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October 21, 2022
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APPLIED PROFESSIONALISM 2022

October 21, 2022

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APPLIED PROFESSIONALISM

Topics

8:30 A.M. Registration & Coffee

8:55 A.M. Welcome and Course Objectives
F. Anthony Paganelli, Chair

9:00 A.M. Civility and Professionalism: What's it Really All About?
Hon. Melissa S. May

9:30 A.M. Conflicts of Interest
Wandini D.F. Riggins

10:00 A.M. Understanding the Ethics of Business Development and Marketing
F. Anthony Paganelli, Rebecca W. Geyer, Frederick W. Schultz

10:30 A.M. Coffee Break

10:45 A.M. Vignettes of Legal Ethics
James J. Bell, Seth T. Pruden
Attorney Client Relationships, Attorney Fees, Confidentiality, Client Communication, Fiduciary Duties, Who is your Client?, Relationships With 3rd Parties, Case Management & Record Keeping

12:15 P.M. Lunch Break

1:15 P.M. Trust Accounts and IOLTA
Seth T. Pruden

2:15 P.M. A Call for Help: The Judges and Lawyers Assistance Program (JLAP)
Ashley E. Hart

2:45 P.M. Refreshment Break

3:00 P.M. Malpractice Insurance Coverage Needs for Today's Legal Practice
Eric. C. Redman

3:30 P.M. Hidden, But Obvious, Tips for Succeeding in Your Legal Career
Joseph C. Pettygrove, Steven E. Runyan

4:30 P.M. Adjourn

October 21, 2022

APPLIED PROFESSIONALISM

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October 21, 2022

F. Anthony Paganelli, Paganelli Law Group LLC, Indianapolis

LIFE AT PLG
- Founder and principal of PLG, leading our team and managing all business functions for the firm.
- Concentrates his practice in commercial litigation, mediation, and business strategy.
- Recognized in 2009 and 2010 as an "Indiana Rising Star" (the top 5% of Indiana lawyers under 40), and as an "Indiana SuperLawyer" (the top 5% of all Indiana lawyers) every year since 2010; included in every edition of "The Best Lawyers in America" since 2013.

LIFE BEFORE PLG
- Litigation partner with Taft, Stettinius & Hollister, one of the largest law firms in the United States, where he developed a national business litigation and trial practice.
- Served as the 2012 Chair of the Litigation Section of the Indianapolis Bar Association.
- Graduated from the University of Notre Dame (B.A. 1992) and Indiana University School of Law—Bloomington (J.D. *Cum Laude* 1995).

LIFE BEYOND PLG
- Instructor and program chair for the annual Indiana Trial Advocacy College, and frequent speaker on legal and business issues.
- Chairman Emeritus of the Children's Organ Transplant Association, a national charity that raises over $5 million per year for children who need life-saving organ transplants.
- Lives in Indianapolis with his wife and their two teenage children.

Hon. Melissa S. May, Judge, Indiana Court of Appeals, Indianapolis

Judge May was appointed to the Indiana Court of Appeals by Governor Frank O'Bannon in April of 1998. She was born in Elkhart, Indiana. She earned a B.S. in criminal justice from Indiana University-South Bend in 1980, a J.D. from Indiana University School of Law-Indianapolis in 1984. She is also a graduate of the Graduate Program for Indiana Judges. Judge May is currently the Presiding Judge of the Fourth District.

Prior to her appointment to the Court, Judge May practiced law for fourteen years in Evansville, Indiana, where she focused on insurance defense and personal injury litigation.

Judge May has been active in local, state, and national bar associations and bar foundations. She served the Indiana Bar Association on the Board of Managers from 1992-1994, as Chair of the Litigation Section from 1998-1999, as Counsel to the President from 2000-2001, as Chair of the Appellate Practice Section from 2007-2008, and as Secretary to the Board of Governors in 2008-2009. She is also a member of the Indianapolis Bar Association and the Evansville Bar Association. In addition, she was a member of the Board of Directors of the Indiana Continuing Legal Education Forum from 1994-1999 and has been a co-chair of ICLEF's Indiana Trial Advocacy College from 2001 to present. She is a fellow of the Indiana Bar Foundation, as well as for the American Bar Association, and she is a Master Fellow of the Indianapolis Bar Association.

From 1999 until December 2004, Judge May was a member of Indiana's Continuing Legal Education Commission, where she chaired the Specialization Committee. She is currently on an Advisory Panel to the Specialization Committee. In 2005, she was named to the Indiana Pro Bono Commission and in July 2008, she was named as Chair of that Commission. While chair, she worked with the fourteen pro bono d istricts to train lawyers and mediators on how to assist homeowners who are facing foreclosure. Judge May also serves on the Civil Instruction Committee, an Indiana Judicial Conference Committee, which has been working to translate all of the civil jury instructions into "plain English." She frequently speaks on legal topics to attorneys, other judges, schools, and other professional and community organizations.

In 2003, Judge May was named to the American Bar Association's Standing Committee

on Attorney Specialization. She is now special counsel to that committee. In the spring of 2004, Judge May became adjunct faculty at Indiana University School of Law-Indianapolis, where she teaches a trial advocacy course.

Also in the spring of 2004, she was awarded an Honorary Doctor of Civil Law from the University of Southern Indiana.

James J. Bell, Paganelli Law Group LLC, Indianapolis

LIFE AT PLG
- 2018 President of the Indianapolis Bar Association.
- Leads PLG's criminal defense and professional discipline team, using nearly 20 years of experience to help his clients.
- Recognized as one of the top 50 lawyers in Indiana by "SuperLawyers" in 2015, 2016, 2018 and 2019; listed in "The Best Lawyers in America."

LIFE BEFORE PLG
- Former partner at Bingham Greenebaum Doll, a large midwestern law firm, where he practiced white-collar criminal defense and professional ethics defense.
- Former major felony public defender.
- Served as an adjunct professor of legal ethics at the Indiana University McKinney School of Law.
- Past chair of the Indiana State Bar Association's Criminal Justice Section, the Indianapolis Bar Association's Criminal Justice Section, and the Indiana State Bar Association's Legal Ethics Committee.
- Graduated from DePauw University (B.A. 1996) and the Indiana University McKinney School of Law (J.D. 1999).

LIFE BEYOND PLG
- One of the most sought-after speakers on legal ethics and criminal practice issues in Indiana.
- Host of the popular "Amateur Lifecoach" series of online video presentations on professional ethics.
- Lives in Indianapolis with his wife and their three small children.

Rebecca W. Geyer, Rebecca W. Geyer & Associates, PC, Indianapolis

Rebecca W. Geyer is the founder of Rebecca W. Geyer & Associates, PC where her practice concentrates in estate planning, estate and trust administration, elder law, tax planning, and business services. A board certified Indiana trust and estate specialist* and a Fellow of the American College of Trust and Estate Counsel, Rebecca is also an adjunct professor of elder law at the Indiana University Robert H. McKinney School of Law.

Rebecca completed her undergraduate degree at Indiana University, majoring in Political Science. She went on to earn her Juris Doctor in 1998 at the Indiana University Maurer School of Law. An avid volunteer in both the legal community and the Indianapolis community at large, Rebecca often speaks and writes on estate planning and elder law topics, and annually provides pro bono legal services to individuals through her work with the Indianapolis Bar Association and the Albert and Sara Reuben Senior Resource and Community Center.

As a frequent lecturer and seminar presenter, Rebecca has authored numerous seminars with ICLEF, ISBA, IBA, and National Business Institute. Her recent presentations include "Alternatives to Guardianship," "Elder Law Update," "Estate Planning Under Our Guardianship Statutes," "Estate Planning with Retirement Assets" and "Estate Planning for Same-Sex Couples in Light of Obergefell."

Rebecca is Secretary of the Indianapolis Bar Association, Past President of the Indianapolis Bar Foundation, a former Chair of the Elder Law Section of the Indiana State Bar Association, and a Past President of the Indiana Section of the National Academy of Elder Law Attorneys (NAELA). She served on the Board of Governors of the Indiana State Bar Association from 2016-2018. Since 2014, Rebecca has been named to the prestigious list of Super Lawyers® for estate planning, and has been designated as one of the top 50 attorneys in Indiana and one of the top 25 women lawyers in Indiana in since 2016 by Law & Politics Magazine and Indianapolis Monthly. She was also named to the Indianapolis Business Journal's 2014 40 Under 40 Class, which recognizes individuals making a difference in their professions and communities prior to the age of 40. In 2018, Rebecca was recognized by the Indianapolis Bar Association for service to the profession, and was awarded the Indianapolis Bar Association's Dr. John Morton Finney Award for Excellence in Legal Education in 2013. Rebecca also volunteers in the community where she serves as Past President of Congregation Beth-

El Zedeck, and Treasurer of the Indianapolis Section of the National Council of Jewish Women.

Rebecca is chair of the Indianapolis Bar Association's Estate Planning and Administration Section, and a member of its Women and the Law Division. Her professional memberships also include the Probate, Trust and Real Property Section and the Elder Law Section of the Indiana State Bar Association, the Indiana Probate Review Committee, Estate Planning Council of Indiana, and the National Academy of Elder Law Attorneys. Rebecca was recognized as a distinguished fellow by the Indianapolis Bar Foundation in 2010.
*Certified by the Indiana Trust and Estate Specialty Board

Ashley E. Hart, United States District Court, Indianapolis

Ashley Hart is an attorney and licensed social worker in Indiana. She serves as a committee member and volunteer of the Indiana Judges and Lawyers Assistance Program (JLAP). She is focused on assisting the legal profession with handling grief and loss and educating others in suicide prevention and awareness. She and her seven-year-old German Shepherd/Belgian Malinois, the Honorable K9 Judge—a certified therapy dog and canine good citizen—enjoy working with JLAP to provide emotional and stress management support in the form of pet therapy to the legal community.

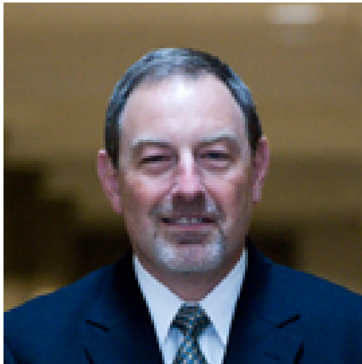
Joseph C. Pettygrove, Kroger Gardis & Regas, LLP, Indianapolis

Joe Pettygrove leads the firm's Employment Law Practice. He learned both client service and "workplace psychology" from his grandfather, uncles, and parents at an early age, as he grew up amidst a Hoosier family grocery business with a workforce of several hundred. That same experience gave Joe a special appreciation for the stress that employers and their managers confront when navigating the many different legal challenges posed by under-performing, ill, sad, angry, or other "challenging" employees. In his law practice, Joe has a particular passion for counseling employers through sensitive workplace investigations, employee medical issues, theft and embezzlement, workplace violence, and other employment challenges. He works with family- and other privately-owned businesses, non-profits, municipalities, and education clients where he both develops policies and practices and is their employment law "problem solver" on delicate employee matters. He counsels on all phases of the employment relationship, from recruiting and hire all the way through termination and unemployment claims. Joe regularly trains clients' HR and supervisory teams on compliance issues and assists in personnel policy/process development, reorganizations, and reductions in force.

Joe also litigates the full spectrum of employment-law issues and has handled hundreds of cases before state and federal trial courts (both inside and outside Indiana), the EEOC, Indiana Civil Rights Commission, and other state, federal, and local agencies. Joe has defended discrimination claims of nearly every stripe, including those under the Family and Medical Leave Act (FMLA), the Americans with Disabilities Act (ADA), Title VII, and the Age Discrimination in Employment Act (ADEA). He has also litigated restrictive covenants in employment, Fair Labor Standards Act (FLSA) claims, wage payment claims, and wrongful discharge actions. He is admitted to practice before the U.S. Court of Appeals for the Second, Third, and Seventh Circuits as well as the U.S. District Courts for the Northern and Southern Districts of Indiana and all Indiana state courts. He has been recognized as a Rising Star by Indiana Super Lawyers every year since 2013.

Joe grew up and lives with his family in Hamilton County. He graduated from Cathedral High School in Indianapolis, Ball State University (summa cum laude), and Indiana University McKinney School of Law (magna cum laude).

Seth T. Pruden, Indiana Supreme Court Disciplinary Commission, Indianapolis



Seth T. Pruden is a staff attorney for the Indiana Supreme Court Disciplinary Commission and has been a staff attorney at the Disciplinary Commission since 1996. He served as Interim Executive Secretary (Director) during the first six months of 2010 upon the departure of Donald Lundberg. Pruden received his J.D. from Indiana University School of Law – Bloomington, in 1984. He is admitted to practice in the State Courts of Indiana, the Southern and Northern Federal District Courts of Indiana, and the United States Supreme Court (2006). Pruden received a B.S. in Music Education from Ball State University in 1979 and taught music education in public schools before attending law school. From 1984 to 1987, Pruden worked as a public defender in Marion County, Indiana, and during that time was hired as the first full-time public defender in Marion County - the precursor to the current Marion County Public Defender Agency. In 1987, Pruden became an associate with the Indianapolis law firm of Bamberger and Feibleman where he acted as a primary litigation lawyer for individual and corporate clients with business, commercial, bankruptcy and other legal matters. From 1993 to 1996, Pruden operated a general litigation law firm in Noblesville, IN. As a member of the Disciplinary Commission litigation staff, Pruden investigates and prosecutes violations of the Rules of Professional Conduct for Lawyers. He has lectured extensively on legal ethics for the past 12 years and has appeared as a presenter or panelist for ethics presentations on numerous occasions and spends considerable time in continuing legal education projects with an emphasis on Trust Account Management. He is currently chairman of the faculty of a new Trust Account Course co-sponsored by the Disciplinary Commission and the Bar Foundation's Continuing Legal Education Forum (ICLEF). As Interim Executive Secretary, Pruden is responsible for the daily operations of the Disciplinary Commission and carries out the policies and procedures of the Commission and the Supreme Court as set forth in the Admission and Discipline Rules of Indiana. Pruden is a member of the National Organization of Bar Counsel (NOBC), the Indiana State Bar Association, the Indianapolis Bar Association and the American Bar Association. Pruden currently teaches Legal Ethics at Indiana University-Purdue University at Indianapolis (IUPUI). He was an instructor in the IUPUI Department of Philosophy from 2004 to 2009 until his course was moved to the Political Science Department beginning in the fall of 2009. Pruden holds a commercial pilot license and when time permits is involved in aviation related activities. Pruden is married to Karen (Rittmeyer) Pruden, and has four children.

Eric C. Redman, Ritman & Associates, Inc., Noblesville

Eric Redman is a Producer with RITMAN and joined the company in 2009. His primary lines of business include all classes of Professional Liability with an emphasis on Lawyers and Title Agents. Eric holds licenses in IN, OH, IL and KY.
Eric is passionate about working for RITMAN which serves a niche in the legal profession. He enjoys the family feel of RITMAN.

