CURRENT EVENTS FOR FAMILY LAWYERS:
LEGISLATIVE AND CASE LAW UPDATE

A Year in Review

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Miscellaneous Topics

Submitted by Bryan Lee Ciyou

MISCELLANEOUS TOPICS

Going Up Against Pro Se Parties

Pro se parties in domestic litigation can create a number of procedural, legal, and factual difficulties for lawyers in resolving a matter or trying the case to the fact-finder. Generally, the net effect is delay of the matter or obscuring the legal issues. In this section of these NBI materials, the relevant rules of ethics and law are enumerated, followed by legal tools that may be employed to mitigate and address such circumstances.

A. Ethical Rules.

The Indiana Rules of Professional Conduct (herein "Rule(s))" set forth the boundaries for the attorney in addressing pro se parties; such is found under the section titled, "Transactions with Persons Other than Clients." In any circumstance, it important for the lawyer not only to consider the controlling Rule(s), but also remember that Commentary to these Rules provide practical examples that may be of assistance.

The central Rules are set forth as follows:

1. Rule 4.1: Truthfulness in Statements to Others.

"In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6."

2. Rule 4.3. Dealing with Unrepresented Persons.

"In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of a client."

3. Rule 4.4. Respect for Rights of Third Persons.

"(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such person. (b) A lawyer who received a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender."

B. Legal Standards.

The point of differentiation between the Rules and the lawyer in dealing with a pro se party is only the lawyer is bound by them. That said, however, it well settled law the *pro se litigants* are held to the same trial practice standard as are licensed attorneys. *See, e.g., Goossens v. Goossens*, 829 N.E.2d 36, 43 (Ind.Ct.App.2005) (citing *Hess v. Hess*, 679 N.E.2d 153, 155 (Ind.Ct.App.1997). This rule applies across the spectrum of civil.

C. Practical Approaches.

1. Communications (Written).

In most situations, the Author controls the communications with *pro se* parties by limiting this to written form. With today's virtually instantaneous electronic communications, such as fax and e-mail, there is not a delay that makes phone communications always necessary. If this technique is utilized, the means should be considered on a case-by-case basis.

For instance, if a question arises to what was sent or received, it is difficult (and expensive) to authenticate e-communications. An e-mail may need to be followed up by mail copy. Where there is a reasonable dispute in the foreseeable future, certified mail may be employed. Finally, in special cases, personal service may need to occur, either by the "civil sheriff", if available, and can meet the time requirements, or a private process server may be hired for this.

2. Notice.

Certain *pro se* litigants are *pro se* because they utilize the status merely to "harass" the opposing party, the proceeding, or indefinitely protract the legal matter and finality. A very common, and frustrating, situation occurs when the litigant protests a lack of notice of an event or hearing. One effective, and inexpensive, way this may be addressed is to ask this litigant at a hearing his or her address and ask the trial court to issue an order on the address for notice and duty to keep same current.

Operationally, the lawyer orally in court, or in written form before or after a hearing, motions the court to order that party to keep the court notified in advance of any move and the official address for service of any pleading, motion, or paper. This can be broader to include other related matters (telephone number, e-mails, etc).

This specific order is likely to carry more enforcement weight than notice sent by the lawyer using the legal fictions of a "current address" for notice by serving the last address of the *pro se* party. This legal fiction is embodied in certain local rules and accounted for in some regard in the trial rules. *See* Ind. Rule Trial Procedure 3.1(E). However, it invites challenge by a litigious pro se party: "I moved judge, and didn't know I was supposed to change my address–never knew about the hearing".

Finally, in appropriate cases, the attorney may file a motion setting forth the problems, or perceived future issues, and request the court issue a more detailed order or set of directions.

This order may specify the method(s) of notice the court desires. Such is particularly useful if service will be a question and it is unclear what the court deems proper notice: publication, mail, certified mail, etc. Such may have particular use in minimizing the ability of the pro se litigant to seek a last-minute continuance or future challenges to a default.

However, with initial filings of matters, and other circumstances, the lawyer should always consult the "Process" protocols of Indiana Rule of Trial Procedure 4.

3. Case Management.

One of the vexing problems associated with a *pro se* litigant is the disjointed nature of the process that may occur by failure to understand and follow local rules and trial rules. This may manifest itself in innumerable ways. The random, obscure, or improperly timed motion or discovery request is a common (and classic) example.

