

Bench & Bar

The newsletter of the Illinois State Bar Association's Bench & Bar Section

Ethical Practices in the Email Age: Courtesy Copy Emails to Judges

BY DAVID W. INLANDER & RONALD D. MENNA, JR.

As the court system has evolved into the era of permitting emails to transmit courtesy copies of pleadings and motions, a troubling trend has ensued. Recently, in the ISBA's Central discussion, several lawyers noted that their opposing counsel are raising new arguments or making disparaging comments in emails transmitting courtesy copies to the judge.¹ This article will discuss this issue and suggest best practices to use to correct this

abusive behavior.

The use of courtesy copy emails to raise new arguments or make disparaging comments is both disturbing and new. As pointed out in the initiating post in the ISBA discussion, this poses several problems: (1) the arguments and comments are outside the record and cannot be effectively reviewed on appeal; (2) it places the Judge "in an ethical trick

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Implicit Bias

BY TRINA SMITH

"Guilty as charged!" The words no public defender likes to hear in the courtroom. However, all of us are *guilty* of possessing implicit biases. As an attorney, it is important that one acknowledges and recognizes this concept and how it effects the means in which legal affairs are handled. Furthermore, by recognizing implicit bias, one is better able to pursue diversity, inclusion, equity, and justice. Implicit bias affects one daily with decision-making,

which is imperative in our profession. No one is immune from these compromising psychological phenomena. It is vital that one identifies biases so one can mitigate and counteract them mindfully and consciously.

Implicit bias is an attitude or stereotype that affects one's understanding, perceptions, actions, and decision-making in an unconscious manner. (simplypsychology.org) The biases are activated involuntarily and without one's

awareness or intentional control.

The term "bias" is a neutral word in and of itself. Frequently, bias is associated with negative connotations. However, the term simply means belief. One can have a positive and favorable bias or a negative and unfavorable bias. Biases can cause one to have feelings and attitudes about other people, based upon characteristics such as race, ethnicity, gender, age, and physical

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bag” if the clerk forwards the transmittal to the Judge; and (3) a judge’s clerk must assume a discretionary role of deciding what communications should or should not be sent to the judge.² Additionally, all counsel are put in the awkward position of not knowing whether the judge actually read the new arguments and/or disparaging comments. Can opposing counsel respond without first seeking leave of court as the record is now blurred?

Within the spirit of the Illinois Rules of Professional Conduct and the court’s inherent powers, there are ways to curb this type of behavior. As Justice Cardozo once observed: “Membership in the bar is a privilege burdened with conditions.”³

There is no statute, Canon of Judicial Conduct, Rule of Professional Conduct, or Supreme Court Rule that covers this exact situation. Since these transmittal emails are not a “pleading, motion and other document of a party,”⁴ Supreme Court Rule 137 does not apply.⁵ Moreover, a party moving for Rule 137 sanctions must show that the opposing party made untrue and false allegations without reasonable cause for the mere purpose of invoking harassment or undue delay of the proceedings.⁶ Finally, our supreme court has recognized that: “Because Rule 137 addresses the pleadings, motions and other papers a litigant files, the rule does not provide a sanction against all asserted instances of bad faith conduct by a litigant or the litigant’s attorney during the course of litigation. [Citation omitted.] For example, a party’s pleadings may conform to Rule 137, yet the party may be guilty of other rule violations amounting to bad faith.”⁷ Thus, in this circumstance, a motion seeking Supreme Court Rule 137 sanctions is not likely to succeed. The question is, then, how should this behavior be sanctioned?

To us, the court’s inherent powers are best suited to stop this type of behavior. Illinois Code of Judicial Conduct, Canon 3 (Illinois Supreme Court Rule 63), provides,

in part, that: “A judge should maintain order and decorum in proceedings before the judge.”⁸ While not directly addressed by our Rules of Professional Conduct, this behavior implicates Illinois Rules of Professional Conduct 3.5 (“A lawyer shall not: ... (d) engage in conduct intended to disrupt a tribunal.”)⁹, 4.4 (“(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, ...”)¹⁰ and 8.4 (It is professional misconduct for a lawyer to: ... (d) engage in conduct that is prejudicial to the administration of justice.)¹¹ These Rules of Professional Conduct, thus, parallel the judge’s duty.