He was born and raises in Indianapolis, Indiana. He graduated from North Central High School and and holds bachelor degrees from Indiana University in both Political Science and Economics.

Eric currently resides in Indianapolis with his wife Laura and son Patrick. Eric enjoys exploring local restaurants and bars with character. He also enjoys music, traveling, and attending Pacers and Colts games.

Wandini Riggins, Bose McKinney & Evans LLP, Indianapolis

Wandini Riggins is an associate in the Labor & Employment Group at Bose McKinney & Evans.

Prior to joining Bose McKinney & Evans, Wandini served as a deputy senior judicial law clerk to the Honorable Elizabeth F. Tavitas of the Court of Appeals of Indiana. In that role, she analyzed state and federal laws and regulations, reviewed civil and criminal judgments, assisted in preparing judicial memoranda, provided legal counsel, and aided judges in clarifying issues of law, informing public policy and establishing precedent.

Wandini also served as a staff attorney for the Indiana General Assembly's Office of Bill Drafting and Research, where she drafted proposed legislation and staffed meetings of the Utilities, Energy and Telecommunications Committee of the Indiana House of Representatives and the Commerce and Technology Committee of the Indiana Senate. Additionally, she has held positions as an associate attorney at an Indianapolis law firm, as a judicial law clerk for the Honorable Carr L. Darden and the Honorable Michael P. Barnes of the Court of Appeals of Indiana, and as a deputy prosecuting attorney for the Hamilton County Prosecutor's Office.

Steven E. Runyan, Kroger Gardis & Regas, LLP, Indianapolis

Steve Runyan primarily counsels and represents clients in complex commercial and contractual disputes. He regularly represents clients before federal and state courts at the trial and appellate levels, administrative agencies, and guides his clients through alternative dispute resolution procedures such as mediation and arbitration.

Steve's varied background has taught him the importance of understanding the client's issue, from both a practical and legal perspective, before setting a path to resolve the issue. He also understands the importance of keeping a client informed of the latest developments in a matter and responding promptly to client questions.

Steve has applied his extensive litigation practice to assist clients in a wide range of matters including: Employment matters, ranging from employment non-compete agreements, to claims of employment discrimination (including FMLA, ADA, Title VII, and political discrimination), to discharge based on employee theft or embezzlement; representing financial institutions in work-out and foreclosure matters as well as defense of tort and contractual claims; fiduciary matters including Director & Officer liability; assisting municipal clients in in federal and state litigation; and representing candidates in elections contests and recounts.

In addition to litigation matters, Steve represents small and mid-sized businesses and their owners regarding internal disputes such as minority freeze-outs and claims of breaches of fiduciary duties, as well as external contractual disputes.

Steve was named as a "Rising Star" by Indiana Super Lawyers in 2009 and 2010. He participated in the Indianapolis Bar Association's Bar Leader Series during 2011-2012, and served on the Bar Leader Series Steering Committee for the 2013-14, 2014-15, and 2015-16 classes.

Prior to earning his J.D., summa cum laude, from Indiana University School of Law – Indianapolis, Steve had a wide-ranging career which afforded him experience he now applies on behalf of his clients. Steve earned an accounting degree from the University of Northern Iowa and successfully completed the Certified Public Accountant Examination. He then spent over six years as an officer in the United States Air Force, primarily as a Special Agent with the Air Force of Special Investigations. As a Special Agent he investigated allegations of criminal and fraudulent conduct, to include complex fraud targeting critical Air Force weapons systems. Steve led an overseas unit tasked with providing mission critical counter-intelligence and anti-terrorism support. Following

his service in the Air Force, he served as a project manager in the new model development group for Honda of America Manufacturing in East Liberty, Ohio.

Frederick W. Schultz, Greene & Schultz Trial Lawyers, Bloomington

Fred Schultz is a graduate of Indiana University School of Law. He began his legal career as a deputy prosecuting attorney with the Greene County Prosecutor's Office from 1996 to 1998. He joined Nunn & Greene Law Office as an associate attorney until he left in May of 2005 to form the law firm of Greene & Schultz with Betsy Greene. Fred has tried numerous jury trials in both State and Federal Courts in Indiana, and has written and spoken at a number of Continuing Legal Education programs, both in Indiana and across the country.

During his career as a trial lawyer, Fred has received numerous awards and recognitions. He has received the top award for a lawyer in practice less than ten years from both the Indiana Trial Lawyers Association and the Association for Justice, the Max Goodwin Award from ITLA, and the F. Scott Baldwin Award from the American Association for Justice. He is also a graduate of the Trial Lawyers College.

Fred has been named a Super Lawyer for every year since 2008 and continuing through 2017 by Law & Politics Magazine, and the publishers of Indianapolis Monthly. The Super Lawyer award is given out only after an extensive peer review and screening process of all the lawyers in Indiana and is bestowed upon those attorneys who are considered to be among the top five percent of all lawyers in Indiana. He has also been recognized by Best Lawyers in America every year since 2013.

Fred is frequently asked to serve in leadership positions in the various organizations which he is involved. Fred has served as president of the Monroe County Bar Association, chairperson of the Indiana Trial Lawyers Association (ITLA) Annual Institute, co-chaired ITLA's Professional Responsibility Seminar, and has been asked to speak several times at the Annual Convention for the American Association for Justice. He is a member of the Indiana State Bar Association. He is also active in leadership in the Indiana Trial Lawyers Association (ITLA), where he has served on the Board of Directors since 2004 and the Executive Committee since 2011. Fred currently serves as the Treasurer of ITLA. He is also a member of the American Association for Justice, where he is a past member of the Board of Governors, and still serves on several committees. Fred is also a member of the American Board of Trial Advocates, and is board certified as a Civil Trial Advocate by the National Board of Trial Advocacy.

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Applied Professionalism
Civility and Professionalism: What's It Really All About

Hon. Melissa S. May
Indiana Court of Appeals
Indianapolis, Indiana

Section One

Applied Professionalism – Civility and Professionalism: What's it Really All About?..........Hon. Melissa S. May

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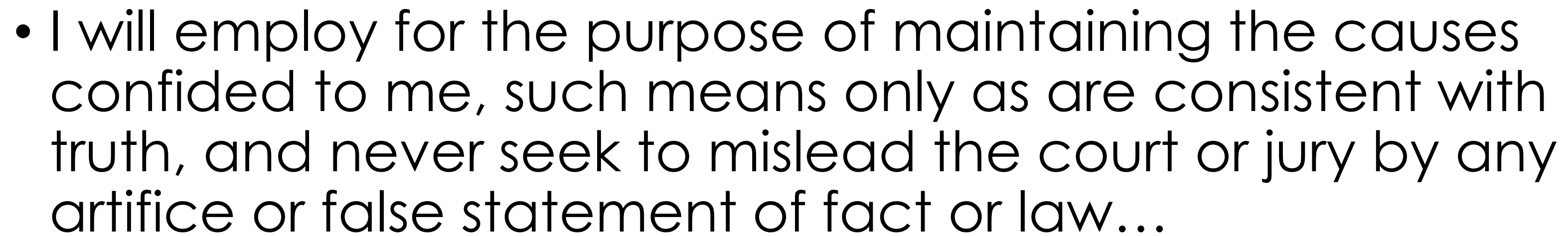
Civility and Professionalism: What’s it Really All About?

- Courtesy; politeness; kind attention; good breeding; a polite act or expression

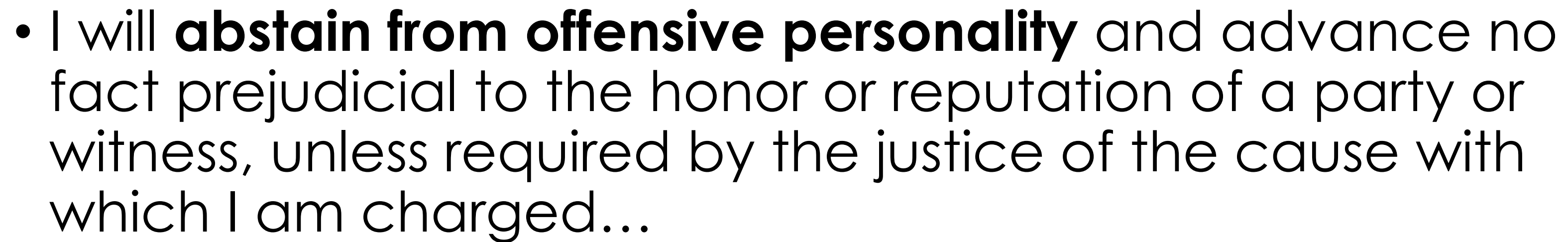
- The act of showing regard for others

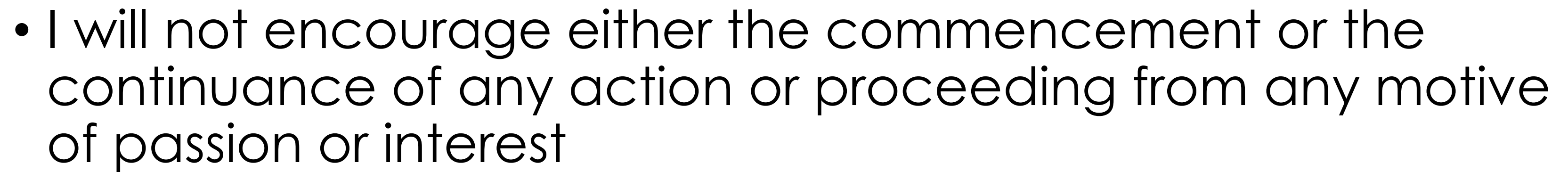
INDIANA OATH OF ATTORNEYS

- "I do solemnly swear or affirm that: I will support the Constitution of the United States and the Constitution of the State of Indiana; I will maintain the respect due to courts of justice and judicial officers; I will not counsel or maintain any action, proceeding, or defense which shall appear to me to be unjust, but this obligation shall not prevent me from defending a person charged with crime in any case; I will employ for the purpose of maintaining the causes confided to me, such means only as are consistent with truth, and never seek to mislead the court or jury by any artifice or false statement of fact or law; I will maintain the confidence and preserve inviolate the secrets of my client at every peril to myself; I will abstain from offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged; I will not encourage either the commencement or the continuance of any action or proceeding from any motive of passion or interest; I will never reject, from any consideration personal to myself, the cause of the defenseless, the oppressed or those who cannot afford adequate legal assistance; so help me God."

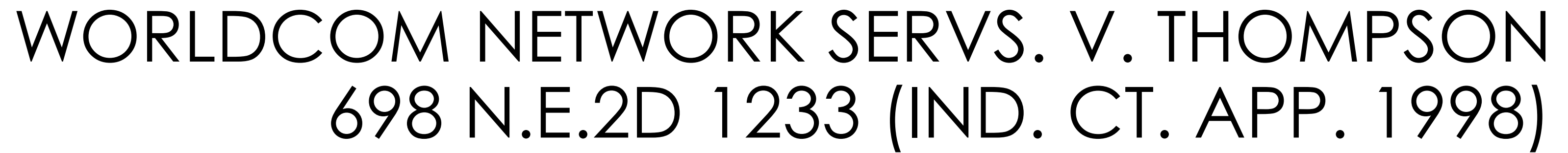


- I will employ for the purpose of maintaining the causes confided to me, such means only as are consistent with truth, and never seek to mislead the court or jury by any artifice or false statement of fact or law…


• I will **abstain from offensive personality** and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged…


• I will not encourage either the commencement or the continuance of any action or proceeding from any motive of passion or interest

- A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. Whether or not engaging in the practice of law, lawyers should conduct themselves honorably.
- Preamble, pg. 1



- Righteous indignation is no substitute for a well-reasoned argument.

4 AREAS OF CONCERN

- Your client
- 3rd parties
- Your fellow lawyers
- The Court

- Lawyers can’t lie …

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MODEL 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 a fraudulent act by a client, unless disclosure is prohibited by Rule 1.6

• Is stretching the truth lying?

Once you lick the frosting off a *cupcake* it becomes a muffin....
and muffins are *healthy.*
You're welcome 😊

• Manage Client Expectations

- Because this is what happens when you don’t!

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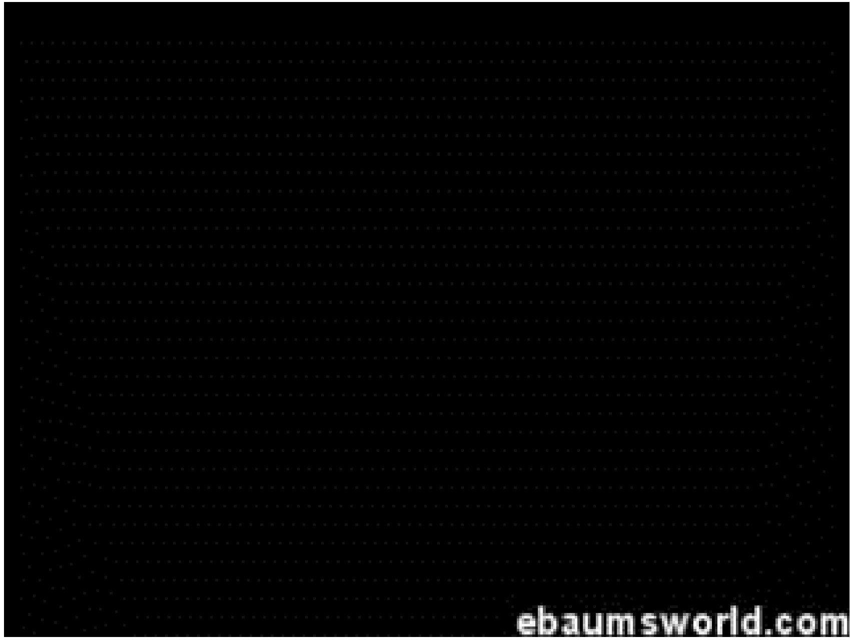
THIRD PARTIES & FELLOW LAWYERS

- "If there is a hell to which disputatious, uncivil, vituperative lawyers go, let it be one in which the damned are eternally locked in discovery disputes with other lawyers of equally repugnant attributes."