There are no quick or necessarily inexpensive fixes for this problem. However, such may be blunted by a pre-trial conference and directions from the court or a case management plan and order. Indiana Rule of Trial Procedure 16. Where a hearing or trial is forthcoming, witness and exhibit exchange may be of use.

4. Attorney's Fees and Contempt.

A fee award request or contempt motion may also be considered. However, with certain *pro se* litigants, legal merits aside, this may fuel his or her actions/inactions. The breadth of these rules and remedies for fees and contempt is addressed in following portions of these NBI materials.

5. Atypical Measures.

Practical and effective solutions to matters raised by *pro se* litigants may be addressed by proper assessment of the legal, emotional dynamics of the actor and his or her objectives. That is a cookie-cutter approach, some of which are fee and contempt filings, may not work, but with proper assessment, the lawyer may consider the following atypical measures in specific circumstances:

Requests for Admission. Indiana Rule of Trial Procedure 36.

Special Findings. Indiana Rule of Trial Procedure 52(A).

Summary Judgment. Indiana Rule of Trial Procedure 56.

Offer of Judgment. Indiana Rule of Trial Procedure 68.

Appellate Pre-Appeal Conference, Motion to Dismiss or Strike (appellate matters). Indiana Rules of Appellate Procedure 19, 36.

In conclusion, the attorney, assuming proper assessment of the operational dynamics of the case may find a legal remedy in the trial or appellate rules. A thorough (and frequent) review of the Indiana Rules of Trial Procedure will be engaged on a consistent basis by the successful practitioner.

Attorney's Fees, Costs, Sanctions

A key, and virtually unique, facet of domestic relations is its deviation from English Rule regarding payment of attorney fees. Under the English Rule, the prevailing party is entitled to recovery of attorney fees from the other party. The American Rule, on the other hand, is that each side pays their own legal fees. There are a few statutory exceptions based on policy grounds (bad faith or power imbalance of litigant).

That said, the only broad legal exception is family law. Here, there are several bases of legal authority for a trial court (and appellate courts) to award and apportion legal fees, expenses, and costs. In the typical domestic case fees, costs, and sanctions arise on a routine basis in one (1) of three (3) scenarios: (1) disparity of income, (2) bad acts, or (3) discovery.

However, as noted, the breadth of legal bases to seek fees, costs, and sanctions in these and other situations is much greater. Rules that may be applicable to such are enumerated for consideration and use by the practitioner, as follows:

A. Paternity (Article 14).

Under the Paternity Act, there is a broad statutory provision addressing the costs of filing and maintaining a case, as follows:

> "(a) The court may order a party to pay: (1) a reasonable amount for the cost to the other party of maintaining an action under this article; and (2) a reasonable amount for attorney's fees, including amounts for legal services provided and the costs incurred, before the commencement of the proceedings or after entry of judgment. (b) The court may order the amount to be paid directly to the attorney, who may enforce the order in the attorney's name . . . ." Ind.Code § 31-14-18-2.

In addition, there are narrow statutory provisions applicable to certain matters of payment, such as the expense of pregnancy, childbirth, and medical tests (DNA). Ind.Code § 31-14-17-1, -18-1.

B. Child Support (Article 16).

Under the statutory provisions governing a duty to support a child, there is a broad attorney fee and cost provisions, as follows:

> "(a) The court periodically may order a party to pay a reasonable amount for: (1) the cost to the other party of maintaining or defending any proceeding under this chapter . . .; (2) attorney's fees; and (3) mediation services; including amounts for legal services provided and costs incurred before the commencement of the proceedings or after the entry of judgment. (b) The court may order the amount to be paid directly to the attorney, who may enforce the order in the attorney's name." Ind.Code § 31-16-11-1.

C. Dissolution (Article 17).

Under the Dissolution Act, there are also a number of fee provisions that may be useful to the attorney ranging from the initial divorce filing through post-decree matters. The controlling authority, and broadly utilized attorney fee provision in custody litigation is set forth, as follows:

> "(a) The court periodically may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under IC 31-17-2, IC 31-17-4, IC 31-17-6, or this chapter and for attorney's fees and mediation services, including amounts for legal services provided and costs incurred before the commencement of the proceedings or after entry of judgment. (b) The court may order the amount to be paid directly to the attorney, who may enforce the order in the attorney's name." Ind.Code § 31-17-7-1.