A judge “has the inherent power to punish, as contempt, conduct that is calculated to impede, embarrass, or obstruct the court in its administration of justice or derogate from the court’s authority or dignity, or to bring the administration of the law into disrepute.”¹² Assuming that a briefing schedule order was entered, or is part of the circuit court’s “local” rules, any argument raised in a courtesy copy email violates that order or local rule and is an act of direct criminal contempt.

Criminal contempt sanctions are imposed to punish past willful misconduct, not compel the contemnor to perform a particular act.¹³ Direct criminal contempt is conduct that is: (1) “personally observed by the judge,” or (2) “committed outside the immediate physical presence of the judge but within an integral part of the court, *i.e.*, the circuit clerk’s office.”¹⁴ Unlike indirect criminal contempt, where the court does not observe the contemptuous act, “[n] either a formal charge nor an evidentiary hearing must precede a hearing on direct criminal contempt because the misconduct was actually observed by the court and the relevant facts lie within the court’s personal knowledge.”¹⁵ Importantly, the judge must find that the contemnor’s conduct was willful.¹⁶ Thus, for attorneys who repeatedly

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send courtesy copy correspondence containing new arguments or disparaging remarks, the judge can find the conduct willful and immediately impose direct criminal contempt sanctions. We expect that this will rarely occur.

Suggested Best Practices: First, attorneys should not include arguments or comments in an email to a judge and/or his/her clerk. If attorneys receive one, print it out and file it with the clerk of the court, thereby placing it in the record. Second, judge's should stop this type of behavior by admonishing any attorney who goes beyond the ministerial contents of a courtesy copy letter or email, and sanction, through direct criminal contempt, attorneys who repeatedly flout the spirit of the rules and the Judge's admonitions. Further, each circuit court could adopt a local rule, pursuant to Illinois Supreme Court Rule 21¹⁷, which specifies the contents of courtesy copy and other communications with Judges to specifically prohibit this type of behavior.

The accepted use of email for filing and transmittal has brought many conveniences and efficiencies to the court

system. However, with its advantages, the opportunity for abuse has surfaced, challenging the court rules of professional conduct and civility. Hopefully, our suggestions can be a step in the right direction to curb these inappropriate practices. ■

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1. <https://central.isba.org/communities/community-home/digestviewer/viewthread?GroupId=133&MessageKey=ef9a4b92-9db8-43a6-b038-b036b236454c&CommunityKey=cf572d57-e4f6-4e6c-9026-78bc31fc8c0c&tab=digestviewer#bme9a4b92-9db8-43a6-b038-b036b236454c> (last visited May 7, 2021) (hereinafter "ISBA Discussion").
2. ISBA Discussion, *supra*, at post 2.
3. *In re Rouss*, 221 N.Y. 81, 84, 116 N.E. 782, 783 (1917).
4. Under Illinois Supreme Court Rule 2, a "Document" is "a

- pleading, motion photograph, recording, or other record of information or data required or permitted to be filed, either on paper or in an electronic format." http://www.illinoiscourts.gov/SupremeCourt/Rules/Art_I/ArtI.htm#2 (last visited May 7, 2021).
5. Illinois Supreme Court Rule 137 http://www.illinoiscourts.gov/SupremeCourt/Rules/Art_II/ArtII.htm#137 (last visited May 7, 2021).
 6. *Webber v. Wight & Co.*, 368 Ill.App.3d 1007, 1032 (1st Dist. 2006), *appeal denied*, 223 Ill.2d 686 (2007).
 7. *Krautsack v. Anderson*, 223 Ill.2d 541, 562 (2006).
 8. Illinois Supreme Court Rule 63 http://www.illinoiscourts.gov/SupremeCourt/Rules/Art_I/ArtI.htm#63 (last visited May 7, 2021).
 9. Illinois Rule of Professional Conduct 3.5 http://www.illinoiscourts.gov/SupremeCourt/Rules/Art_VIII/ArtVIII_NEW.htm#3.5 (last visited May 7, 2021).
 10. Illinois Rule of Professional Conduct 4.4 http://www.illinoiscourts.gov/SupremeCourt/Rules/Art_VIII/ArtVIII_NEW.htm#4.4 (last visited May 7, 2021).
 11. Illinois Rule of Professional Conduct 8.4 http://www.illinoiscourts.gov/SupremeCourt/Rules/Art_VIII/ArtVIII_NEW.htm#8.4 (last visited May 7, 2021).
 12. *People v. Ernest*, 141 Ill. 2d 412, 421 (1990); *see also, People v. Warren*, 173 Ill.2d 348, 370 (1996) ("The power to punish for contempt does not depend on constitutional or legislative grant.")
 13. *In re Marriage of Betts*, 200 Ill.App.3d 26, 43 (4th Dist. 1990).
 14. *People v. Hixson*, 2012 IL App (4th) 100777, ¶ 12.
 15. *People v. Perez*, 2014 IL App (3d) 120978, ¶ 18.
 16. *People v. Simac*, 161 Ill.2d 297, 307 (1994). The contemptuous state of mind may be inferred from the allegedly contemptuous conduct itself. *People ex rel. Kuncze v. Hogan*, 67 Ill. 2d 55, 60, 61 (1977).
 17. Illinois Supreme Court Rule 21 http://www.illinoiscourts.gov/SupremeCourt/Rules/Art_I/ArtI.htm#21 (last visited May 7, 2021).