- Dahl v. City of Huntington Beach, 84 F.3d 363, 364 (9th Cir. 1996) (quoting Krueger v. Pelican Prod. Corp., No. CIV-87-2385-A (W.D. Okla. Feb. 24, 1989).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THE COURT

- Judges Know How to Get Your Attention

- Do unto others as you would have them do unto you

PROFESSIONALISM ON ZOOM

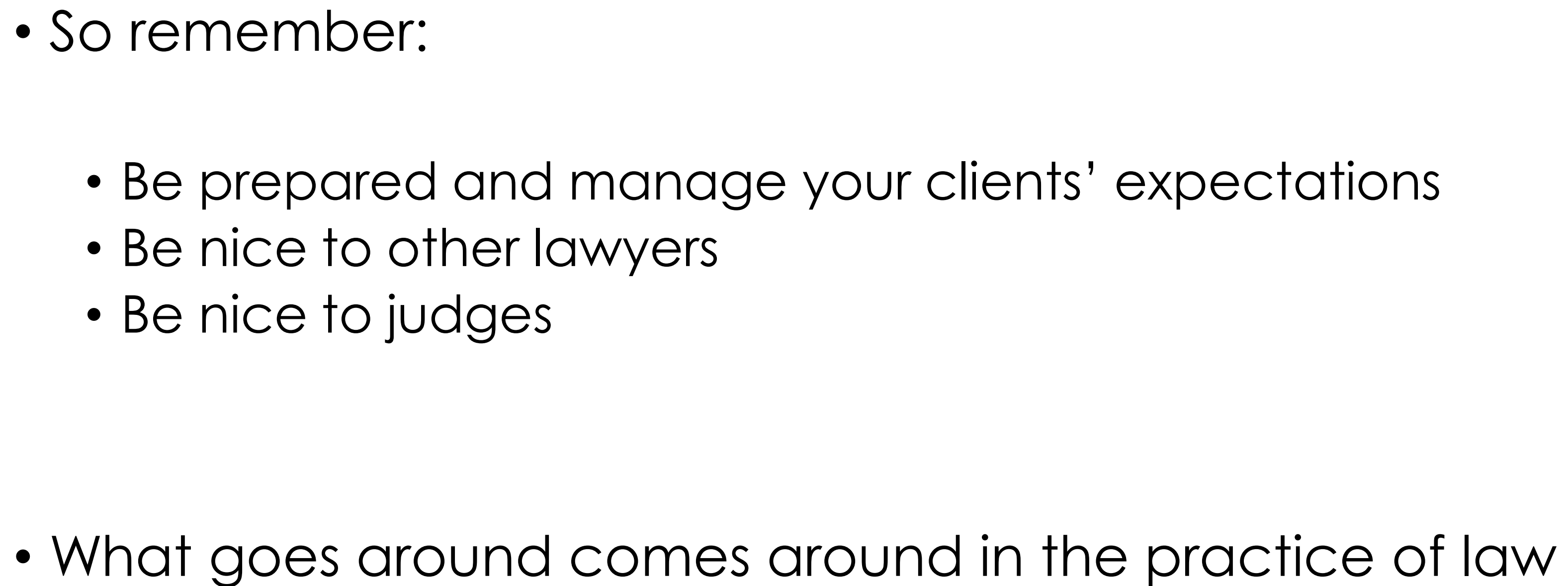
- Zoom/Webex are probably here to stay.
- There are different considerations in a remote hearing situation
- You need to tell your clients different things.
- And you need to make sure you understand your technology.

The Guardian

• Here’s definitely not what to do

NEWS
abc ACTION NEWS
11:03 76°

• Stephen Diaco, Robert Adams and Adam Filthaut were all permanently disbarred by the Florida Supreme Court.


• So remember:
• Be prepared and manage your clients' expectations
• Be nice to other lawyers
• Be nice to judges
• What goes around comes around in the practice of law

Fostering Civility in an Uncivil World:

What's It Really All About

Hon. Melissa S. May
Indiana Court of Appeals
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Hon. Gary L. Miller
Marion Superior Court
Indianapolis, IN 46204
Gary.Miller@indy.gov
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Competency

Rule 1.1 of the Rules of Professional Conduct states:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

The Commentary further advises that:

> In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.

Do the Work

Sanctions against lawyers for violation of the professional rules can result from private reprimand to disbarment. In *Matter of Williams*, 764 N.E.2d 613 (Ind. 2002), Williams was disbarred for a number of his actions and non-actions. There were 6 counts listed by the Indiana

Supreme Court, one of which involved Williams' conduct after he filed a claim for damages on behalf of a client. Williams failed to respond to opposing counsel's discovery requests or to file witness or exhibit lists and also failed to abide by the trial court's discovery orders or pay opposing counsel's attorney fees as ordered by the court. In addition, he failed to respond to his client's inquiries about the case, did not withdraw from representation when she demanded his withdrawal, and without the client's consent, proceeded to act as her attorney at trial. In summary, the supreme court stated:

> We find that the respondent violated Ind. Professional Conduct Rule 1.2(a) by failing to abide by his clients' objectives of representation; Prof. Cond. R. 1.3 by failing to act with reasonable diligence and promptness; Prof. Cond. R. 1.4 by failing to keep his clients adequately informed about the status of their cases, failing to respond to their requests for information, and failing to explain matters to the extent reasonably practicable to allow them to make informed decisions regarding their cases; Prof. Cond. R. 1.5(c) by failing to reduce a contingency fee agreement to writing; Prof. Cond. R. 1.16(d) by failing to take reasonable steps, upon termination of representation, to protect the interests of his clients; Prof. Cond. R. 1.16(a)(3) by failing to withdraw from representation after being discharged by his client; Prof. Cond. R 3.2 by failing to expedite litigation consistent with the interests of this clients; Prof. Cond. R. 3.4(d) by failing to comply with legally proper discovery orders; Prof. Cond. R. 8.1(b) by failing to comply with a lawful demand made by a disciplinary authority; Prof. Cond. R 8.4(c) by engaging in conduct involving dishonesty, fraud, deceit, and misrepresentation; and Prof. Cond. R. 8.4(d) by engaging in conduct that was prejudicial to the administration of justice.

Id. at 616.

In *In re Drendall*, 53 N.E.3d 404 (Ind. 2015), Drendall represented the maternal grandparents in a custodial action for their grandson. The child's mother had just died and the child's father was in arrears on support. Drendall filed a motion seeking leave for the grandparents to intervene and for the court to award custody to the grandparents.

Drendall did not provide the father notice of the custody hearing. Further, he did not allege an emergency as required by Trial Rule 65(B). After the court awarded custody to the grandparents, the father filed a motion to correct error and at a subsequent hearing, the court awarded custody to the father. Drendall consented to discipline and received a public reprimand.

Do the Work Timely

In the *Matter of Pope*, 695 NE.2d 112, (Ind. 1998), the court stated

> a client's interests often can be adversely affected by the passage of time or change of conditions. Even when the client's interests are not affected in substance, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. Due to such concerns, Indiana Professional Conduct Rule 1.3 requires that lawyers act with reasonable diligence and promptness in representing clients . . . the respondent failed to act with reasonable diligence and promptness on behalf of his client in violation of Prof. Cond. R. 1.3

Id. at 114.

Be Nice to Third Parties

Civility to third persons is required under Rule 4.4 as "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 a person."

In the *Matter of Burns*, 657 N.E.2d 738 (Ind. 1995), Burns was hired to represent a party in a lawsuit against two individuals, one of

whom was a former attorney who had resigned from practice. A lawsuit was filed in December and a pre-trial conference was held on July 31. Burns appeared for his client, the former attorney appeared *pro se*, and the other defendant was represented by another attorney. During a recess in the hearing, outside of the presence of the judge, Burns made the following comments to the former attorney defendant:

> Let me . . . let me warn you about something. If you file anything with the bankruptcy court against me, I'll be asking for attorney fees and punitive damages. You have my word on it, . . . And the next time you write my client a letter, I'm not going to file anything with the Court; I'm going to come over to your house and I'm going to hit you in the head with a baseball bat. Now, you may not be practicing law, but you know better than that. If I ever find out you wrote my client a letter again or sent him anything, you've got me to deal with. Do you understand: You better understand it right now, because I'm not going to tell you a second time. Now, that's my promise to you, right here on the record. I'm going to come over to your house and beat you half to death with a baseball bat.

Id. at 739

Thereafter, Burns told the former attorney that he had no right to communicate directly with Burn's client. The former attorney stated that he could communicate directly with Burn's client and the following exchange occurred:

> BURNS: You'll communicate through me or you won't communicate at all. Do you understand me?
>
> FORMER ATTORNEY: Are you threatening me physically?
>
> BURNS: Oh, you've got it. You are exactly correct. I'm threatening you physically. You'll either follow the rules or you'll have to deal with me. Do you understand? And if I

> have to tell you that again, you're going to go out of here in a hospital van. Don't press your luck, . . . Don't press your luck. Because you're not going to like me if I'm angry. You won't walk away from it, I guarantee you. Don't look grave to me, because if you do, you're a . . . (obscenity). I swear to God.
>
> FORMER ATTORNEY: You'd better kill me.
>
> BURNS: Oh, believe me, I will. Believe me, I will. And I will get a medal for it.

Id. at 740.

Be Truthful

In *In re Richards*, 755 N.E.2d 601 (Ind. 2001), Richards represented plaintiffs in a federal lawsuit. The defendants scheduled a deposition of one of the plaintiffs on April 13, 1993, at 9:00 am in the offices of an Indianapolis law firm. Richards' paralegal drove him to the site of the deposition, dropped him off, and waited in the car. After Richards returned, they went to the federal district court office to see if the deposition had been continued. Richards later formally asked the district court to award him attorney fees because he had shown up for the deposition only to find the defendant's attorneys not present. At the hearing of the attorney fee issue before a federal magistrate, Richards testified that he had not received notice that the defendants' lawyers would be unable to attend the deposition, and that he had appeared at the scheduled site of the deposition at 9:30 am on April 13 prepared to proceed. In fact, the defendant's counsel had telephoned Richards' office on April 12, 1993, and had advised that he would be unable to attend the deposition and also sent a letter via facsimile transmission to Richards' office confirming the deposition's cancellation. Further, counsel and two receptionists testified that they were at the office where the cancelled deposition was to have occurred during relevant times and never observed Richards arriving for the deposition. Despite

those facts, Richards testified at the attorney fee hearing that he entered the office and spoke with a receptionist, who told him the defendant's attorneys were not present.

The Indiana Supreme Court held:

> By testifying falsely before a federal magistrate that he entered the office for the deposition only to learn, for the first time, that the deposition was cancelled, the respondent violated Prof. Cond. R. 3.3(a)(1) and Prof. Cond. R. 8.4(c). His actions were prejudicial to the administration of justice in violation of Prof. Cond. R. 8.4(d).

Id. at 603.

In another case, Richards offered into evidence a bank sale prospectus purportedly prepared by a financial services company. In fact, the document had been manufactured by Richards and a paralegal under his direction one evening during the trial to "cure" a problem with the testimony of one of the witnesses in the case. The court found that by submitting falsified documents into evidence, Richards violated Prof. Cond. R. 3.3(a)(1)(2) and (4), and also 3.4(b). "His actions involved dishonesty, fraud, deceit, and also misrepresentation in violation of Prof. Cond. R. 8.4(c), and were prejudicial to the administration of justice in violation of Prof. Cond. R. 8.4(d)." *Id.*

Be Smart and Exercise Good Judgment

In *Matter of Robertson*, 78 N.E.3d 1090 (Ind. 2016), Robertson drove while intoxicated (BAC: .15) to the Shelby County Courthouse for a scheduled small claims hearing where he repeatedly made advances on the court's receptionist. Security was summoned and the hearing had to be rescheduled. The Court held that a one-year suspension, including 90 days actively served

and the remainder stayed subject to completion of at least two years of probation, was warranted for Robertson's misconduct.

Be Careful of Your Word Choice

In *B & L Appliance and Services, Inc. v. McFerran*, 712 N.E.2d 1033 (Ind. Ct. App. 1999), the Appellants petitioned for a rehearing before the Court of Appeals. In the petition, there was a contention that the original decision amounted to "a bad lawyer joke." The verbatim argument in support of its petition for rehearing read as follows:

> III. SADLY, THE RAMIFICATIONS OF THE COURT'S DECISION READS [sic] LIKE A BAD LAWYER JOKE ... "WHEN IS IT OKAY FOR A LAWYER TO LIE? WHEN HIS LIPS ARE MOVING TO AN INSURANCE ADJUSTER."
>
> This Court's opinion continues the perception that was discussed extensively in the Indiana Lawyer, March 3-16, 1999, where the legal profession is attempting a public relations campaign concerning the public's perception of lawyers. The Indiana Lawyer discussed the American Bar Association's study that said the public's perception is lawyers are more concerned with their own interests than the public's or their client's and expressed a concern to stop the cocktail party jokes or mute the motion picture stereotypes that paint the legal profession as greedy and ruthless.
>
> The Court's opinion does nothing more than fuel these perceptions. It is a widely held belief by the general public that lawyers lie and the Court's [sic] protect them. This Court cannot ignore McFerrans' lawyer lied to Bruce Kotek, when he promised not to seek a default, communicated both orally and in writing, and then later filed a default. The breaking of a promise is a lie and the essence of the Court's holding is that it is acceptable for a lawyer to lie to an insurance adjuster.

> The Trial Court abused its' [sic] discretion in not enforcing McFerrans' promise not to seek a default. This Court could have advanced lawyer accountability in communications by finding the Trial Court abused its' [sic] discretion in not enforcing McFerrans' lawyer's promise and further, by stating the failure to enforce a lawyer's promise not to seek a default constitutes an abuse of discretion and holding that attorney misrepresentations or lying would not be tolerated.

Id. at 1037.

The court took strong exception to B & L's characterization of the court's ruling as a "bad lawyer joke." The Court said

> The very nature of a petition for rehearing generally presupposes that the counsel who files such a petition disagrees with the court's earlier holding. This court is certainly willing to reconsider its decisions when appropriate and encourages counsel to pursue rehearing or our reconsideration when warranted to zealously represent the interests of clients. However, in framing arguments in support of rehearing or reconsideration, counsel are obliged to maintain a respectful bearing towards this court. *See Redman v. State*, 28 Ind. 205, 212 (1867).
>
> We remind B & L's counsel that members of the bar are officers of the court. They are its assistants in the administration of justice, and so intimately related to our judiciary system, and so much a part of it, that thoughtful and self-respecting attorneys seldom allow themselves, however much they may feel aggrieved, to make public expression, in argument or otherwise, derogatory to the rectitude or good intentions of the bench. *See Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Muncie & Portland Traction Co.*, 166 Ind. 466, 466, 77 N.E. 941, 941 (1906).

We direct counsel for B & L to the advice this court rendered in *WorldCom Network Servs., Inc. v. Thompson*:

> [O]verheated rhetoric is unpersuasive and ill-advised. Righteous indignation is no substitute for a well-reasoned argument. We remind counsel that an advocate can present his cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

698 N.E.2d 1233, 1236-37 (Ind.Ct.App.1998).

As our supreme court noted in *Portland Traction*:

> Counsel has need of learning the ethics of his profession anew, if he believes that vituperation and scurrilous insinuation are useful to him or his client in presenting his case. The mind, conscious of its own integrity, does not respond readily to the goad of insolent, offensive, and impertinent language. It must be made plain that the purpose of a brief is to present to the court in concise form the points and questions in controversy, and by fair argument on the facts and law of the case to assist the court in arriving at a just and proper conclusion. A brief in no case can be used as a vehicle for the conveyance of hatred, contempt, insult, disrespect, or professional discourtesy of any nature for the court of review, trial judge, or opposing counsel. Invectives are not argument, and have no place in legal discussion, but tend only to produce prejudice and discord.

