lawyer name, law field concentration, geographic location, and language fluency have been removed. The rule retains the prohibition related to government agency or a public or charitable legal services organization. A law firm trade name is now regulated under the false or misleading standard of Professional Conduct Rule 7.1 as it relates to lawyer communications to the public. The new Rule 7.5 reads as follows:

A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1.

A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

WHY THE CHANGE?

Indiana's former Rule 7.5(a) did not resemble its equivalent in the Model Rule either past or current. In fact, the location, practice concentration, and language fluency restrictions were unique to Indiana. In 2018, the ABA deleted the text of Model Rule 7.5(a) and simplified trade name ethical governance by moving it into Model Rule 7.1 which governs all

"The seven states not in unity with either version of the Model Rule were sued individually in their respective federal jurisdictions by a Utah legal entity calling itself Law HQ."

lawyer advertising communications. A lawyer's communication about the lawyer or the lawyer's services cannot be false or misleading. Comment 5 to Model Rule 7.1 recognizes a trade name as an advertising communication.

Indiana's new Rule 7.5(a) now mirrors that of the recently deleted Model Rule 7.5(a). Being one generation behind the Model Rule is not a negative position for Indiana. A majority of states still follow the deleted Model Rule version of Rule 7.5(a). Simplicity and outdatedness were the driving forces behind the Model Rule moving trade name regulation into Rule 7.1.

At the time Indiana enacted its amendment, it was one of only seven states with trade name restrictions greater than those of either the current or repealed Model Rule. Only one state, Ohio, strictly prohibited any type of trade name for a lawyer or law firm. Our other neighbors in Michigan, Illinois, and Kentucky followed either the current or repealed Model Rule approaches to lawyer trade names.

The seven states not in unity with either version of the Model Rule were sued individually in their respective federal jurisdictions by a Utah legal entity calling itself Law HQ. The Utah entity indicated it wished to open law offices in the seven states but was barred by an alleged unconstitutional trade name restriction.

Georgia and Nebraska adopted the current version of Model Rule 7.1 to regulate lawyer trade names and avoided litigation. Texas and Mississippi had pending proposals before either their state bar association or supreme court to bring their trade name regulation into unity with some version of the Model Rule when Indiana acted. Ohio and New Jersey were preparing for litigation to defend their stance. Upon the Indiana Supreme Court's amendment of Rule 7.5(a), Law HQ dismissed its lawsuit against Indiana.

FUTURE IMPACT

A lawyer trade name is not new in Indiana as the repealed Rule 7.5(a) did permit a trade name, but with tight restrictions. An entity like Law HQ might open in Indiana, but it still must have lawyer ownership and licensed Indiana attorneys in its employ. Non-lawyer ownership of a law firm is still prohibited. An entry of appearance or lawyer endorsement on a document will still require the lawyer's identity such as name and attorney number.

It might not be enticing for an existing law firm to re-brand itself under a trade name. The expense of re-tooling letterhead, signage, and advertising materials might be an impediment. Also, one's goodwill in both the legal and commercial communities still rests primarily on one's name and reputation rather than a catchy marque.

Early career lawyers and future law school graduates might see an opportunity to start their career with a trade name, but the pride of introducing oneself as a lawyer, and the investment in one's education should still serve as incentives to preserve an individual identity as a lawyer rather than a brand. A trade name might attract a client to come through the door, but the lawyer's skill, knowledge, and effectiveness will remain the foundation for their reputation within the bar and the community that they serve. RG

RECENT DECISIONS

By Curtis T. Jones and Bradley M. Dick

APPELLATE CIVIL CASE LAW UPDATE (AUGUST)

This article highlights Indiana Supreme Court and Indiana Court of Appeals civil opinions issued in August 2021.

SUPREME COURT TRANSFER GRANTS

Indiana Business Trust Act limitation period is a statute of repose

In *Blackford v. Welborn Clinic*, -- N.E.3d -- (Ind. Aug. 31, 2021), the Indiana Supreme Court held a five-year limitation provision in the Indiana Business Trust Act, under Ind. Code § 23-5-1-11, was a statute of repose that precluded equitable rules of tolling.

Court applies eggshell skull rule
In *Renner v. Shepard-Bazant*, -- N.E.3d – (Ind. Aug. 31, 2021), the Indiana Supreme Court applied the "eggshell skull rule," which "recognizes that if one throws a piece of chalk at a victim with an eggshell skull, and the chalk strikes the victim and fractures his skull, the perpetrator would be guilty . . . even though he did not intend to do great bodily harm." (Internal quotation omitted) (alteration in original).

TRANSFER DISPOSITIONS

The Indiana Supreme Court granted transfer in four civil cases in August.