Like paternity matters, there are narrow statutory provisions, such as the provision for taxing, as costs, the payment of necessary travel and other expenses incurred by any person whose presence at a hearing the court finds necessary to determine a child's best interests. Ind.Code § 31-17-2-19.

D. Discovery.

In association with discovery disputes or failures, the trial court has the authority to award legal fees under Indiana Rule of Trial Procedure 37.

E. Appeals.

Generally, before the trial court clerk issues its Notice of Completion of Clerk's Record, the trial court has discretion to award appellate legal fees. *See* Indiana Rule of Appellate Procedure 8. The Court of Appeals may exercise its discretion and award fees in narrower circumstances. Precisely, the Court of Appeals' discretion to award attorney fees under Indiana Rule of Appellate Procedure is limited to instances when an appeal is permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay. *Poulard v. LaPorte County Election Board*, 922 N.E.2d 734, 737 (Ind.Ct.App.2010). The more restrained approach by the Court of Appeals is to avoid a chilling effect on the right to appeal.

F. Contempt.

In all family law matters, the trial court may sanction a litigant by its contempt powers. This authority is found throughout the Code and various other rules. Other than the inherent authority to utilize contempt to run its affairs in the administration of justice, all Indiana court's have statutory authority to find direct or indirect contempt. Ind.Code § 34-47-3-1 *et. seq.*

In conclusion, the trial court has the statutory authority to apportion and award virtually any expense, legal fee, or costs in paternity, support, and dissolution matters. The only apparent limitation on this discretion is that it must be reasonable.

This noted, a reasonable attorney fee award occurring in the emotionally-charged context

of a family law matter may be far less than a reasonable attorney fee charged to meet the client's directives as determined by the Indiana Rule of Professional Conduct 1.5. The practitioner should be mindful of this distinction.

Surname Changes

A. Dissolution

In order to be restored to a maiden name or previous married name, "[a] woman who desires the restoration of her maiden or previous married name must set out the name she desires to be restored to her in her petition for dissolution as a part of the relief sought. The court shall grant the name change upon entering the decree of dissolution." Ind.Code § 31-15-2-18.

A technical interpretation of this statute could necessitate a cross-petition. Ind.Code § 31-15-2-9. Some courts will not grant the decree and a name change therein if this request is not contained in the divorce filings. It is reversible error to not grant the name change if properly before the court. *See Maloblocki v. Maloblocki*, 646 N.E.2d 358, 364 (Ind.Ct.App.1995).

In other circumstances, aside from paternity, a name change is available under a legal filing in the circuit court and is subject to legal publication and passage-of-time requirements. Ind.Code § 43-28-2.

B. Paternity

A child's surname may be changed in a paternity action or through a Change of Name action.
Depending if paternity has been established, or not, this determines the precise legal course for a name change.

In an action where paternity has been established, "when deciding a petition to change the name of a minor child, the court is guided by the best interest of the child under Ind. Code §31-17-2-8." *Daisy v. Sharp*, 901 N.E.2d 627, 629 (Ind.Ct.App.2009). However, this is also a presumption, under Ind. Code § 34-28-2-4(d), in favor of a parent of a minor child who: (1) has been making support payments and fulfilling other duties in accordance with a decree issued under [Indiana Cod Articles] 31-15, 31-16, or [Indiana Code Article] 31-17.....; and (2) objects to the proposed name change of the child. *Id.*

When paternity has not been established, the legal course changes, and it does not require the trial court inquire into the best interest of the child. *In the Matter of the Change of Name of J.N.H., a Minor, to : J.N.B., T.J.B. v. G.A.H.*, 659 N.E.2d 644, 647 (Ind.Ct.App.1995). The sole consideration is Ind. Code §34-4-6-2 (name change statute for minors), which provides, in pertinent part: "(b) in the case of a parent who wishes to change the name of a minor child, the petition must be verified and it must state in detail the reason the change is requested. In addition, except where a parent's consent is not required under [Ind. Code §] 31-3-1-6, the written consent of a parent, or the written consent of the guardian if both parents are dead, must be filed with the petition." Id. at 646. Essentially, the sole duty of the trial court is to determine whether fraudulent intent is involved. Id. at 647.