166 Ind. at 466, 77 N.E. at 941-42.

Id. at 1037-38.

The Court then went on to exercise its plenary power and struck the argument from the brief.

Be Nice to Judges

In the *Matter of Ogden*, 10 N.E.3d 499 (Ind. 2014), Ogden made several allegations about a judge in order to have him removed from a case involving the administration of an estate. He alleged that the judge committed malfeasance in the initial stages of the administration of the Estate by allowing it to be opened as an unsupervised estate, by appointing a personal representative with a conflict of interest, and by not requiring the posting of a bond. He also alleged that the judge allowed the personal representative to engage in misconduct over the course of the administration of the estate. The court found that the Commission met its burden of proof in proving that Ogden had violated Rule 8.2(a) which provides that "A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge . . . ." The judge had not actually presided over the administration of the estate during the time that the personal representative was involved. The court found that Ogden could have easily acquired this information prior to making the allegations, which represented to them that Ogden made the statement without any reasonable basis for believing it to be true, and suspended him from the practice of law for 30 days.

So Many Things Not to Do

In *Matter of Usher*, *IV*, 987 N.E.2d 1080 (Ind. 2013), Usher was a partner at a law firm, and pursued a consistently unrequited relationship with a summer intern. Their previous friendship declined because of his persistent pursuit of a romantic relationship. Usher received a movie clip featuring the Intern in a state of undress. After Usher told the Intern he had that in his possession, she ended their

friendship. Not being satisfied with that, Usher then began efforts to humiliate Intern and to interfere with her employment. Usher sent the clip to attorneys at the firm where she had accepted a job offer in an effort to adversely affect her employment. He sent Intern an email accusing her of lying and misleading him, and also drafted a fictitious email thread entitled "'Bose means Snuff Porn Film Business' w/ addition of [Jane Doe]," (*id.* at 1084), and suggested the Intern was a danger to female professionals. Usher recruited a paralegal to disseminate the email with directions on how to avoid having the e-mail linked back to them. Usher was out of town when the email was sent. Thereafter, the Intern served him with a protective order with the email attached. Usher's firm demanded he resign, and he did so.

At the disciplinary hearing, the hearing officer found the email was a "vindictive attempt to embarrass and harm [Intern] both personally and professionally." (*Id.* at 1085.) The court found that Usher violated Professional Conduct Rule 3.3(a)(1) by knowingly submitting false responses to requests for admissions in defense of Intern's civil action against him. Usher finally admitted to originally misrepresenting his involvement with the email. The Court concluded that he violated Indiana Professional Conduct Rules 3.3(a)(1), 8.1(a), 8.1(b), 8.4(a), 8.4(c), and 8.4(d), by, among other things, engaging in a pervasive pattern of conduct involving dishonesty and misrepresentation that was prejudicial to the administration of justice. For Usher's misconduct, the Court suspended him from the practice of law in the state for not less than three years, without automatic reinstatement.

American Board of Trial Advocates Civility Principles

In 1958 the American Board of Trial Advocates was formed, dedicated to only two principles: preservation of the right to civil jury trials and civility in the practice of law.

> There were then two classes of lawyers: those who were mentored in civility, and those whose exposure to discourteous conduct became their de facto training. The fortunate who were mentored, learned and observed that the golden rule applies with full force to the legal profession. They learned that civility protects the integrity of the judicial system and serves the best interests of their clients. The rest were either trained to employ sharp practices and uncivil methods of dealing, or their observations of such conduct led them to seek improper "advantages" thereby.

(David B. Casselman, *Why Civility . . . And Why Now?*, Civility Matters, ABOTA Foundation.)

The American Board of Trial Advocates promulgated Principles of Civility, Integrity and Professionalism. As a member of the American Board of Trial Advocates, members pledge to:

1. Advance the legitimate interests of my clients, without reflecting any ill will they may have for their adversaries, even if called on to do so, and treat all other counsel, parties, and witnesses in a courteous manner.

2. Never encourage or knowingly authorize a person under my direction or supervision to engage in conduct proscribed by these principles.

3. Never, without good cause, attribute to other counsel bad motives or improprieties.

4. Never seek court sanctions unless they are fully justified by the circumstances and necessary to protect

a client's legitimate interests and then only after a good faith effort to informally resolve the issue with counsel.

5. Adhere to all express promises and agreements, whether oral or written, and, in good faith, to all commitments implied by the circumstances or local custom.
6. When called on to do so, commit oral understandings to writing accurately and completely, provide other counsel with a copy for review, and never include matters on which there has been no agreement without explicitly advising other counsel.
7. Timely confer with other counsel to explore settlement possibilities and never falsely hold out the potential of settlement for the purpose of foreclosing discovery or delaying trial.
8. Always stipulate to undisputed relevant matters when it is obvious that they can be proved and where there is no good faith basis for not doing so.
9. Never initiate communication with a judge without the knowledge or presence of opposing counsel concerning a matter at issue before the court.
10. Never use any form of discovery scheduling as a means of harassment.
11. Make good faith efforts to resolve disputes concerning pleadings and discovery.
12. Never file or serve motions or pleadings at a time calculated to unfairly limit opposing counsel's opportunity to respond.
13. Never request an extension of time solely for the

purpose of unjustified delay or to obtain a tactical advantage.

14. Consult other counsel on scheduling matters in a good faith effort to avoid conflicts.

15. When calendar conflicts occur, accommodate counsel by rescheduling dates for hearings, depositions, meetings, and other events.

16. When hearings, depositions, meetings, or other events are to be canceled or postponed, notify as early as possible other counsel, the court, or other persons as appropriate, so as to avoid unnecessary inconvenience, wasted time and expense, and to enable the court to use previously reserved time for other matters.

17. Agree to reasonable requests for extension of time and waiver of procedural formalities when doing so will not adversely affect my client's legitimate rights.

18. Never cause the entry of a default or dismissal without first notifying opposing counsel, unless material prejudice has been suffered by my client.

19. Never take depositions for the purpose of harassment or to burden an opponent with increased litigation expenses.

20. During a deposition, never engage in conduct which would not be appropriate in the presence of a judge.

21. During a deposition, never obstruct the interrogator or object to questions unless reasonably necessary to preserve an objection or privilege for resolution by the court.

22. During depositions, ask only those questions

reasonably necessary for the prosecution or defense of an action.

23. Draft document production requests and interrogatories limited to those reasonably necessary for the prosecution or defense of an action, and never design them to place an undue burden or expense on a party.
24. Make reasonable responses to document requests and interrogatories and not interpret them in an artificially restrictive manner so as to avoid disclosure of relevant and nonprivileged documents.
25. Never produce documents in a manner designed to obscure their source, create confusion, or hide the existence of particular documents.
26. Base discovery objections on a good faith belief in their merit, and not for the purpose of withholding or delaying the disclosure of relevant and nonprivileged information.
27. When called on, draft orders that accurately and completely reflect a court's ruling, submit them to other counsel for review, and attempt to reconcile any differences before presenting them to the court.
28. During argument, never attribute to other counsel a position or claim not taken, or seek to create such an unjustified inference.
29. Unless specifically permitted or invited, never send to the court copies of correspondence between counsel.

Further, their Civility Rules state:

When In Court I Will

1. Always uphold the dignity of the court and never be disrespectful.
2. Never publicly criticize a judge for his or her rulings or a jury for its verdict. Criticism should be reserved for appellate court briefs.
3. Be punctual and prepared for all court appearances, and, if unavoidably delayed, notify the court and counsel as soon as possible.
4. Never engage in conduct that brings disorder or disruption to the courtroom.
5. Advise clients and witnesses of the proper courtroom conduct expected and required.
6. Never misrepresent or misquote facts or authorities.
7. Verify the availability of clients and witnesses, if possible, before dates for hearings or trials are scheduled, or immediately thereafter, and promptly notify the court and counsel if their attendance cannot be assured.
8. Be respectful and courteous to court marshals or bailiffs, clerks, reporters, secretaries, and law clerks.

EVANSVILLE BAR ASSOCIATION

Code of Professional Courtesy

PREAMBLE

In order to promote a high level of professional courtesy and enhance and preserve the professional relationships among members of the Evansville Bar Association, the Board of Directors of the Association adopts the following Code of Professional Courtesy. Notwithstanding this Code of Professional Courtesy, an Attorney's first duty is still to the legitimate interests of his/her client. In the event a conflict arises between the Attorney's duty to his/her client and courtesy to a member of the Bar, the duty to the client is still paramount. Moreover, all Attorneys in this State are bound to adhere to the Rules of Professional Conduct. Should there be any conflict between the Rules of Professional Conduct and the Code of Professional Courtesy, the former shall always take precedence.

1. PUNCTUALITY

1.1 A telephone call from the court should be an Attorney's first priority to return if he/she is unable to accept the call when placed. An Attorney should return telephone calls to the court at the earliest opportunity, but in no event later than four (4) hours after the call was placed. If the call cannot be returned in that length of time, someone from the Attorney's office should contact the court, explain the reason the call has not been returned and give the best estimate of when the call will be returned.

1.2 All telephone calls to other Attorneys should be returned as soon as practical but in any event within twenty-four (24) hours. In the event an Attorney is unable to return a call within 24 hours, someone from his/her office should place the call and explain the reason for the delay.

2. CORRESPONDENCE

2.1 All professional correspondence seeking a response, from whatever source, should be acknowledged and the reply mailed no later than seven (7) business days after the receipt of the correspondence.

2.2 All entries which have been prepared by another Attorney requiring the signature of counsel should be executed and returned within five (5) business days of receipt. If the Attorney cannot, in good conscience, sign the entry for the court, the reason for the refusal to sign should be made known to the opposing counsel within five (5) business days.

2.3 All entries, orders and stipulations to be prepared by an Attorney should be sent to the other Attorney in the cause for comment and/or changes, even if signatures are not required, prior to submission to the court. This provision may be waived by the other Attorney.

3. TREATMENT OF OTHER ATTORNEYS

3.1 Civility and courtesy are an Attorney's professional obligations. A client had no right to demand that an Attorney engage in discourteous or abusive conduct.

3.2 When appropriate, an Attorney will advise the client that the Attorney reserves the right to determine whether to grant accommodations to opposing counsel in all matters that do not adversely affect the client's lawful objectives. A client has no right to instruct an Attorney to refuse reasonable requests made by other counsel.

3.3 When appropriate, an Attorney will tell the client that he or she is under an ethical obligation not to engage in tactics which are intended to delay resolution of the matter, or to harass or drain the financial resources of the opposing party.

3.4 An Attorney should avoid taking action adverse to the interests of a litigant known to be represented without notice to opposing counsel sufficient to permit response, except when giving such notice would impair the rights of the Attorney's client.

3.5 An Attorney should avoid making ill-considered accusations of unethical conduct toward an opponent, should never unnecessarily and intentionally embarrass another Attorney, and should avoid wrongful and gratuitous personal criticism of other counsel, provided, however, that when the Rules of Professional Conduct require an Attorney to take action against another Attorney, those rules supersede the Code of Courtesy.

3.6 An Attorney should strive to maintain a courteous tone in correspondence, pleadings and other written communications.

3.7 In all professional and personal activity, an Attorney should maintain a cordial and respectful demeanor and should be guided by a fundamental sense of integrity and fair play and with the awareness that his or her conduct reflects on all members of the bar and bench.

3.8 An Attorney should never knowingly deceive another Attorney or the court, and if such occurs unknowingly, full disclosure should be made at the earliest available opportunity.

3.9 An Attorney owes to opposing counsel a duty of courtesy and cooperation, the observance of which is necessary for the efficient administration of our system of justice. Attorneys should treat each other with courtesy and civility and conduct themselves in a professional manner at all times.

3.10 Attorneys will not comment about another Attorney's ability unless specifically asked by a person. In such event the Attorney's answer as to the other Attorney's ability or character and reputation shall be as truthful and accurate as if he or she were giving it under oath. It does not reflect well on the profession to criticize a fellow Attorney with derogatory remarks that are unnecessary or unwarranted, provided,

however, that all Attorneys recognize the duty to report to the Indiana Disciplinary Commission any substantial violation of the Rules of Professional Conduct.

3.11 No Attorney shall make an unsolicited comment on another Attorney's fee charged to a client as being too high unless the Attorney honestly believes that the fees were unconscionably high and would be willing to testify in open court that the fees were too high. Attorneys do not know what work another Attorney may have done for a client or the nature of the work and it does not reflect well on the profession to gratuitously opine that another Attorney is overcharging a client.

3.12 If a fellow member of the Bar makes a justified request for cooperation or seeks scheduling accommodations, an Attorney will not arbitrarily or unreasonably withhold consent and will agree whenever possible with such changes.

3.13 Attorneys should be willing to stipulate to undisputed matters not inconsistent with their client's interest as a matter of courtesy to the court and opposing counsel.

4. COURTESY TO THE COURT

4.1 An Attorney will always address the court with the utmost respect and courtesy both in and out of the court room and in that regard, shall stand when addressing the court in open session, shall refer to the court as "Sir", "Madam", or "Your Honor" and shall instruct his/her client to do the same.

4.2 An Attorney will not unnecessarily demean a judge or his/her ability to anyone.

4.3 An Attorney will not imply that he/she has some special relationship with a judge or otherwise give a litigant reason to believe that cases are decided on anything other than the merits of the case.

4.4 An Attorney owes to the judiciary candor, diligence and the utmost respect.

4.5 As soon as a matter has been settled, both Attorneys shall take it upon themselves to immediately, and in no case longer than 24 hours, notify the court that the matter has been settled and should be removed from the court's calendar. This is a courtesy not only to the court but also to those Attorneys who have second and third settings.

4.6 In open court, Attorneys should try to direct their comments only to the court, the witnesses or, during voir dire, to the jury and should try to refrain from directly addressing opposing counsel except on introductory matters.

4.7 The court is the personification of the legal system, which is the basis of our society, and as such must be treated with the respect and honor due to the court, regardless of the Attorney's opinion of the qualifications, abilities or bias of the person occupying the bench as an individual.

4.8 Attorneys shall be courteous to court personnel and to other non-Attorneys who are involved in the court system.

4.9 Attorneys should dress appropriately when entering a court room or any other judicial or administrative proceeding. At a minimum, men should always wear a coat and tie and women should wear appropriate attire. Sports clothes are satisfactory for recreational activities but not for the court room.

4.10 Before filing a motion which may reasonably be unopposed, an Attorney should ask opposing counsel whether he/she will oppose the motion and include counsel's response in the body of the motion.