- *Service Steel Warehouse Co., L.P.*, 2021 WL 4047005 (Ind. Aug. 26, 2021).
- *National Collegiate Athletic Association v. Finnerty*, 2021 WL 4047475 (Ind. Aug. 26, 2021).
- *Wilson v. Anonymous Defendant 1*, 2021 WL 969218 (Ind. Ct. App. March 16, 2021).
- *Arrendale v. American Imaging & MRI, LLC*, 172 N.E.3d 274 (Ind. Aug. 5, 2021).

INDIANA COURT OF APPEALS

No fraud claim based on meeting with fake lawyer
In *Spainhower v. Smart & Kessler, LLC*, - - N.E.3d - - (Ind. Ct. App. Aug. 24, 2021), the Court of Appeals held a fraud claim against a law firm based on an unlicensed person being held out as a lawyer failed because"[t]here is no evidence that the firm had actual knowledge that Boehning was not licensed to practice law when it held Boehning out as an attorney and a member of the firm."

Failure to obtain approval of settlement bars indemnification claim
A contract provided that an insurer would only indemnify a settlement for over $10,000 if it was approved by the insurer's committee. *New Hampshire Ins. Co. v. Indiana Automobile Ins. Plan*, - - N.E.3d - - (Ind. Ct. App. Aug. 24, 2021). The Court of Appeals held there was no right to indemnity for a $7.5 million settlement that was entered without obtaining the committee's approval.

Indiana law did not require participation in federal program
In *Holcomb v. T.L.*, 2021 WL 3627270 (Ind. Ct. App. Aug. 17, 2021), the Court of Appeals held that Indiana law did not require Indiana's participation in the federal CARES Act programs, for Coronavirus relief. RG

The full texts of all the Indiana appellate court decisions, including those issued not-for-publication, are available via Casemaker at www.inbar.org or the Indiana Courts website at www.in.gov/judiciary/opinions. A more in-depth version of this article is available at inbar.org.

FREE-FOR-MEMBERS CLE IN THE ISBA ON-DEMAND LIBRARY

By Res Gestae Staff

The following CLE programs are available on-demand for free to ISBA members as part of your membership.

As a reminder, as of Sept. 23, 2020, until further notice by the Supreme Court, any continuing legal education taken by attorneys, judges and other state-level judicial officers will not count toward distance education credit limits as outlined in the Admission and Discipline Rules (rules 28 and 29).

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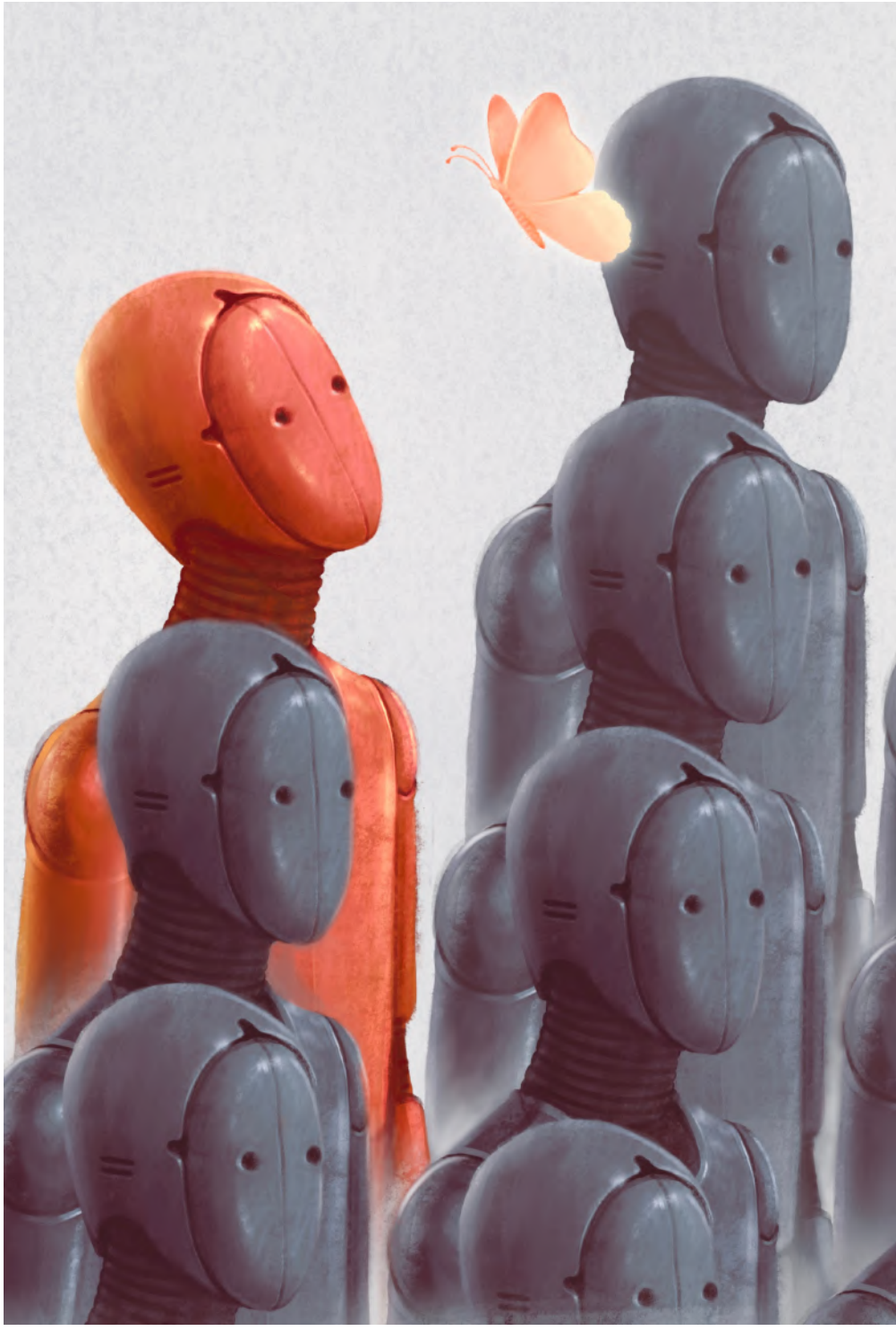
- Transition Planning for Lawyers (1.0 CLE/Ethics) RG