Death and Divorce: When Ex-Spouse is the Beneficiary

Most family law practitioners who practice long enough will deal with the death of a past or present client, and claims therefrom raised by a spouse during the pendency or former spouse. Hopefully, advanced consideration of such a contingency may aid in drafting to mitigate or eliminate these contingencies.

The permutations to this issue are virtually endless. A number of general considerations and practice pointers are provided in this section of the materials on the death, followed by a brief discussion of the beneficiary issue. This beneficiary legal issue is highly fact sensitive.

A. Death of a Client or Past Client, Generally.

1. Attorney-Client Contract.

The building blocks of a solid attorney-client relationship is (or should be) the contract. As a general matter, Indiana Rule of Professional Conduct 1.5(b) does not require this to be in writing. It is ill advised for the contract to be orally relayed. Minimally, it should be sketched out in any engagement letter.

This contract should account for the client's death, particularly if it is a flat fee or contingency contract (the latter available only in narrow circumstances of a post-judgment collection action under Rule 1.5(d)). Also, the lawyer must be careful to account that the attorney-client privilege survives a client's death.

2. Settlement Agreements.

In complex divorce cases where a settlement agreement is entered into, it should have death provisions, particularly as it relates to high-asset cases and child support.

3. Advisement as to Beneficiary Changes.

A third general provision is that a client should be advised, at least initially, and upon conclusion of the representation, about addressing contractual beneficiary provisions, such as on life insurance.

B. Beneficiary Matters.

Draftsmanship in settlement agreements or proposed orders is critical to avoid future matters with beneficiary issues. Specifically, account numbers (as redacted under Indiana Administrative Rule 9) identifying policies to have a beneficiary maintained or deleted is critical. Also when assigning a policy for purposes of child support or maintenance, ensure that the amount of the policy to be maintained is specified, and there is a time established for this duty to cease, or a phase out of the amount specified therein.

For contractual accounts that will remain in an ex-spouse beneficiary position, as is

common, in trust, with life insurance to effectively guarantee child support in the event of the untimely death of a parent, there should be a provision to allow the beneficiary spouse, as trustee, to monitor its continuance. Obviously, there are economic, actuarial, and other variables that may cut against such provisions and monitoring (i.e., spending $2,000 of legal time to ensure a $5,000 face amount life policy of insured in a harmonious divorce may not be advisable).

When, and if, a dispute arises in the future that is not accounted for, or the lawyer is consulted about this issue, he or she should compare the client's facts with those of caselaw. Again, it is well to remember these legal issues are highly fact sensitive and should be viewed with the most current caselaw. A representative case is enumerated, as follows:

In *Klitz v. Klitz*, 708 N.E.2d 600 (Ind.Ct.App.1999), the insured entered into a property settlement agreement as a part of his divorce proceedings and agreed to name his children as beneficiaries of a $100,000.00 insurance policy on his life. The children filed a claim against the insured's estate when they discovered that no such insurance policy existed at the time of the insured's death. The Court of Appeals held the children had a valid claim and enforceable claim against the insured's estate because that provision of the property settlement agreement did not state that the insured's obligation would terminate once the children reached the age of majority. 708 N.E.2d at 603.

Finally, the ability to make estate claims is time-limited, as is the practical ability to make a claim against non-probate transfers upon a death, if the money is disbursed and spent.

Companion Pet Protection Orders

Under the Indiana Civil Protection Order Act, pets are not afforded judicial remedy. Ind.Code § 34-26-5. Further, in Indiana, a pet is personal property. *See Harlan Sprague Dawley, Inc. v. S.E. Lab Group, Inc.*, 644 N.E.2d 615, 621 (Ind.Ct.App.1994).

Pets are sometimes at issue in family law matters. Perhaps the most common is the beloved family dog, which each party wants, and if they cannot have the pet, they desire "visitation." Under the Dissolution Act, a pet is a part of the marital property and must be divided by the court with the rest of the marital assets and liabilities. Ind.Code § 31-15-7-4.

This noted, however, the parties are free to (and sometimes do) draft contractual provisions for maintenance of pets. Ind.Ct.App. § 31-15-2-17. Such an agreement may be enforced under Indiana contract law. *See, e.g., Thomas v. Thomas*, 577 N.E.2d 216, 219 (Ind.1991).