5. COURTESY IN LITIGATION

5.1 If an Attorney knows a party or person to be represented by counsel, he/she shall serve a courtesy copy of any complaint, notice, summons or subpoena to that Attorney, even if the Attorney is not accepting service on behalf of that party or person. If reasonably possible, this should also be done by e-mail.

5.2 An Attorney shall make all reasonable efforts to schedule matters with opposing counsel by agreement.

5.3 An Attorney should make all reasonable efforts to reach informal agreements on preliminary and procedural matters.

5.4 During a trial, an Attorney will never resort to a personal attack on opposing counsel or make derogatory remarks about opposing counsel, will be polite and courteous to opposing counsel and will not interrupt opposing counsel's address to the court or jury except to make legitimate objections.

5.5 Once an Attorney has made an agreement with opposing counsel about the submission of evidence or identification of witnesses or stipulations of the facts that he or she will make at trial and the Attorney knows that something has happened that will require him/her to not honor that commitment, opposing counsel must be immediately informed.

5.6 An Attorney should not move for default against another Attorney without first giving him/her the courtesy of at least one letter, e-mail or telephone communication and an opportunity to file whatever pleading is required, unless specifically directed by his/her client to move for the default without displaying such courtesy.

5.7 An Attorney will not file dilatory pleadings that he/she knows are not likely to be granted, as the filing of such pleadings not only is a discourtesy to the court and opposing counsel, but adds to the cost of the litigation process.

5.8 No Attorney shall correspond with the court on a pending matter without providing a copy of such correspondence to opposing counsel.

5.9 An Attorney will give trial witnesses adequate notice as a matter of courtesy to the witnesses, allowing them sufficient time to prepare to attend court. The minimum time shall usually be ten (10) days absent unusual circumstances which do not allow that

much time. Counsel shall attempt to schedule witnesses in a manner which minimizes the witnesses' time spent at the court house.

5.10 Once a matter has been scheduled for deposition, hearing or trial, no Attorney should attempt to continue such deposition, hearing or trial without a good, just and valid reason and no Attorney should fabricate or facilitate the conflict for the purpose of seeking a continuance and delay.

5.11 No Attorney shall seek continuances or extensions of time to respond or appear unless such are actually needed. A continuance or extension shall never be sought purely for purposes of delay or harassment. A request for Alternative Dispute Resolution should not be made unless the client is genuinely committed to negotiate in good faith.

5.12 In situations where the Attorneys are controlling the calendar of a court proceeding such as in misdemeanor court, in uncontested divorce matters or small claims cases, any Attorney with five (5) or more matters on the docket should, as a matter of courtesy, allow other Attorneys with one or two matters to be heard ahead of the Attorney with five or more matters.

6. COURTESY IN SCHEDULING

6.1 No Attorney should arrive at a designated meeting with another Attorney more than ten (10) minutes after the time set for the meeting. In the event the Attorney is unable to keep the meeting with another Attorney at the appointed time, he or she should call and explain the delay and give a reasonable estimated time of arrival.

6.2 No Attorney should arrive at a scheduled time in court later than five (5) minutes from the scheduled time. If the Attorney finds that he/she is unable to keep that time due to unavoidable circumstances, the Attorney must call the court and explain the reason and ask that the court personnel inform opposing counsel of the delay, the reason for the delay and a reasonable estimated time as to when the Attorney will arrive.

6.3 An Attorney should not schedule more than two (2) matters in court at the same time which involve different counsel. If an Attorney knows he/she has too many matters scheduled at a specific time in a specific court and with different counsel opposing, the Attorney shall, twenty-four (24) hours prior to the scheduled hearing, contact opposing counsel, inform them of his/her schedule the next day and offer a later time to have the matter heard.

6.4 An Attorney who knows that the other side is represented by legal counsel will not unilaterally set any hearings, motions or matters on the court's calendar without first calling opposing counsel to obtain a convenient date. If the Attorney does set a matter unilaterally, he/she will notify opposing counsel of the date, time and place of hearing in writing and by email where reasonably possible within 24 hours and courteously inform

opposing counsel that the Attorney will agree to vacate and reschedule the hearing, motion, trial, etc., if the date is not convenient to his or her schedule.

6.5 No Attorney shall contend that a matter should be placed on the contested calendar unless the Attorney honestly believes it will be tried and is genuinely contested. An Attorney will not place matters on the contested calendar simply as a means of delaying the resolution of that matter.

6.6 Depositions, hearings and other matters which cannot be set by agreement of counsel should not be set with less than ten days' notice except in cases where a client's circumstances necessitate an earlier hearing or other action.

7. AVOIDING DISCOVERY ABUSE

7.1 No Attorney will schedule depositions without first consulting the calendar(s) of opposing counsel for a convenient date and time.

7.2 Attorneys will not abuse the discovery process by serving form interrogatories that are not germane to the facts of the case but are merely produced for the purpose of burdening the opposing side.

7.3 An Attorney shall not refuse to respond to discovery without a valid, legal reason nor shall he/she raise frivolous or meritless objections.

7.4 No Attorney shall file a motion to compel or motion for sanctions in a discovery matter without first writing or calling opposing counsel and making a good faith effort to resolve the matter.

7.5 An Attorney should not abuse the judicial process by pursuing or opposing discovery arbitrarily or for the purpose of harassment or delay.

7.6 An Attorney shall respond to discovery when due, or shall inform opposing counsel of the delay and give a reasonable estimate of a response time. An Attorney shall request no more than one extension of time without the agreement of opposing counsel, or a hearing if such agreement is withheld. Such agreement shall not be unreasonably withheld.

8. SOCIAL MEDIA

8.1 An Attorney shall be mindful of his/her use of social media and its impact on any legal case or matter, including whether it attempts to or could be perceived as attempting to influence any member of the Bar, judiciary, or public.

8.2 An Attorney should refrain from any use of social media that could be construed as impugning the character or professional standing of any member of the Bar or judiciary or in any way calling into question the characteristics essential to a Judge or a trusted Attorney, such as independence and integrity.

9. MISCELLANEOUS

9.1 The Code of Professional Courtesy applies equally to communication by email and fax as it does to verbal and/or written communication.

9.2 Cellular telephones should be turned off or silenced during court, while in judges' chambers, during mediation, administrative hearings, arbitrations, or other proceedings where decorum and respect are required to minimize distraction and delay.

9.3 No Attorney shall use the Indiana Disciplinary Commission as a means solely for personal revenge against another Attorney or to embarrass another Attorney. No Attorney shall encourage his/her client to take such action unless the Attorney honestly believes there has been a valid breach of the Rules of Professional Conduct in which case it would be the Attorney's duty to personally report such unethical behavior to the Disciplinary Commission.

9.4 An Attorney should never threaten another Attorney with an unwarranted disciplinary action.

9.5 No Attorney shall attempt to cause another Attorney or firm to be disqualified in litigation without a valid and just basis for so doing and should not attempt to interpose an allegation of conflict merely to gain an advantage in the litigation.

9.6 Any Attorney believing that another Attorney has a conflict of interest in litigation shall first contact the Attorney, explain the facts as known to him/her and make a request that the Attorney withdraw before filing anything with the court seeking any mandatory withdrawal of counsel or a firm.

9.7 The rules of professional courtesy contained herein are not meant to be used as standards in any disciplinary proceedings or legal malpractice action and denote only the standards for courtesy in Vanderburgh County among Attorneys and not the standards of professional conduct which are contained in the Rules of Professional Conduct and elsewhere.

CONCLUSION

This Code of Professional Courtesy is adopted to help promote good working relationships among the Attorneys in Vanderburgh County and to help insure that in adversarial proceedings, although clients may generate ill feelings, those ill feelings should not influence an Attorney's conduct, attitude or demeanor toward fellow Attorneys.

Adopted by the Board of Directors of the Evansville Bar Association on this 17th day of May, 1990. Edward W. Johnson, President; Attest: James P. Casey, Secretary

Revised by the Board of Directors of the Evansville Bar Association 11, January 2007, Shannon Frank, President, attested, Shawn Sullivan, Secretary

Revised by the Board of Directors of the Evansville Bar Association on this _____day of _________, 2017.

/s/ __________________
President
Attest:
/s/ __________________
Secretary

(Bench & Bar Subcommittee 3/21/17 version)

Indianapolis Bar Association

STANDARDS OF PROFESSIONALISM

I. Commitment
We are committed to practicing law in a manner that maintains and fosters public confidence in our profession, faithfully serves our clients, and fulfills our responsibilities to the legal system.

II. Character
We will strictly adhere to the spirit as well as the letter of the Rules of Professional Conduct and will at all times be guided by a fundamental sense of honor, integrity and fair play.

III. Competence
We will conduct ourselves to assure the just, economical and efficient resolution of every matter entrusted to us consistent with thoroughness and professional preparation.

IV. Courtesy
We will at all times act with dignity, civility, decency and courtesy in all professional activities and will refrain from rude, disruptive, disrespectful, obstructive and abusive behavior.

V. Community Involvement
We recognize that the practice is a learned profession to be conducted with dignity, integrity and honor dedicated to the service of clients and the public good.

STANDARDS FOR PROFESSIONAL CONDUCT

WITHIN THE SEVENTH FEDERAL JUDICIAL CIRCUIT

Preamble

A lawyer's conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms. In fulfilling our duty to represent a client vigorously as lawyers, we will be mindful of our obligations to the administration of justice, which is a truth-seeking process designed to resolve human and societal problems in a rational, peaceful, and efficient manner.

A judge's conduct should be characterized at all times by courtesy and patience toward all participants. As judges we owe to all participants in a legal proceeding respect, diligence, punctuality, and protection against unjust and improper criticism or attack.

Conduct that may be characterized as uncivil, abrasive, abusive, hostile, or obstructive impedes the fundamental goal of resolving disputes rationally, peacefully, and efficiently. Such conduct tends to delay and often to deny justice.

The following standards are designed to encourage us, judges and lawyers, to meet our obligations to each other, to litigants and to the system of justice, and thereby achieve the twin goals of civility and professionalism, both of which are hallmarks of a learned profession dedicated to public service.

We expect judges and lawyers will make a mutual and firm commitment to these standards. Voluntary adherence is expected as part of a commitment by all participants to improve the administration of justice throughout this Circuit.

These standards shall not be used as a basis for litigation or for sanctions or penalties. Nothing in these standards supersedes or detracts from existing disciplinary codes or alters existing standards of conduct against which lawyer negligence may be determined.

These standards should be reviewed and followed by all judges and lawyers participating in any proceeding, in this Circuit. Copies may be made available to clients to reinforce our obligation to maintain and foster these standards.

LAWYERS' DUTIES TO OTHER COUNSEL

1. We will practice our profession with a continuing awareness that our role is to advance the legitimate interests of our clients. In our dealings with others we will not reflect the ill feelings of our clients. We will treat all other counsel, parties, and witnesses in a civil and courteous manner, not only in court, but also in all other written and oral communications.

2. We will not, even when called upon by a client to do so, abuse or indulge in offensive conduct directed to other counsel, parties, or witnesses. We will abstain from

disparaging personal remarks or acrimony toward other counsel, parties, or witnesses. We will treat adverse witnesses and parties with fair consideration.

3. We will not encourage or knowingly authorize any person under our control to engage in conduct that would be improper if we were to engage in such conduct.

4. We will not, absent good cause, attribute bad motives or improper conduct to other counsel or bring the profession into disrepute by unfounded accusations of impropriety.

5. We will not seek court sanctions without first conducting a reasonable investigation and unless fully justified by the circumstances and necessary to protect our client's lawful interests.

6. We will adhere to all express promises and to agreements with other counsel, whether oral or in writing, and will adhere in good faith to all agreements implied by the circumstances or local customs.

7. When we reach an oral understanding on a proposed agreement or a stipulation and decide to commit it to writing, the drafter will endeavor in good faith to state the oral understanding accurately and completely. The drafter will provide the opportunity for review of the writing to other counsel. As drafts are exchanged between or among counsel, changes from prior drafts will be identified in the draft or otherwise explicitly brought to the attention of other counsel. We will not include in a draft matters to which there has been no agreement without explicitly advising other counsel in writing of the addition.

8. We will endeavor to confer early with other counsel to assess settlement possibilities. We will not falsely hold out the possibility of settlement as a means to adjourn discovery or to delay trial.

9. In civil actions, we will stipulate to relevant matters if they are undisputed and if no good faith advocacy basis exists for not stipulating.

10. We will not use any form of discovery or discovery scheduling as a means of harassment.

11. We will make good faith efforts to resolve by agreement our objections to matters contained in pleadings and discovery requests and objections.

12. We will not time the filing or service of motions or pleadings in any way that unfairly limits another party's opportunity to respond.

13. We will not request an extension of time solely for the purpose of unjustified delay or to obtain a tactical advantage.

14. We will consult other counsel regarding scheduling matters in a good faith effort to avoid scheduling conflicts.

15. We will endeavor to accommodate previously scheduled dates for hearings, depositions, meetings, conferences, vacations, seminars, or other functions that produce good faith calendar conflicts on the part of other counsel. If we have been given an accommodation because of a calendar conflict, we will notify those who have accommodated us as soon as the conflict has been removed.

16. We will notify other counsel and, if appropriate, the court or other persons, at the earliest possible time when hearings, depositions, meetings, or conferences are to be canceled or postponed. Early notice avoids unnecessary travel and expense of counsel and may enable the court to use the previously reserved time for other matters.

17. We will agree to reasonable requests for extensions of time and for waiver of procedural formalities, provided our clients' legitimate rights will not be materially or adversely affected.

18. We will not cause any default or dismissal to be entered without first notifying opposing counsel, when we know his or her identity.

19. We will take depositions only when actually needed to ascertain facts or information or to perpetuate testimony. We will not take depositions for the purposes of harassment or to increase litigation expenses.

20. We will not engage in any conduct during a deposition that would not be appropriate in the presence of a judge.

21. We will not obstruct questioning during a deposition or object to deposition questions unless necessary under the applicable rules to preserve an objection or privilege for resolution by the court.

22. During depositions we will ask only those questions we reasonably believe are necessary for the prosecution or defense of an action.

23. We will carefully craft document production requests so they are limited to those documents we reasonably believe are necessary for the prosecution or defense of an action. We will not design production requests to place an undue burden or expense on a party.

24. We will respond to document requests reasonably and not strain to interpret the request in an artificially restrictive manner to avoid disclosure of relevant and non-privileged documents. We will not produce documents in a manner designed to hide or obscure the existence of particular documents.

25. We will carefully craft interrogatories so they are limited to those matters we reasonably believe are necessary for the prosecution or defense of an action, and we will not design them to place an expense or undue burden or expense on a party.

26. We will respond to interrogatories reasonably and will not strain to interpret them in an artificially restrictive manner to avoid disclosure of relevant and non-privileged information.

27. We will base our discovery objections on a good faith belief in their merit and will not object solely for the purpose of withholding or delaying the disclosure of relevant information.