Implicit Bias

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appearance, to name a few. This is also commonly known as stereotyping.

Stereotypes are widely held, oversimplified deep-rooted beliefs that are mentally associated with a type of person or thing. (<https://languages.oup.com/google-dictionary>) Stereotypes are commonly based upon distorted and inaccurate information. When the brain has incomplete information, it quickly processes and makes assumptions and connections automatically, without using much cognitive effort. The brain will rely upon stereotypes and associative concepts from the subconscious memory. Although one does not consciously set out to discriminate against others or make bad decisions, biases can affect client relations, professional relationships, courtroom practice, and even professional civility. The concept of implicit bias can result in real-life barriers and prejudices.

Why do these biases occur? Biases occur as a function of our brain processes. Associative learning enables the brain to associate two or more concepts instantaneously. Associative learning is a style of learning that happens when two unrelated elements become connected in our brains through a process known as classical conditioning. *See* twinkl.com. Associative learning should be thought of as a short cut for our brain to process and sort through the millions of bits of information and data that continuously filter in. It is a necessity for human functioning and enables memories to develop. Associative learning means that the brain develops patterns, compartmentalizes, and creates generalizations of various concepts. According to Information Theory-Physiology at Britannica.com, on average, the brain subconsciously processes eleven million bits of information per second.

On the other hand, consciously the brain processes an average of fifty million bits of information. Consequently, by doing the math, one primarily functions daily subconsciously and on automatic pilot. Thereby, one can preserve their cognitive energy for relevant tasks that require concentration, mindfulness, and laser-focus. Our brain enables us to brush our teeth, walk, talk, make coffee, eat, think about our daily schedule, etc., all without forethought and at lightening-rates of speed.

What Is the Impact of Implicit Biases?

There are many forms of implicit bias. I will focus on affinity bias, confirmation bias, and gender bias. These biases can affect hiring, project assignments, performance evaluations, and promotional opportunities. All of which should be based upon one's

cognitive and conscious objectiveness.

Affinity bias is the unconscious tendency and preference to favor those that look like you, act like you, think like you, and have the same experiences as you. This is analogous to favoring oneself when looking in the mirror. It is easier to associate oneself with those who are just like you. Those individuals are members of one's "in-group." The homogeneous nature of the "in-group" results in a lack of diversity, innovation, and creativity. This favoritism can be detrimental in the preparation of legal strategy. There is a mentality of "we are all agreeably on the same page." The members of the "in-group" are unjustly preferred and rewarded solely based upon their "in-group status." Unwarranted advantages are bestowed upon the "in-group."

Those that are excluded from the "in-group" are commonly known as the "out-group." The individuals included in the "out-group" are less likely to feel more comfortable to express their differing opinions, suggestions, or strategies. Problem-solving is decreased and discouraged. The "out-group" members are not rewarded for their contributions, nor are their efforts acknowledged based upon merit. There is a detrimental effect on the "out-group;" consequently, those in the "out-group" will feel less motivated and devalued when they perceive affinity bias. In best practices, an expansion of the discussion beyond a group of one-tracked minds should occur.