A cautionary word is that enforcement may be limited by the untimely demise or disappearance of the pet. If a party wants to engage in such bad behavior, there are few legal remedies. Even in egregious circumstances, Indiana has rejected tort claims for witnessing the death of a dog. *Lachenman v. Stice*, 838 N.E.2d 451, 467 (Ind.Ct.App.2006).

In the right factual scenario, a lawyer facing this issue may find some relief under the contempt power of a court or seek relief by the State under the animal cruelty statutes. Ind.Code § 31-46-3. These statutes address the abandonment or neglect of a vertebrate animal. Ind.Code § 31-46-3-7. Additionally, it is a criminal act to beat a vertebrate animal. Ind.Code § 31-46-3-12.

Finally, "[a] person who knowingly or intentionally kills a vertebrate animal with the intent to threaten, intimidate, coerce, harass, or terrorize a family or household member commits domestic violence animal cruelty, a Class D felony."

Although this statute appears to speak to the issue at hand, it seems doubtful this statue would be applied with any frequency. However, it is a tool that exists.

Parentage by Estoppel

The doctrine of parentage by estoppel is not developed in any significant fashion under Indiana caselaw.

Historically, a parent, who by his actions acted as a child's parent was (or may be) estopped from later challenging same: "A husband who has put himself in loco parentis of a bastard child of his wife ought not be permitted to disturb the family relation by establishing the child's bastardy after condoning the wife's offense by taking her in marriage." *Cross v. Cross*, 402 N.E.2d 30, 37 (Ind.Ct.App.1980).

The underpinnings of this legal doctrine is stability for a family and child and finality of judicial determinations of a parent-child relationship. As a general rule, where there has been a determination that a child is of the marriage or paternity established, a particular father's rights and obligations are determined and fixed as such. *Paternity of P.S.S.*, 913 N.E.2d 765, 768-69 (Ind.Ct.App.2009).

In the absence of DNA testing, a threshold question in many divorce or paternity cases is properly, "Is there a question as to parentage?"

What to do With Accidentally Divulged Privileged Information

Discovery is perhaps the most likely legal circumstance in which a privilege may occur in domestic practice and cause accidental disclosure of privileged information. Such is the general focus of these materials. This noted, the threshold issue for the attorney is the critical understanding of the difference between the attorney-client communication privilege and the work-product doctrine and its privileges.

A. Communications Privilege and Work Product Privileges.

These legal privileges, which protect disclosure of certain information, spring from common law origins; and they inherently embody the need for the attorney to be able to address a matter with a client without fear of being forced to disclose it, and ultimately used against the client, in a court of law.

Under the current state of the law, the attorney-client communications privilege is narrower than the work product doctrine and its privileges, which are not limited to attorney-client communications. *See, e.g., Burr v. United Farm Bureau Mutual Insurance Company*, 560 N.E.2d 1250, 1256 (Ind.Ct.App.1990).

1. Statutory Attorney-Client Communications Privilege.

The attorney-client (and privileges of physicians, clergymen, and spouses) communications privilege is embodied in statute: "Except as otherwise provided by statute, the following persons shall not be required to testify regarding the following communications: (1) Attorneys, as to confidential communications made to them in the course of their professional business, and as to advice given in such cases . . . ." Ind.Code § 34-46-3-1.

This privilege "applies to all communications between the client and his attorney for the purpose of obtaining professional legal advice or aid regarding the client's rights and liabilities." *Corll v. Edward D. Jones & Co.*, 646 N.E.2d 721, 724 (Ind.Ct.App.1995). However, the attorney-client privilege is to be narrowly construed because the privilege may prevent the disclosure of relevant information. *Owens v. Best Beers of Bloomington, Inc.*, 648 N.E.2d 699, 702 (Ind.Ct.App.1995).

2. Work-Product Doctrine and its Privileges.

The work product doctrine, and privileges emanating therefrom, are embodied and set forth under Ind. Rule of Trial Procedure 26(B)(3). Under the umbrella of work product, one type of information is subject to a qualified privilege and the other an absolute evidentiary privilege.

a. Materials Prepared in Anticipation of Trial.

With ordinary work product, a party may obtain discovery of materials prepared in anticipation of litigation or for trial in limited circumstances: "only upon a showing that the party seeking discovery has a substantial need of the materials in the preparation of his case and he or

she is unable without undue hardship to obtain the substantial equivalent of the materials by other means." *Id.*

b. Mental Impressions, Conclusion, Opinions, or Legal Theories.