28. When a draft order is to be prepared by counsel to reflect a court ruling, we will draft an order that accurately and completely reflects the court's ruling. We will promptly prepare and submit a proposed order to other counsel and attempt to reconcile any differences before the draft order is presented to the court.

29. We will not ascribe a position to another counsel that counsel has not taken or otherwise seek to create an unjustified inference based on counsel's statements or conduct.

30. Unless specifically permitted or invited by the court, we will not send copies of correspondence between counsel to the court.

LAWYERS' DUTIES TO THE COURT

1.We will speak and write civilly and respectfully in all communications with the court.

2. We will be punctual and prepared for all court appearances so that all hearings, conferences, and trials may commence on time; if delayed, we will notify the court and counsel, if possible.

3. We will be considerate of the time constraints and pressures on the court and court staff inherent in their efforts to administer justice.

4. We will not engage in any conduct that brings disorder or disruption to the courtroom. We will advise our clients and witnesses appearing in court of the proper conduct expected and required there and, to the best of our ability, prevent our clients and witnesses from creating disorder or disruption.

5. We will not knowingly misrepresent, mischaracterize, misquote, or miscite facts or authorities in any oral or written communication to the court.

6. We will not write letters to the court in connection with a pending action, unless invited or permitted by the court.

7. Before dates for hearings or trials are set, or if that is not feasible, immediately after such date has been set, we will attempt to verify the availability of necessary participants and witnesses so we can promptly notify the court of any likely problems.

8. We will act and speak civilly to court marshals, clerks, court reporters, secretaries, and law clerks with an awareness that they, too, are an integral part of the judicial system.

COURTS' DUTIES TO LAWYERS

1. We will be courteous, respectful, and civil to lawyers, parties, and witnesses. We will maintain control of the proceedings, recognizing that judges have both the obligation and the authority to insure that all litigation proceedings are conducted in a civil manner.

2. We will not employ hostile, demeaning, or humiliating words in opinions or in written or oral communications with lawyers, parties, or witnesses.

3. We will be punctual in convening all hearings, meetings, and conferences; if delayed, we will notify counsel, if possible.

4. In scheduling all hearings, meetings and conferences we will be considerate of time schedules of lawyers, parties, and witnesses.

5. We will make all reasonable efforts to decide promptly all matters presented to us for decision.

6. We will give the issues in controversy deliberate, impartial, and studied analysis and consideration.

7. While endeavoring to resolve disputes efficiently, we will be considerate of the time constraints and pressures imposed on lawyers by the exigencies of litigation practice.

8. We recognize that a lawyer has a right and a duty to present a cause fully and properly, and that a litigant has a right to a fair and impartial hearing. Within the practical limits of time, we will allow lawyers to present proper arguments and to make a complete and accurate record.

9. We will not impugn the integrity or professionalism of any lawyer on the basis of the clients whom or the causes which a lawyer represents.

10. We will do our best to insure that court personnel act civilly toward lawyers, parties, and witnesses.

11. We will not adopt procedures that needlessly increase litigation expense.

12. We will bring to lawyers' attention uncivil conduct which we observe.

Section Two

CONFLICTS OF INTEREST

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Section Two

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PowerPoint Presentation

Conflicts of Interest

I. Generally

Black's Dictionary defines "conflict of interest" as "[a] real or seeming incompatibility between one's private interests and one's public or fiduciary duties" or "between the interests of two of a lawyer's clients, such that the lawyer is disqualified from representing both clients if the dual representation adversely affects either client or if the clients do not consent." 11th ed., 2019.

Conflicts pose a potential minefield of risks for practitioners and can arise in civil and criminal contexts, as well as regarding litigation and transactional matters. Conflicts can exist in regard to existing, prospective, and former clients. Various contexts give rise to conflicts and should trigger a lawyer's review for conflicts. For instance, taking on a new job at a law firm should prompt a close review for potential conflicts. This is because lawyers continue to owe duties of confidentiality and loyalty to clients after the representation ends. Notably, a lawyer's conflicts can be imputed to other lawyers within the lawyer's firm, just as a lawyer's disqualification for conflicts may likewise be imputed to other lawyers within the lawyer's firm.

Government lawyers are not immune from conflicts either. When a lawyer, i.e., a former deputy prosecutor, leaves the employ of the government to join a firm, or a lawyer leaves private practice to work as a public officer or employee, conflicts of interest can arise that merit close attention and prompt action. Similarly, former judges, arbitrators, mediators, and other third parties neutral must be vigilant for potential conflicts regarding matters that they presided over. Lastly, a lawyer's own interests can present a conflict of interest.

In addition to conflicts that exist before a representation, conflicts of interest can arise unexpectedly during the course of a representation. Every lawyer must try to avoid accepting a representation infected with an impermissible conflict of interest by implementing an appropriate procedure to check for conflicts.

Conflicts, which are governed primarily by RPC Rules 1.7 through 1.13,[1] as well as Rules 3.7 and 8.4, can give rise to wide-ranging consequences for practitioners, including disqualification, fees, liability for malpractice or breach of fiduciary duty, and disciplinary action before the Indiana Supreme Court.

II. CONCURRENT CONFLICTS[2]

A. CURRENT CLIENTS

As general matter: (1) a lawyer should not represent an individual in a matter against another person the lawyer represents, regardless of whether the litigation or transactional matters are related; and, even absent any directly adverse representation, (2) a lawyer should not represent an individual if the lawyer's responsibilities to an existing client, a former client, another individual, or the lawyer's own interests will interfere with the representation of the individual. As to the latter, the key inquiry is whether it is likely that a difference in the clients'

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[1] The following non-exhaustive list includes RPC rules with direct and indirect bearing upon conflicts:

Rule 1.7. Conflict of Interest: Current Clients
Rule 1.8. Conflict of Interest: Current Clients: Specific Rules
Rule 1.9. Duties to Former Clients
Rule 1.10. Imputation of Conflicts of Interest: General Rule
Rule 1.11. Special Conflicts of Interest for Former and Current Government Officers and Employees
Rule 1.12. Former Judge, Arbitrator, Mediator or Other Third-Party Neutral
Rule 1.13. Organization as Client
Rule 3.7: Lawyer as Witness
Rule 8.3: Reporting Professional Misconduct
Rule 8.4: Misconduct

[2] RPC 1.7.

interests will arise and whether, in that event, "it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client." RPC 1.7, cmt. 8.

These general rules stem from RPC 1.7, which provides that "a lawyer should not represent a client if the representation involves a concurrent conflict of interest" RPC 1.7 defines a "concurrent conflict of interest" as existing where "the representation of one client is directly adverse to another client; or where there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." Ind. Prof. Conduct R. 1.7(a).

Notwithstanding the existence of a concurrent conflict of interest, a lawyer may proceed with the representation if:

> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
> (2) the representation is not prohibited by law;
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
> (4) each affected client gives written informed consent, confirmed in writing.

RPC 1.7(b). "Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client." RPC 1.7, cmt. 18.

Practice Pointers:

- Adopt procedures to pre-screen clients for conflicts
- Where there is a conflict, employ the following framework, per Comment 2:

  - Identify the client/clients
  - Determine if conflict exists
  - Decide if representation can go forward despite the conflict
  - Apprise the client(s) and obtain informed consent, confirmed in writing, from the affected client(s)

- Decline a representation where a conflict exists before the representation commences, unless the client has given informed consent.

- Regarding informed consent, confirmed in writing, it is not enough for a lawyer to merely obtain a document signed by the client. The lawyer must apprise the client of the risks and advantages related to the conflict, provide reasonably available alternatives, and give the client time to contemplate and question. RPC 1.7, cmt. 20.

- Withdraw from representation where conflict arises after the representation commences, unless the client grants informed consent.

  - If there is more than one client, the representation may continue depending on the lawyer's ability to honor her duties to the former client and ability to adequately represent the remaining clients.

- Where unforeseen circumstances, i.e., firm merger, result in conflicts and the lawyer must withdraw from a representation, the lawyer should seek court approval as needed and honor client confidences.
- Where a client grants, but later revokes informed consent regarding a conflict, continuation of the representation depends on: (1) the nature of the conflict; (2) whether the revocation resulted from a material change in circumstances; (3) the reasonable expectations of the other client; (4) whether material detriment will result to other clients or the lawyer; and (5) other attendant circumstances. RPC 1.7, cmt. 21.

- A conflict exists if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case. RPC 1.7, cmt. 24.

  - The lawyer here must decline one of the representations, absent informed consent.

B. RELEVANT CASES

1. State v. Justin David Pearson, 191 N.E.3d 892 (Ind. Ct. App. 2022)

- Pearson sought post-conviction relief on the ground that he did not intelligently plead guilty and/or was denied effective assistance of counsel. One month after Pearson pleaded guilty to a Class A felony, agreed to a twenty-five year sentence, and waived his rights to challenge the sentence as erroneous, challenge the trial court's weighing of aggravating and mitigating factors, and to appellate review, the Indiana Supreme Court announced his counsel's agreed resignation from the Bar amid an investigation into allegations of misconduct regarding which counsel could not successfully defend himself if prosecuted. Thus, Pearson's counsel had entered into the legal representation, while contemplating retirement.

- In his petition for post-conviction relief, Pearson alleged that counsel: (1) met with him only briefly; (2) did not appear to have investigated leads provided by Pearson; (3) did not appear to have negotiated with the State regarding said leads; (4) failed to provide Pearson with copies of discovery, charging information(s), probable cause affidavits, police reports, or statements; (5) pressured Pearson into accepting the State's offer; (6) disregarded Pearson's resistance to the plea offer; (7) indicated that Pearson would be eligible for modification of sentence, which was untrue, given that the terms of the plea agreement were fixed; (8) sent an unfamiliar associate to cover the sentencing hearing; and (9) did not reveal that his law license was under investigation and in jeopardy.

- The post-conviction court granted Pearson's petition, and the State appealed. In affirming the post-conviction court, the Court of Appeals cited a host of violations committed by counsel, including in pertinent part, counsel's violation of Indiana Post Conviction Rule 1.7(a)(2), prohibiting counsel from representing a client if the representation involves a concurrent conflict of interest. Here, counsel's representation of Pearson was materially limited by counsel's "personal interest," given his impending resignation.

***2. In re McKinney*, 948 N.E.2d 1154 (Ind. 2011)**

- Respondent, while collecting a salary as a deputy prosecuting attorney, also collected attorney fees as a private lawyer bringing suits for the forfeiture of criminal defendants' property. Respondent and the elected county prosecutor entered into written fee agreements wherein Respondent would receive an amount 25% of any judgment entered in a civil forfeiture action Respondent brought. The elected prosecutor did not provide oversight.

- Respondent conducted plea agreement negotiations in criminal cases with criminal defendants before and/or after Respondent also engaged in settlement negotiations regarding related civil forfeiture actions with the same criminal defendants. Respondent did this knowing that he would receive 25% of the amount transferred as personal compensation equaling from the action.

- Charged violations:

    - 1.7(b) (effective Jan. 1, 1987): Representing a client (the State) when the representation may be materially limited by attorney's own self-interest.

    - 1.7(a)(2): Representing a client when there is a concurrent conflict of interest because of a significant risk that the representation may be materially limited by attorney's own self-interest.

    - 1.8(1): While serving as a part-time or deputy prosecutor, representing a client as a private attorney in a matter wherein there exists an issue upon which he has statutory prosecutorial authority or responsibilities.

    - 8.4(d): Engaging in conduct prejudicial to the administration of justice.

- The parties stipulated that Respondent violated the above rules. Our Supreme Court found Respondent's conduct created a conflict of interest between his public duties and the private gain he realized in the forfeiture proceedings.

- Penalty: 120-day suspension with automatic reinstatement.

***3. Matter of Burton,* 139 N.E.3d 211 (Ind. 2020)**

- Burton ("Respondent") was the chief deputy to the elected Knox County prosecutor. Before an interview with a woman who faced methamphetamine-related charges in Greene County, a Vincennes Police Department detective learned from the State Police that the woman was involved with "your prosecutor." *Id*. at 212. The woman later confirmed her long-term sexual relationship with Respondent.

- Only after the woman was convicted and in prison did she tell Respondent about the interview. Respondent was livid and alerted the elected county prosecutor, Carnahan ("Prosecutor"), who filed an employee misconduct complaint against the detective.

- Respondent intimated that the woman's executed sentence could be modified to home detention, which the woman could serve while she resided with Respondent; offered to contact the Greene County prosecutor on the woman's behalf; instructed the woman to tell investigators that Respondent was her legal counsel; and advised the woman to cease cooperating with the police.

- Respondent stipulated that he violated RPC 1.7(a)(2), *see supra*, and RPC 8.4(d) and -(e). RPC 8.4(d) and (-e) provide that "[i]t is professional misconduct for a lawyer to: . . . (d) engage in conduct that is prejudicial to the administration of justice; [or] (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law. . . ."

- Our Supreme Court opined that Respondent's violations constituted "more than an isolated conflict of interest"; and rather, "reflect[ed] an attempt by Respondent to improperly leverage his prosecutorial authority to exact a personal vendetta" against the detective, who was "seeking to determine whether Respondent or Carnahan had attempted to trade consideration of leniency in [the woman]'s criminal matters of the years for sexual contact." *Id*. at 213. Our Supreme Court found that Respondent's "overriding motivation was not to further the public interest but rather to protect his own self-interest." *Id*. at 214.

Penalty: 90-day suspension with automatic reinstatement, if eligible

***4. In re Stern*, 11 N.E.3d 917 (Ind. 2014)**

- Respondent was charged with various RPC violations in this matter involving a condemned building.[3] After the City of Indianapolis obtained an order of demolition regarding the building, the elderly client, D., retained Respondent. The most relevant violation stems from Respondent's transfer of the building, by quitclaim deed, from D., to Respondent's non-lawyer legal assistant, J., to whom Respondent also provided pro bono representation.

- Our Supreme Court found that "[b]ecause D[.] quitclaimed her fee simple interest to J[.] *after* the unsafe building order was issued, the transfer resulted in D[.] and J[.] being jointly and severally responsible for demolition and administrative costs. *See* Ind. Code § 36-7-9-12(a). Thus, the transfer of the Building to J[.] did *not* relieve D[.] of financial liability, and it created a conflict of interest between of J[.] and [D.]" *Id*. at 919. Respondent, thus, violated RPC 1.7(a), among other rules.

- Penalty: 18-month suspension without automatic reinstatement.

[3] In all, our Supreme Court found, in Respondent: failed to provide competent representation; represented clients with conflicting interests; knowingly made and failed to correct false statements; asserted frivolous legal positions; used a nonlawyer legal assistant who was not an employee; improperly revealed client information; and failed to correct misapprehension created by attorney.