Confirmation bias is a consequence of one formulating an opinion or impression and seeking a means to affirm that belief. It is naturally counterintuitive to contradict ourselves. Does not one always want to be right! One wants to legitimize and add credence to one's beliefs. Any information that does not corroborate one's impression, will tend to be filtered out, rejected, or ignored. One tends to turn a blind eye to objective facts. Envision a Venn diagram with a comparison between objective facts and one's beliefs. The slither in the middle, is the crossover between objective facts and partial beliefs. That small section is the information that is consciously processed. Pertinent information, outside

of the common parameters, is lost with confirmation bias. As an attorney, one should consider ALL factors that are provided, without impartially.

Gender bias is self-explanatory. It is a preference or prejudice toward one's gender over the other. A Harvard study of 200,000 participants, both men and women, found that 76% of the respondents opined that men were more suited for the workplace, while women were more suited for homemaking. (<https://bhr.org/2018/05/the-different-words-we-use-to-describe-male-female-leaders>)

In another study, women and men managers were evaluated. Men were evaluated based upon their job performance/skills, and critiqued as being assertive, competitive, and direct. Contrarily, women were evaluated on their personality traits. Although the women exhibited the exact same level of professionalism, they were described as abrasive, aggressive, angry, and difficult. (<https://buffer.com/resources/marketing-psychology>)

In yet another study, a resume was drafted, with the exact same credentials, and thereafter evaluated. One resume listed the candidate as John, and the other, Jessica. Jessica will most likely be perceived as less competent and will earn less. Gender bias is still present in the legal profession. Men may be referred to as "counsel" while women are referred to by their first names. Women may mistakenly be referred to as other, non-attorney courtroom staff. Interaction with either gender, of course, should always be professional and respectful.

Although the above examples may run contrary to one's morals, values, and beliefs, they are nevertheless present. These biases can affect one's perceptions, attitudes, attention levels, listening skills, and behaviors.

How Do Implicit Biases Develop, Outside of the Associative Learning Process?

Childhood socialization. As a child, one's family and local community are their first exposures to cultural categories and stereotypes. The roles of one's parents

and siblings are stored in memory and the subconscious. Although cognitively one may disagree with such roles, one's childhood observations are deeply rooted in the subconscious.

Media influence one continuously.

The objective of the media is to influence one's perceptions and impact how others think. Media sources such as the news, newspapers, magazines, books, television, movies, and social websites bombard the subconscious. Consequently, the dissemination of information, accurate or not, denies one the opportunity to filter out or cognitively analyze the bulk of it.

Social experiences. One's social experience influences biases. Were you reared in an urban, rural, or suburban community? With whom do you associate, those like yourself or you have a diverse set of acquaintances?

Stereotypes. Repeated exposure to stereotypical associations and prejudices become automated in our long-term memory. Reinforcement of biases occurs continuously.

Cultural experiences. Cultural experiences play a factor. What are your beliefs, customs, practices, religion and/or ideologies?

How Does One Contend With Implicit Biases?

The upside is that implicit biases are not permanent, they are malleable. So how does one counteract and mitigate their implicit bias?

1. Educate oneself by reading articles on the topic, attend trainings and seminars so that one may increase their self-awareness of their biased attitudes.
2. Practice individualization with putting forth effort to recognize people by their distinctive interests, skills, and personalities. The more one looks at others as individuals, the less likely one will place them in a stereotypical group.
3. Appreciate diversity because being color-blind is not an option. To use the phrases, "I don't see color," or "I see everyone as being the same," fails to recognize that we all have

different experiences and cultures. It results in a rejection of others cultures and invalidates unique experiences. Acknowledge and appreciate others who are different. Put forth an effort to actively include and not exclude.

4. Counter-stereotype by considering how one does not fit into the stereotypical image you may have of an individual. Cognitively consider how one does not fit into the standard image that you may unconsciously associate with that person. What qualities does this individual *not* possess that one

would otherwise associate with their stereotypical group.

5. Put forth an effort to foster and create associations with those that are not in your “in-group,” so you may learn about their experiences, opinions, and assets. Do not rely upon inaccurate subconscious stereotypes and generalizations.
6. Be mindful, thoughtful, and deliberate in your thoughts. Rely less upon biases and memories and utilize more cognitive energy.