This noted, while ordinary work product materials may be discoverable upon a special showing, "a party seeking discovery is never entitled to the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of the party concerning the litigation." *Penn Cent. Corp. v. Buchanan*, 712 N.E.2d 508, 516 (Ind.Ct.App.1999). This material is often called opinion work product, and is entitled to absolute protection from discovery. *Id.*

B. Application and Scope of the Privileges.

These distinctions noted, a communication between an attorney and client may be privileged under either or both. By way of example, a conversation between the attorney and client on theories of the case, memorialized in writing, may be protected under both.

On the other hand, the work product doctrine may apply and not involve any attorney-client communication. A letter to an insurance company, its insured's defense, and a potential expert and his or her report may be protected work product.

The work product doctrine extends to a party or representative of a party. If this is then covered by a letter with a theory of defense, it may constitute a mental impression and be subject to a nearly absolute immunity from disclosure.

C. Discovery Production and Deposition (Oral or Interrogatory).

1. Documents.

As practically applied in discovery, the attorney-client privilege and/or work product doctrine is asserted with regard to the discovery material sought. However, the assertion should be on a document by document basis, not a blanket assertion. *See, e.g., Petersen v. U.S. Reduction Co.*, 547 N.E.2d 860, 862 (Ind.Ct.App.1989). The parties are then expected to informally try to reach a resolution. Ind. Rule of Trial Procedure 26(F).

If not resolved thereby, the party seeking to avoid this production may seek a protective order under Ind. Rule of Trial Procedure 26(C). The party seeking the information would file a motion to compel. Ind. Rule of Trial Procedure 37(A).

Under Ind. Rule of Trial Procedure 26(C) and 37 (A), the trial court is vested with a wide range of tools and discretion to order relief. The burden to prove the application of the privilege is on the party who asserts it. *Howard v. Dravet*, 813 N.E.2d 1217, 1222 (Ind.Ct.App.2004).

In the alternative, depending upon the relative risks, if the material tendered is subject to a claim of privilege or protection as trial-preparation material, a party making such claim may

notify any party that received the information of the claim and basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved.

A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

2. Statements.

If the legal privilege becomes an issue during the course of a deposition, the attorney may instruct the deponent not to answer, objection noted, and have the question certified by the Reporter. Thereupon, the question, with the objection, when so certified shall be delivered to the party requesting the certification who may then proceed under Ind. Rule of Trial Procedure 37(A).

D. Confidentiality of Information.

A final point of consideration is that confidentiality is far broader than evidentiary privileges. Most broadly, a lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or otherwise authorized. Indiana Rule of Professional Conduct 1.6.

The line between confidential information and a legal evidentiary privilege may become blurred. For instance, mediation (ADR) is confidential and is treated as a compromise or offer to compromise under Indiana Rule of Evidence 408. While confidential, if a statement or conduct made in settlement negotiations was sought to be admitted in court, it is inadmissible and privileged. Indiana Rule of Evidence 501. The strength of a privilege differs from privilege to privilege.

With any statement or document the lawyer faces, he or she must continually filter this through the screen of confidentiality, privilege, and strength of such privilege.

Assisted Reproduction

As noted in the subsequent section of these NBI materials discussing the legal definition of marriage, Indiana has a very traditional and thus conservative legal approach to sexuality, marriage, and child-rearing. National trends, such as civil unions, are challenging these long-held positions.

In a recent case in this undeveloped area, T.G. and V.G., husband and wife, agreed with D.R., V.G.'s sister, that their embryo would be implanted into D.R. *In Re the Paternity and Maternity of Infant R.*, 922 N.E.2d 59, 60 (Ind.Ct.App.2010). Thereafter, a paternity action was filed. T.G.'s paternity was established by affidavit. *Id.* On hearing, the court denied establishing maternity in V.G., holding Indiana law does not permit a non-birth mother to establish maternity. *Id.*

On appeal, the Court of Appeals recognized the limits of the Paternity Act and stated, "it is for the Legislature to evaluate and deliberate comprehensive proposals for changes to these statutes." *Id.* at 61. However, noting the narrow circumstances, it held the paternity statutes provided a template (by equity) to challenge the putative relationship between the infant and D.R./V.G. *Id.* at 62.