5. K.F. v. B.B., 145 N.E.3d 813 (Ind. Ct. App. 2020)

- Teenaged birth parents got pregnant, and birth father contacted Attorney Francis, a family friend, to discuss a potential adoption and legal emancipation of birth mother. Attorney Francis had previously provided legal counsel to birth father's family and also owned the Heartland Adoption Agency. Attorney Francis supplied birth father with adoption materials, including a notice of intent to relinquish parental rights that birth mother signed; honored birth mother's request to hide the pregnancy from her guardian; prepared emancipation paperwork, which birth mother's guardian signed; scheduled and attended birth mother's medical appointments, and provided legal counsel on various matters.

- Adoptive parents paid Attorney Francis help them to adopt. Attorney Francis introduced adoptive parents to birth parents. After meeting, adoptive parents attended birth mother's next medical appointment. Before the appointment, Attorney Francis gave birth father a "consent to termination of parental rights and consent to adoption" to sign. The consent provided "that [Father] was not under 'undue influence, duress, or improper pressure in signing the consent; he had 'carefully considered' the reasons for adoption, he was aware that once he signed, he had 'no legal claim' to the child, the document was irrevocable, and he understood at [Attorney] Francis . . . Represented the adoptive parents and not him, and [Father] had the right to consult with an attorney." *Id*. at 817.

- Attorney Francis told birth father that the potential adoption could be terminated on birth parents' request. Attorney Francis neglected to tell birth parents about the consequences of executing the consent or that they could seek independent legal counsel. Attorney Francis filed an adoption petition on behalf of adoptive parents and attached the birth parents' executed consent.

- After the child's birth, birth mother signed a "relinquishment of custody" and consent to termination of her parental rights. The consent language mirrored that signed by birth father. Adoptive parents took the child home. Soon thereafter, birth parents notified Attorney Francis that they wanted the child back and believed such was possible based on Attorney Francis' representations. Birth parents sought leave of the trial court to withdraw their consents. Attorney's Francis' adoption agency, Heartland, filed a petition to terminate birth parents' parental rights. Mother opposed the adoption and renewed her request to withdraw consent. Heartland moved for summary judgment.

- A consolidated trial ensued, during which Attorney Francis represented the adoptive parents and Heartland. Adoptive parents did not object to Attorney Francis' representation and lodged a few failed objections regarding Francis' comments. "[T]here was no further inquiry by the parties or the trial court about a potential conflict of interest with regard to Francis." *Id*. at 819. The trial court denied the adoption and invalidated the birth parents' consents as involuntary and found that: birth parents did not understand the executed consents were irrevocable; Attorney Francis failed to "adequately disclose" to birth parents that he was not their counsel, failed to review the consent documents with

birth parents, and failed to advise youthful birth parents to seek independent legal counsel regarding weighty legal issues.

- On appeal, the adoptive parents argued, among other things, that they were denied a fair trial because Attorney Francis should have recused as he was a potential trial witness. Judge Altice, writing for the majority, deemed this issue waived due to adoptive parents' failure to object below. Waiver notwithstanding, Judge Altice cited RPC 3.7, which provides:

> **<u>Rule 3.7. Lawyer as Witness</u>**
>
> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
>
> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
>
> (3) disqualification of the lawyer would work substantial hardship on the client.
>
> (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

- Judge Altice observed that "[Attorney] Francis was never a witness, never sought to be called as a witness, and no one attempted to disqualify him as a witness. Moreover, five attorneys and the trial judge were aware of a potential concern regarding the need for Francis' testimony months before the trial commenced. No objection was made regarding Francis's continued representation of the adoptive parents. The trial court could not have determined whether any testimony that Francis might have provided related to an uncontested issue on [RPC] 3.7(a)(1), because none was ever offered. . . . "[T]he importance of any testimony that Francis might have offered is unclear and only speculative." *Id*. at 822.

- Judge Altice also observed that the record, which indicated that adoptive parents were uninhibited in their presentation of their case in chief, did not support the Court of Appeals invading the trial court's wide discretion to determine whether an RPC violated rendered trial unfair.

- **<u>Practice pointer</u>**—Under different circumstances, Attorney Francis' conduct regarding RPC 3.7 may have resulted in dire consequences.

6. Reed v. Hoosier Health Systems, Inc., 825 N.E.2d 408 (Ind. Ct. App. 2005)

- Reed sued Hoosier Health Systems and Hoosier Living Centers and others regarding a shareholder dispute. Reed's complaint was dismissed without prejudice and he refiled it. By the time of refiling, Reed's attorneys had joined a new firm, Tabbert Hahn, which was representing Hoosier Health Systems and Hoosier Living Centers in pending medical malpractice matters. Hoosier Health Systems and Hoosier Living Centers successfully moved to disqualify Reed's attorneys. In affirming the disqualification, Judge Mathias found that "IRPC 1.7(a) is violated in the case at bar because (1) Reed's Motion to Reinstate litigation specifically names Hoosier Health and Hoosier Living as defendants, (2) Tabbert Hahn represents Hoosier Health and Hoosier Living in ongoing litigation, and (3) there is no evidence of consent." *Id*. at 411.

- Judge Mathias rejected Reed's argument that his shareholder dispute was unrelated to Tabbert Hahn's medical malpractice cases as follows: "[T]he relatedness of ongoing cases is not a relevant exception to IRPC 1.7(a). *See* Ind. Prof. Cond. R. 1.7(a) cmt. ("[A] lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated.)" *Id*. Regarding Reed's argument that no conflict existed because Tabbert Hahn offered to withdraw from representing Hoosier Health and Hoosier Living, Judge Mathias reasoned that an attorney cannot avoid disqualification by withdrawing from the conflicted representation.

III. LAWYERS' INTERESTS[4]

A.

For specific rules involving conflicts regarding current clients, some practice pointers follow. Generally, a lawyer **shall not**:

- Enter a business transaction (or a more advantageous fee agreement renegotiation) with a client or knowingly acquire an interest adverse to a client unless: (1) the interest was acquired under terms that are fair and reasonable to the client, fully disclosed in a plain language writing; (2) the client is advised in writing to seek independent counsel regarding the interest, (unless the client is independently represented, in which case a written disclosure from the lawyer or the independent counsel suffices); and (3) the client gives signed, written informed consent that meets specific requirements enumerated in RPC 1.8(a)(3). RPC 1.8(a).

[4] RPC 1.7(a)(2), 1.8.

- As needed, the lawyer should discuss the material risks of the proposed transaction, risks presented by the lawyer's involvement, any reasonably available alternatives and the benefits of consulting with independent counsel. RPC 1.8, cmt. 1.

- When a significant risk exists that the lawyer's representation will be materially limited by the lawyer's interest in the transaction, the lawyer must comply with RPCs 1.8(a) and 1.7.

- NOTE: The transaction need not be closely related to the representation for these obligations to attach.

- Use information regarding the representation to the client's disadvantage for the benefit of the lawyer or a third person, without informed consent, unless RPCs allow or require. RPC 1.8(b).

- Solicit a substantial gift from a non-relative client. RPC 1.8(c).

  - Where the effectuation of the substantial gift requires the lawyer to draft a will or conveyance, the non-relative client must get independent legal advice.

- Before a representation concludes, enter or negotiate an agreement that gives the lawyer literary or media rights to a portrayal or account based in substantial part or on information relating to the representation. RPC 1.8(d).

- Provide financial assistance to a client for pending or anticipated litigation except to advance court costs and expenses "the repayment of which may be contingent on the outcome of the matter" or if the client is indigent. RPC 1.8(e).

- Be paid for legal representation by anyone other than the client, except if: the client gives informed consent, the arrangement does not interfere with the lawyer's independent professional judgment or the client-lawyer relationship, and client's information is protected. RPC 1.8(f); *see* related RPC 5.8.

  - If there is a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's interest in the fee arrangement or by the lawyer's responsibilities to the payor, there is a conflict, and the lawyer must comply with RPC 1.6 (confidentiality) and RPC 1.7.

- Where the lawyer represents two or more clients, enter or aid entry of: (1) an aggregated settlement of the claims of/against the clients; or (2) aggregated plea

agreements in criminal matters, absent signed, written informed consent from each client and a detailed disclosure by the lawyer. RPC 1.8(g).

- Prospectively limit the lawyer's malpractice liability to a client who lacks independent representation regarding the agreement; or settle a malpractice liability claim with an unrepresented existing or former client, unless the client is advised in writing to seek independent counsel regarding the settlement. RPC 1.8(h).

- Acquire a proprietary interest in the cause of action or subject matter of litigation at issue in the lawyer's representation of the client, except for a lien to secure attorney's fees and expenses or a contract for reasonable contingent fees in civil cases. RPC 1.8(i).
- Engage in sexual relations with a client, unless the consensual relationship predated the representation. RPC 1.8(j).

- For part-time prosecutors or deputy prosecutors, represent private clients in matters involving issues over which the prosecutor has statutory prosecutorial authority of responsibilities, subject to exceptions for tort cases, qualifying infractions, and family law cases. A part-time deputy prosecutor may be granted a prior, express written limitation of duties that authorizes representation of private family law clients. RPC 1.8(l).

- Act as advocate at a trial in which the lawyer is likely to be a necessary witness unless: (1) the testimony pertains to an uncontested issue; (2) the testimony pertains to the nature and value of legal services rendered in the case; or disqualifying the lawyer would cause substantial hardship to the client. A lawyer may act as an advocate in a trial in which a fellow firm lawyer may be called as a witness, subject to RPC 1.7 and RPC 1.9. If RPC 1.7 or RPC 1.9 disqualifies the testifying fellow firm lawyer, the other lawyers in the firm are also disqualified. RPC 3.7.

  - "In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, . . . the dual role may give rise to a conflict of interest that will require compliance with Rules 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer the representation involves a conflict of interest that requires compliance with Rule 1.7." RPC 3.7, cmt. 6.

  - "Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent. *See* Rule 1.7. *See* Rule 1.0(b) for the definition of "confirmed

in writing" and Rule 1.0(e) for the definition of "informed consent.'" RPC 3.7, cmt. 6.

B. Relevant Cases

1. ***Duff v. Rockey*, 180 N.E.3d 954 (Ind. Ct. App. 2022).**

- Following the 2010 dissolution of the marriage of the mother and father, the mother married attorney Duff and became pregnant. A dispute arose between mother and father regarding parenting time, and Attorney Duff entered his appearance on the mother's behalf. Father moved to disqualify Attorney Duff on the basis of Rule 3.7 of the Indiana Rules of Professional Responsibility, which bars an attorney form acting as an advocate a trial in which the lawyer is likely to be a necessary witness, unless the testimony relates to an uncontested issue; relates to the nature and value of legal services rendered; or substantial hardship would result to the client upon disqualification of the lawyer.

2. ***See In re McKinney*, 948 N.E.2d 1154 (Ind. 2011), *supra*.**

3. ***Camm v. State*, 957 N.E.2d 205 (Ind. Ct. App. 2011).**

  - During Camm's third trial and second trial for killing his family, the prosecutor from Camm's second trial hired a literary agent. Camm was found guilty. The literary agent negotiated a publishing deal for the prosecutor, who received a book advance. After our Supreme Court overturned Camm's conviction, the prosecutor informed his agent about his intention to retry Camm, if needed; to proceed with writing the book; and to return the book advance to avoid the appearance of impropriety. The publisher acquiesced in the cancellation of the contract, and the prosecutor returned the advance.

  - Camm moved for the appointment of a special prosecutor, which was denied. On appeal, Camm argued "that an actual conflict of interest exists because, when [the prosecutor] signed the literary contract, he irreversibly divided his loyalties between his personal interests in his book and his duties as a prosecutor for the people of the State of Indiana." *Id.* at 209. In reversing the trial court, Judge Baker found clear and convincing evidence of an actual conflict of interest in violation of RPC 1.8(d) and reasoned:

    - "[The prosecutor] signed a contract to author and publish a book about the Camm case prior to Camm's third retrial, and, in doing so, he permanently compromised his ability to advocate on behalf of the people of the State of Indiana in this trial." "As prosecutor, [one] should not have a personal interest in this case separate from his professional role as prosecutor. In other words, [the prosecutor] cannot be both committed to writing a book about the Camm case

and serve as prosecutor. Such a personal interest creates an actual conflict of interest with his duties as prosecutor. *Id*. at 210-11.

4. *In re Williams,* 971 N.E.2d 92 (Ind. 2012).

- An elderly woman hired Respondent to administer her estate in the event of illness or her death. After the client moved into a retirement community, the client executed a power of attorney in favor of Respondent, who subsequently prepared a living will for the client. The client's niece became concerned on learning that the retirement community had not been paid in months and demanded an accounting. When confronted, Respondent replied that the client's money was gone. The client revoked her power of attorney and named her niece in Respondent's stead. The client's niece filed a complaint, wherein she demanded an accounting. Respondent resisted and was sanctioned.

- The trial court found as follows and awarded nearly $70,000 in damages to the client:

  - "(1) Respondent failed to supply an accounting as required . . . ; (2) Respondent failed to keep records of his use of [the client]'s funds and of the legal services rendered on behalf of [the client]; (3) . . . Respondent billed [the client] for a total of 546 hours of legal services, which included an inordinate amount of unproductive and nonprofessional work and for which he paid himself fees of $93,500; (4) there was no conceivable reason for the fees charged, which consumed nearly one-third of [the client]'s modest estate of around $300,000; and (5) Respondent committed what amounted to constructive fraud upon [the client]."

  Id. at 95.

- The client's niece filed a grievance with the disciplinary commission, which alleged various RPC violations including:

  - 1.7: Representing a client when there is a concurrent conflict of interest due to the lawyer's personal interests.

  - 1.8(a): Entering into a business transaction with a client (unilaterally raising his fee) unless the transaction is fair and reasonable, the terms are fully disclosed in writing, the client is given an opportunity to seek the advice of independent counsel, and the client consents in writing to the transaction.

- Our Supreme Court found Respondent committed the charged violations:

- "Regarding the charge that Respondent violated Rule 8.4(b), we note that Respondent wrote checks to himself totaling approximately $100,000 from his frail and elderly client's account, consuming approximately one-third of her estate. He had no written documentation to memorialize any work performed for the client. Although he first maintained that his withdrawal of the $100,000 was for legal services performed, he changed his explanation mid-litigation to claim that they constituted her voluntary assistance to him as an author. [ ] We find Respondent's abandonment of his claim that the $100,000 was for legal services, combined with his wholly incredible claim that it was a gift, sufficiently probative of the Commission's charge that Respondent violated Rule 8.4(b) by committing a criminal act (conversion) that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer." *Id.* at 97.

- Penalty: 2-year suspension without automatic reinstatement. Justices Sullivan and Massa dissented on the grounds that disbarment was appropriate and that Respondent had forfeited the opportunity to return to legal practice.

5. *In re Hollander*, 27 N.E.3d 278 (Ind. 2015).

- Respondent used information obtained through his public defender employment to meet a woman, who was arrested for prostitution, under the guise of offering legal services. Respondent intended to have sexual contact with the woman in exchange for providing legal services. The Disciplinary Commission alleged the following RPC violations:

    - 1.2(d): Attempting to counsel or assist a client in conduct the lawyer knows to be criminal.