Continued from page 14

first time in the advance-care planning arena, the act has added to the Indiana Code explicit definitions of "best interests," "incapacity," and "informed consent." A non-exclusive list of optional provisions that *can* be included in a new-style advance directive is stated in one section, I.C. § 16-36-7-29. When an advance directive is silent on a specific issue, the "default settings" or presumptions are found primarily in one section, I.C. § 16-36-7-34. *See also* I.C. §§ 16-36-7-10 and 1-36-7-36(a).

8. Unless it explicitly states otherwise, a new-style advance directive (and each health care representative's authority under it) is effective upon signing. This presumption (in I.C. § 16-36-7-34(1)) is consistent with the presumption under the durable POA statute (I.C. § 30-5-4-2(a)). It will be easy to structure a new-style advance directive so the document (or a health care representative's authority to act under it) becomes effective on a stated future date, or after occurrence of an event, or upon a determination the declarant has become incapacitated. See I.C. §§ 16-36-7-29(1) and (2) and 16-36-7-34(7) and (10). The standards and procedures for determining incapacity or recovery from incapacity are stated in new section 16-36-7-35, which preserves the primacy of the probate courts' authority to resolve disputes over incapacity issues.

9. Under the act, a later-signed advance directive is presumed to revoke and supersede all earlier-signed advance directives by the same declarant. The opposite presumption applies under the pre-2021 durable POA statute: A later-signed POA by the same principal does not revoke a prior POA unless the later POA says otherwise, and the attorneys in fact named in the earlier and later POAs are presumed to have concurrent authority. This rule has created serious problems in clinical treatment settings when the same individual signs two different health care directives a few months or years apart but forgets the earlier one. The act solves this problem by creating a presumption that a later-signed advance directive always revokes and supersedes all earlier advance directives by the same declarant, *unless* the later-signed directive states the earlier directive is being kept in effect or amended. *See* I.C. §§ 16-36-7-27(g), 16-36-7-32(a), and 16-36-7-34(4).

10. Under the act, the latest or current health care decisions and treatment preferences of a competent individual are paramount and controlling. Indiana's "Health Care Consent Act" (now codified at IC 16-36-1) was enacted in 1987 and chose to protect the autonomy of patients with capacity by making the authority of an appointed health care representative effective *only* at times when the patient is incapable of consenting. *See* I.C. § 16-36-1-7(e). Thus, the "health care representative appointment" under that statute always had to be "springing," and this created a contradiction with the power of attorney statutes, which were incorporated by reference in I.C. § 16-36-1-14(a). Senate Enrolled Act 204 preserves patient autonomy in a different way, by explicitly stating when a declarant has not been determined to be incapacitated, that declarant can issue treatment decisions and instructions which overrule the contents of that declarant's advance directive or which reverse or veto consents or decisions made by an appointed health care representative. *See* I.C. §§ 16-36-7-27(e), 16-36-7-34(1) and (11), and 16-36-7-35(b).

During the 18-month transition period which ends in December 2022, Indiana lawyers can play a crucial role in educating the general public and health care providers about the act and the new-style advance directive. RG

Jeffrey S. Dible is counsel with the law firm of Frost Brown Todd LLC. From June 2018 through March 2021, he served on the working group which designed and drafted Senate Enrolled Act 204 (P.L. 50-2021).

FOOTNOTES

i. As enacted, Senate Enrolled Act 204 contained an error in subsection (c)(1) of I.C. § 16-36-7-28. The phrase "Signed in the declarant's direct physical presence" should have read 'Signed in the declarant's presence." This error was corrected in Section 9 on pages 37-39 of House Enrolled Act 1436 (P.L. 199-2021), which was signed by the governor on April 29.

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