In reversing and remanding, the Court held the presumptive relationship to Infant R. and D.R would stand, unless V.G. establishes that she is, in fact, the biological mother of Baby R. *Id.* Precisely, the Court of Appeals instructed the trial court to conduct an evidentiary hearing and, assuming that V.G. is shown by clear and convincing evidence to be the biological mother of Baby R., grant all other relief just and proper under the circumstances. *Id.*

The practitioner working any such case should stay abreast of the most current caselaw and/or statutory challenges.

Contested Trials

A contested trial in a divorce/paternity matter maybe a time-consuming, and correspondingly expensive, process if properly prepared. Assuming all reasonable and proper courses have been explored to resolve the matter, the preparation for the potential trial should have been started at the time the attorney begins in the case (the effective practitioner works toward settlement and the best agreed outcome, but prepares for the worst, a contested trial).

There are a myriad (an virtually endless) number of considerations, many of which are as follows:

A. Initial Considerations.

Court/Judge. Ind. Rule of Trial Procedure 76(B),(C).

Opposing Counsel.

Legal v. Emotional Objectives.

Proper Pleadings/Motions. Ind.Code § 31-14-5-1 (verified petition for paternity); § 31-15-2-4 (verified petition for dissolution).

Preliminary Matters. Ind.Code § 31-14-10-1 (hearing upon initial determination man is child's biological father) and § 31-14-11-1.1 (temporary order for child support); § 31-15-1 (provisional order in dissolution and legal separations).

Companion Cases.

Protective Orders.

Criminal Matters.

CPS/CHINS.

Legal Budget.

Local Rules.

B. Mid-Point Considerations.

Discovery (type). Ind.Rule of Trial Procedure 26-37.

Mediation and/or Mediator (other ADR).

Property Appraisals.

Business Valuations.

Custody Evaluations/Guardian Ad Litem. Ind. Rule of Trial Procedure 35; Ind.Code § 31-14-10-2 (consultation and referral in paternity) and § 31-14-13-3 (interview child in-chambers in paternity); § 31-17-2-12 (investigation and custody report in dissolution).

Trial Setting (Choices) and Days. Ind.Code § 31-17-2-6 (custody hearings must receive priority in being set for hearing).

C. Trial Considerations.

Subpoenas.

Documentary Exhibit Foundations.

Scripting of Witnesses, Exhibits, Objections.

Preparing the Client.

Direct (non-leading).

Cross (limits).

General Judgment or Special Findings. Ind. Rule of Trial Procedure 52(A).

Ordering of Evidence.

Trial Theme.

D. Appellate Considerations.

Controlling Dates (Date Signed, Date File Marked, CCS). Ind. Rule of Trial Procedure 77(B).

Expedited Appeal and Restriction on Extensions. Ind. Rule of Appellate Procedure 21(A), 35(D).

Adoptions

In Indiana, intrastate adoptions are governed by Ind.Code § 31-19-1-1, *et. seq.* Interstate adoptions are subject to compliance with the Interstate Compact on the Placement of Children. Ind.Code § 31-28-4-1.

With a typical intrastate adoption, the overarching goal is to meet the child's best interests. This is accomplished through a series of systematic steps:

Filing a Proper Petition. Ind.Code § 31-19-2-6.

Providing Notice, Obtaining Waivers and/or Consents. Ind.Code § 31-19-2.5-1 *et. seq.*

Home Study. Ind.Code § 31-19-8-1 *et. seq.*

Adoption Hearing and Decree. Ind.Code § 31-19-11-1 *et. seq.*

Interstate adoptions involve the sending state (Indiana) communicating with a receiving state to ensure the child's proposed placement in the foreign state is not contrary to the child's interests. This is governed by an interstate compact between the states. Interstate compact compliance must occur in addition to the other steps for an intrastate adoption enumerated *supra.*

Two (2) recent cases have substantially developed the requirements of adoptions where there are competing cross-petitions and an interstate component, one by the Supreme Court, *In re Adoption of Infants H.*, 904 N.E.2d 2009 (Ind.2009), and the other the Indiana Court of Appeals, namely *In re Adoption of S.A.*, 918 N.E.2d 736 (Ind.Ct.App.2009). They should be carefully reviewed by all practitioners handling intrastate or interstate adoptions.

International adoption is beyond the scope of these materials.

Domestic Abuse

May a Minor File a Petition for a Domestic Violence Protective Order?