Lastly, take the Harvard Implicit Association Test (www.implicit.harvard.edu) so that you can self-identify your

implicit biases. Once one is cognizant of where one’s biases lie, one can be mindful in counteracting them. When that mitigation occurs, there will be a promotion and increase of diversity, equity, inclusion, and justice. This makes the attorney more effective, and successful, to the benefit of all involved. ■

Trina Smith is the chief of the Juvenile Justice Division of the Office of the Cook County Public Defender, where she has served for the past two decades.

COVID-19 and Mental Health

BY DR. ALEXANDRA TSANG

COVID-19 brought us an epidemiological and psychological crisis. This is the largest mental health impact in modern history. The increased isolation, changes to routine, changes to our jobs and the daily confrontation with our own mortality is an overwhelming stress that impacts all of us. Frustration and boredom related to the isolation of quarantine, inadequate supplies and access to health care for some, and insufficient or contradictory information about the virus from public health officials all add to our stress levels. Suicide hotline calls have increased, individuals with substance abuse problems are relapsing more and declining mood and increasing anxiety are a reality. If your mental health was in relatively good shape prior to COVID-19, you now likely are doing less well. If you were already doing less well and had some pre-existing depression and anxiety prior to COVID-19, you now are likely struggling. And if you were already struggling prior to COVID-19, you are now likely in crisis. Basically, we all have experienced some level of mental health decline this year.

Rates of depression and anxiety in Americans have significantly increased. Parents who now have to juggle working

from home while tending to the academic needs of their children have a two-fold onus and thus double the stress. There is little reprieve when you work, attend school, have dinner and socialize with the household all within a few rooms of the house. There is no stress relief of going to concerts, eating out at restaurants, attending sport games or going on vacation.

Quarantine stress impacts us all but in different ways. Children respond to anxiety differently than do adults. Young children may not have the vocabulary to express their frustration, boredom, or the feelings of loss of not seeing their friends, playing at recess on the playground and engaging in social activities. Children will likely show you how they are feeling rather than tell you. This means that you may see more acting out behaviors in your young ones. Agitation, clingy behavior, anxiety and complaints of stomach aches and headaches can be common. It is important that as parents we limit their exposure to the news and translate the information in a way that they understand. Reassure your children that they can be safe, teach them everyday actions to reduce the spread of germs and keep up with their regular routines. Children respond to structure because structure is predictable

and with predictability comes the feeling of safety. That will translate in a calmer behavior.

Adolescence, even in the best of times, is a developmental period that comes with angst, growing pains and when peer group development is very psychologically significant. This is when children start pulling away from their parents psychologically in order to become independently functioning adults. Hormones, focus on peers and social events such as graduations, proms and sport events become crucial. Teenagers have faced the loss of many of these activities. Creatively, a lot of these activities have taken on a new form such as drive-by birthday celebrations, but the feel is not the same. Encourage your teens to stay socially connected to their peers via phone, video chats and even video games which can utilize the chat function for cooperative play.

The emerging adult group, ages 18-24, have also faced the loss of in-person milestones such as visiting college campuses, going on their first job interview and securing an internship or work-study program. These are now virtual. It is common for teens and emerging adults to feel “robbed” of these events that they grew

up hoping to have one day.

With all this being said, one key thing to remember is: “It’s OK to not be OK.” Yes, we all have been affected. We are all having a normal reaction to a historically not-normal era. However, there are attainable things we can do to lighten our moods and keep the positivity going.

One way to take care of your well-being is to let go of things you cannot control. You cannot control when other people refuse to wear masks or wear them half way slung down their faces dangling from their ear like a wispy feather boa. You cannot control when others do not social distance and contaminate your personal space bubble. You cannot predict what will happen in 2021 as it pertains to the coronavirus. You cannot predict toilet paper shortages. You cannot control how long this will last. But... You can control your media exposure and decide what levels of information you can tolerate. You can control your own mask-wearing, social distancing and hand washing behaviors. Remember there are perks to face mask wearing. You don’t have to smile if you don’t want to. You can even sneak in a bit of a grimace and no one will be the wiser. You can control keeping a positive attitude. You can find fun things to do at home.