Pursuant to the Indiana Civil Protection Order Act, a child's need of protection is to be addressed by a parent, a guardian, or other representative. Ind.Code § 34-26-5-1 *et. seq.* These persons are authorized to file for the child.

In the event a child's needs cannot be fully met by the individual filing on behalf of the child, the Protection Act authorizes the trial court to appoint a guardian ad litem to represent the interests of a child of one (1) or both of the parents. Ind.Code § 34-26-5-19.

Terminating the Lease in Cases of Domestic Violence

Indiana law is silent on terminating a lease of real property in the event of domestic violence. If a practitioner is faced with such a situation, the place to start is with review of the termination provisions of the lease. However, it is well to note that Indiana has strong laws benefiting landlords.

That said, the Author has had some successes in this area. First, in apartment complexes, it is often possible to convince management to allow the client to move apartments within the complex. Second, in larger operations, management may also allow the resident to move to another apartment community.

Non-Traditional Families

Rights of Unmarried Fathers

For children born out of wedlock, the legal rights of a father trigger upon the establishment of paternity. *See, e.g., In Re Paternity of H.H.*, 879 N.E.2d 1175, 1176 (Ind.Ct.App.2008). Paternity can be established in only one of two (2) ways. The first is by the filing of a paternity action and holding a hearing, or second, without a hearing, if a proper paternity affidavit is filed. Ind.Code § 31-14-8-1. While a proper affidavit may establish a man "is a child's legal father", a hearing must be held (or agreed entry reached and ordered) to determine the issues of child support, physical and legal custody and parenting time. Ind.Code § 31-14-10-1.

Be aware of changes to the paternity affidavit as promulgated by the legislature during the 2010 term, that may impact, or provide rights to fathers (joint legal custody).

Evolution in the Legal Definition of Marriage

The legal definition of marriage in Indiana and has not evolved, despite challenges. Precisely, only a female may marry a male. Only a male may marry a female. Ind.Code § 31-11-1-1(a). Moreover, a marriage between persons of the same gender is void in Indiana, even if it is lawful in the place where it is solemnized. Ind.Code § 31-11-1-1(b).

In addition, two (2) individuals may not marry each other if the individuals are more closely related than second cousins. However, two (2) individuals may marry each other if the individuals are first cousins and both are at least sixty-five (65) years of age. Ind.Code § 31-11-1-2.

Furthermore, two (2) individuals may not marry each other if either individual has a husband or wife who is alive. Ind.Code § 31-11-1-3.

Finally, two (2) persons may not marry each other unless both individuals are at least eighteen (18) years of age. Ind.Code § 31-11-1-4. With consent, certain underage persons may marry. Ind.Code § 31-11-1-5, -6.

In *Morrison v. Sadler*, 821 N.E.2d 15, 19 (Ind.Ct.App.2005), the plaintiffs were three (3) same-sex couples who were living together in long-term relationships. All three (3) couples traveled to Vermont to enter into civil unions permissible under that state's statutory framework. *Id.*

Thereafter, they filed a declaratory judgment complaint seeking an injunction requiring the Hendricks and Marion County clerks to issue marriage licenses to them. *Id.* The basis for their legal claim was that Indiana's statutory scheme in defense of marriage violated provisions of the Indiana Constitution. *Id.*

The trial court granted the State's motion to dismiss. This was affirmed on appeal.

Broadly, these constitutional claims were rejected under the following policy consideration: "The State of Indiana has a legitimate interest in encouraging opposite-sex couples to enter into and remain in, as far as possible, the relatively stable institution of marriage for the sake of children who are frequently the natural result of sexual relations between a man and a woman." *Id.* at 30.

Thus, the legal hallmark and definition of a marriage in Indiana is sexual union of opposite-sex couples, such coupling of genders alone, potentially creating a child through natural processes.

Cohabitation and Domestic Partnerships

In the typical male-female cohabitation case, any child born of the relationship would be addressed through the statutory legal framework of the Paternity Act. Ind.Code § 31-14-2-1 *et. seq.*

In cases where assets and liabilities have been acquired by the cohabitation, the courts have addressed such under contract law theories. Precisely, a party who cohabitates with another person without subsequent marriage is entitled to relief by the court upon a showing of an express contract or a viable equitable theory such as implied contract or unjust enrichment. *Turner v. Freed*, 792 N.E.2d 947, 950 (Ind.Ct.App.2003).