Which brings me to home survival strategies. In regards to every day functioning, have some sort of routine. If you roll out of bed and shuffle with your bunny slippers to the next room with a pillow crease on your face, believe me, you will not be as productive at work as you can be. You have to transfer into work mode. That means, yes, take that shower before you log onto your computer and not during brunch or when the sun is setting and the geese are returning to their ponds. Comb your hair and put on makeup if it will make you feel more alert, even if only your dog Fido sees you and appreciates your effort. Designate only one work area for yourself. If you scatter your papers around the house like a windstorm, everywhere you look you will see reminders of work and you may have a hard time unwinding in the evening.

Find productive and fun ways to use your time at home. You can use the shelter in place time to exercise your brain. Take

an academic course like something from Khan Academy or Skillshare. Do some brain training apps like Cognifit, Lumosity or Elevate. Listen to a TED Talk. Check out Goodreads for book recommendations and book reviews with other readers. Do a self-help workbook. There are a ton of resources out there for anxiety and depression. Write in a journal, keep a gratitude journal, or color in an adult coloring book. Do some meditation through Headspace. Start that yoga routine you have always wanted. I personally recommend the YouTube channel Yoga with Adriene. She has yoga routines designed for specific body issues, such as lower back pain, and also for emotional issues such as anxiety. And she does not make me feel awkward and clumsy just because I can’t touch my toes without wincing. Keep an optimism calendar where you do one positive thing a day even when you are having one of those days when the only positive thing that happened that day seems to be “I didn’t burn dinner.”

There are also semi-mindless tasks you can do. These are my personal favorites. Mindless tasks will burn off some of the anxious energy and will keep your brain engaged. Cleaning and decluttering is a great one. Learn how to fold your clothes Marie Kondo-like. Please see Netflix for the reference. Do some jigsaw puzzles or work on that scrapbook that you started in 1999. Organize your photos. Who cares that your kid just graduated college and you are on page two of his baby photo album. Pets are another source of comfort and stress relief even though they may steal all your hand towels and use them as chew toys. I’m just saying. (I’m looking at you, Mango). Learn to cook a great soup, how to play the guitar or how to knit.

Remember those things that are not cancelled are family movie nights, playing board games, baking cookies, and calling a friend. Remember that it’s OK to not be OK and that even though these times will be in history books we have the choice to remember this as a completely negative event or a time where we revived family walks, we learned how to cook something new, and we realized we were much more resilient than we thought because we

chose to see the slivers of opportunity that came with this unique time period and we remembered that those gray winter days always lead to sunnier seasons. ■

Dr. Alexandra Tsang is the director of the Kane County Diagnostic Center.

Recent Appointments and Retirements

1. Pursuant to its constitutional authority, the supreme court has appointed the following to be circuit judge:

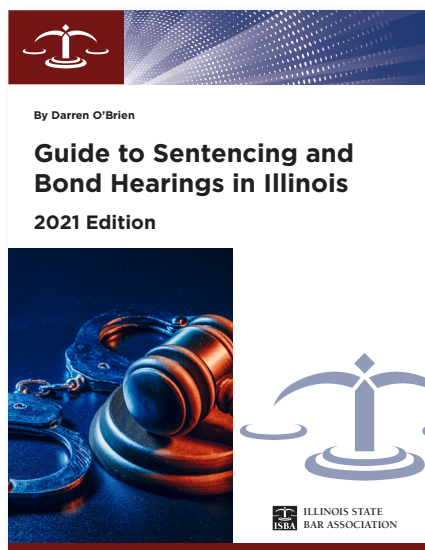
- Steven M. J. Bost, 1st Circuit, March 1, 2021
- Timothy D. Denny, 1st Circuit, March 1, 2021
- Hon. Carol Penuic, 14th Circuit, March 19, 2021
- Christina M. Caitlin Van Wiggeren, 13th Circuit, March 22, 2021
- Hon. Dinah J. Archambeault, 12th Circuit, March 31, 2021

2. The circuit judges have appointed the following to be associate judge:

- James A. Andreoni, 13th Circuit, March 1, 2021
- Scott Brinkmeier, 15th Circuit, March 1, 2021
- Douglas C. Gruenke, 4th Circuit, March 26, 2021 ■

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