    - 1.5(a): Attempting to charge an unreasonable fee (sex for legal services).

    - **1.7(a): Attempting to represent a client when the representation involves a concurrent conflict of interest.**

    - **1.8(j): Attempting to engage in a sexual relationship with a client unless it began prior to the representation.**

    - 7.3(a): Improperly soliciting employment in-person, by phone, or by real time electronic contact from a person with whom the lawyer has no prior relationship when a significant motive is the lawyer's pecuniary gain.
    - 8.4(a): Attempting to violate the Rules of Professional Conduct.

      - 8.4(b): Committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer.

      - 8.4(c): Engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.

      - 8.4(d): Engaging in conduct prejudicial to the administration of justice.

  - Penalty: 1-year suspension without automatic reinstatement.

6. *In re Sniadecki*, 924 N.E.2d 109 (Ind. 2010).

  - Respondent owned his firm's premises as tenant in common with a co-owner ("Co-owner"), and Respondent and Co-owner were responsible for the mortgage. Respondent told a client that the premises were for sale and subsequently entered into an oral agreement for the sale of the property to Client. "Client had no experience or expertise in purchasing real estate. Respondent did not advise Client that he did not hold clear title to the property, he did not put the terms of the sale of the Property in writing, and he did not advise her to seek independent legal counsel regarding her purchase." *Id*. at 115-16.

  - Under pressure from Respondent, Client made a partial payment for the property. Respondent did not tell Co-owner about this payment and applied the money toward new premises. When Client requested another inspection, she felt that Respondent intimidated her. Client backed out of the deal and demanded return of her partial payments, which Respondent failed to honor.

  - "Client made numerous attempts to get Respondent to provide her with documentation to protect her right to repayment . . . . In response, Respondent presented Client with a promissory note for this amount, but he failed to comply with Client's requests to set up a payment schedule." *Id*. at 115-16. Our Supreme Court found these RPC violations:

      - 1.8(a): Entering into a business transaction with a client unless the terms are fair and reasonable, the terms are fully and clearly disclosed, the client is given reasonable opportunity to seek independent counsel, and the client consents in writing to the transaction.

      - 8.4(c): Engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.

      - Penalty: Disbarment.

IV. FORMER CLIENTS[5]

A.

After a representation ends, a lawyer still owes duties to former clients. To be sure, past representations can present weighty conflicts risks. Such conflicts can arise: (1) when a lawyer represents a new client, in the same way or a substantially similar way, as a former client with materially adverse interests; (2) where a lawyer switches firms and possesses information that is material to the representation of the former client; and (3) regarding the use of information acquired through a representation.

RPC 1.9 governs duties to former clients and provides that a lawyer, who has represented a client in a matter, may not represent another person in the same (or a substantially related matter) in which the person's interests are materially adverse to those of the former client, unless the former client gives written informed consent. [RPC 1.9(a)]. "Matters are 'substantially related' if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." RPC 1.9, cmt. 3.

Also, "a lawyer shall not knowingly represent a person in the same or a substantially related matter" in which the lawyer's former firm "had previously represented a client whose interests are materially adverse to that person; and about whom the lawyer had acquired material client information, unless the lawyer has obtained the former client's written informed consent. *See* RPC 1.6, RPC 1.9(c).

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[5] RPC 1.6(a), 1.9(c)(2).

Further still, "a lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter: (1) use information relating to the representation to the disadvantage of the former client," except as permitted or required by the RPCs or when the information is generally known; or (2) reveal information regarding the representation," except as permitted or required by the RPCs.

Practice Pointer:

- "When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. . . . . **The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question**." RPC 1.9, cmt. 2.

B. RELEVANT CASES

- ***In re Smith*, 991 N.E.2d 106 (Ind. 2013).**
    - Attorney Smith ("Respondent") had a long-term sexual relationship with a woman, who held a high-level role in federal government. Respondent represented the woman ("the client") in multiple legal matters during the decade-long relationship and maintained a friendship with her afterwards.
        - "During this period, Respondent advanced money, made personal loans, permitted his credit card to be used, and provided personal assistance to [the client]. Although [the client] owed Respondent legal fees, he continued to lend her additional funds and to provide additional services. Respondent grew increasingly frustrated with [the client] over her lack of payments but continued to represent her in order to increase his opportunity to be repaid. Respondent did not consider whether their personal relationship, including [the client]'s financial reliance on Respondent, would materially limit his ability to represent her professionally. The hearing officer concluded that Respondent's actions

created a conflict between his own interests, the interests of third persons, and his duty of loyalty to his then-client . . . ." *Id.* at 108-09.

- After the relationship soured, Respondent wrote an autobiography in which he divulged personal and confidential aspects information that he acquired through the representation and relationship with client.

    - "The book describes several criminal cases . . . in which Respondent represented [Client]. Respondent revealed such details as his negotiations regarding bail and plea agreements, conversations with a police detective, conversations with [Client] pertaining to the charges and her incarceration, [Client]'s mental and physical state, the source of funds for restitution, discussions about his fees, and his personal thoughts about [Client] and about the matters. The book revealed that Respondent provided his legal files pertaining to his representation of [Client] in criminal cases to [Client]'s husband at one point. Respondent also represented [Client] for the purpose of reviewing a divorce agreement. In the book, Respondent revealed details of his conversations with [Client], details about her marriage, and his personal opinions and thoughts about [Client]'s conduct." *Id.* at 108.

- Although Respondent claimed the client consented to his writing the book, Respondent failed to demonstrate "that [the client] gave the level of informed written consent necessary to permit Respondent to disclose and publish the confidential information in the book." *Id.*

- Our Supreme Court found that Respondent committed a host of RPC violations including, "revealing confidential, sensitive information relating to his representation of a former client by publishing it in a book for personal gain" and by engaging in conduct involving dishonesty or misrepresentation. *Id.* at 107.

- Penalty: Disbarment.

V. IMPUTATION OF CONFLICTS[6]

RPC 1.10 provides that where a lawyer within a firm is prohibited from undertaking the representation of a client by RPCs 1.7, 1.9, or 2.2., no lawyer within the firm may knowingly represent that client, *unless* the prohibition relates to a personal interest of the

[6] RPC 1.10.

prohibited lawyer and poses no significant risk of materially limiting the remaining firm lawyers' representation of the client. RPC 1.10(a).

Notably, after a lawyer severs from a firm, the firm may represent a person with interests materially adverse to those of the former firm lawyer's client, who is not currently represented by the firm, except where "the matter is the same or substantially related to that in which the formerly associated lawyer represented the client"; and any lawyer remaining in the firm has material information that is protected by RPC 1.6 and RPC 1.9. RPC 1.10(b).

Further, where a firm lawyer is disqualified from a matter, no lawyer in the firm can knowingly represent a person in the matter, unless "the disqualified lawyer lacked primary responsibility for the matter that caused the disqualification; the disqualified lawyer is timely screened from any participation in the matter "and is apportioned no part of the fee therefrom"; and any affected former client received prompt written notice "to enable it to ascertain compliance with the provisions of this rule." RPC 1.10(c).

Practice Pointers:

- Imputation of a conflict to the attorneys within a firm can be lifted with the informed consent of the affected client or the former client, as provided in RPC 1.7. Basically, the lawyer must determine that the representation is not prohibited by RPC 1.7(b) and that "each affected client or former client has given informed consent to the representation, confirmed in writing." RPC 1.10, cmt. 7.

- Treatment of conflicts involving firm lawyers who formerly represented the government is governed by RPC 1.11.

B. RELEVANT CASES

1. XYZ, D.O. v. Sykes, 20 N.E.3d 582 (Ind. Ct. App. 2014).

- Respondent Attorney Clark maintained a solo civil defense practice, and took on Dr. XYZ (the "Doctor") as a client. Respondent later closed her firm and joined E&E. By the time Respondent left E&E, she had represented Doctor in

six medical malpractice suits. Respondent later joined the MMMMK firm. Respondent performed the intake of Sykes' ("Plaintiffs") medical malpractice claim and presented it to her MMMMK colleagues, one of whom took on the case. After MMMMK filed suit against the Doctor and a hospital on behalf of Plaintiffs, the Doctor moved unsuccessfully to disqualify MMMMK from representing the Plaintiffs in this case based upon Respondent's prior representation.

- On appeal, the Doctor argued that Respondent's prior representation of him in six cases created a conflict of interest pursuant to RPC 1.9 that should be imputed to MMMMK, pursuant to RPC 1.10. In reversing on appeal, Judge Crone relied on *Gerald v. Turnock Plumbing, Heating, & Cooling, LLC,* 768 N.E.2d 498, 502-03 (Ind. Ct. App. 2002), which analyzed imputed disqualification due to lawyers' migration between firms.

- Under the three-step *Gerald* test for determining whether a migrating lawyer, and that lawyer's new law firm, should be disqualified from a present representation due to a prior representation:

  - First, determine whether a substantial relationship exists between the subject matter of the prior and present representations.

  - Next, if a substantial relationship does exist, ascertain whether the presumption of shared confidences with respect to the prior representation has been rebutted.

  - Then, if this presumption has not been rebutted, determine whether the presumption of shared confidences has been rebutted with respect to the present representation. Failure to rebut this presumption also makes disqualification proper.

- As Judge Crone reasoned: "the prior and the present representations here are substantially related for the purposes of Rule 1.9. In her six prior representations of Doctor, [Respondent] defended him against allegations of medical malpractice. The present representation involves an allegation against Doctor for medical malpractice as well as an[other] allegation . . . based in part upon the Hospital's alleged failure to adequately investigate the circumstances surrounding those six prior malpractice cases in which Respondent represented Doctor. Thus, the present case involves one claim of the same subject matter as [Respondent]'s prior representations of Doctor, and another claim that grew out of and is directly related to Respondent's prior representations of Doctor. The issues in the prior and present cases are undoubtedly closely interwoven [and] there is a substantial risk that confidential factual information as would normally have been obtained in the prior representations would materially advance the Plaintiffs' position in the present case." *Id*. at 587.

- Judge Crone further found that:

    - Respondent and MMMMK had a conflict of interest regarding the current representation of Plaintiffs in the matter because Plaintiffs' interests were materially adverse to the Doctor's.

    - If Respondent's six prior representations remained relevant, "any confidential factual information gleaned during those prior representations [was not] stale or obsolete." *Id*. at 558.

    - The presumption of shared client confidences was not rebutted because Respondent was the Doctor's primary lawyer in the six prior medical malpractice cases and "was [thereby] privy to much confidential information, including but not limited to Doctor's personal thoughts and mental impressions regarding the facts and circumstances and the strengths and weaknesses of those cases." *Id*.

    - Also, because Respondent was the Doctor's primary lawyer in the six prior medical malpractice cases, the presumption of shared confidences between Respondent and her MMMMK colleagues was irrebuttable. "[I]mputed disqualification is per se, and screening is not possible in cases where[, as in this case,] the personally disqualified lawyer had 'primary responsibility' for the prior "matter that causes the disqualification. [ ] [Respondent]'s personal disqualification from this matter must be imputed to MMMMK." *Id*.

2. *Drake v. Dickey*, 2 N.E.3d 30 (Ind. Ct. App. 2013).

- A law firm partner, Drake, owned a farm that was adjacent to land that Dickey, others, and Duke Realty ("Duke Realty") intended to develop. Duke Realty offered to purchase the farm, and Drake declined. The firm recognized the conflict and suspended representing Duke Realty regarding the proposed development. Eventually, Duke entered into a confidential Land Use Agreement "that limited how Duke Realty could develop its land near Drake's property." The firm resumed representing Duke Realty regarding the proposed development.
- The relationship between Drake and Duke Realty soured. When Drake applied for a plan commission position, Duke Realty threatened withdraw its business from the firm if Drake failed to withdraw her application. Drake withdrew. Drake subsequently accused Duke Realty of breaching the land use agreement. Duke Realty met with the firm and again warned that the representation relationship would end if Drake took further action against Duke Realty. The firm subsequently notified Drake that she would be terminated from the partnership if she did not sell to Duke Realty. Drake refused and was stripped of partner status. Drake sued Duke Realty for tortious interference with her

partnership agreement. The trial court granted summary judgment for Duke Realty.

- On appeal, Duke Realty argued "'had a legitimate business interest in exercising its unfettered right to end its attorney-client relationship with [the firm] ....' In support, Duke Realty notes that 'the personal interests of a lawyer cannot 'be permitted to have an adverse effect on the representation of a client,' *id.* at 26 (citing Ind. Professional Conduct Rule 1.7(a)(2) cmt. 1, 10), and that one lawyer's conflict of interest is generally imputed to that lawyer's entire firm, *see* Prof. Cond. R. 1.10(a)." *Id.* at 40. In response, Judge Najam reasoned:

    - "But our Rules of Professional Conduct do not justify a client's tortious behavior toward an attorney. While Duke Realty has an unfettered right to terminate its attorney-client relationship with [the firm], Duke Realty could have exercised that right without issuing a threat or ultimatum regarding Drake. A client's first-party right to terminate an attorney-client relationship does not include a corresponding third-party right to interfere with an attorney's partnership agreement." *Id.* at 40-41.

    - Judge Najam also found the firm's resumed representation of Duke Realty after Drake and Duke Realty executed their land use agreement "indicates that . . . Drake's personal interest did not 'present a significant risk of materially limiting the representation of the client by the remaining lawyers of the firm.'" *Id.* at 41 (citing RPC 1.10(a)).

- Judge Najam affirmed in part, reversed in part, and remanded finding, in relevant part, the existence of a genuine issue of material fact regarding whether Drake's personal interest adverse to Duke Realty "present[ed] a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm." *Id.* at 42.

VI. FEES[7]

A.

When a lawyer and client enter a fee agreement, the ensuing business relationship can give rise to a conflict of interest. When such agreements are modified for any reason, the

[7] RPC 1.5(a), 1.8(a).

lawyer must ensure that the client is fully apprised and is allowed to consult with independent counsel regarding the proposed modification.

Under the RPCs, a lawyer may be paid for legal services rendered by a person other than the client, provided that the lawyer obtains the client's informed consent and the payment arrangement does not compromise the lawyer's duties of loyalty and independent judgment to the client. According to Comment 3 to RPC 1.8, the critical inquiry in assessing such a payment arrangement for a conflict of interest is to ask **whether there is a significant risk that the lawyer's interest in accepting the payment agreement will materially limit the lawyer's representation of the client**. If such is the case, the lawyer should forgo the payment agreement. Where there is significant risk that accepting the payment arrangement will materially limit the lawyer's representation of the client, the representation may still go forward if:

- the lawyer reasonably believes the lawyer can provide competent and diligent representation to the affected client(s)
- the representation is not prohibited by law
- the representation does not involve claims by one client against another in the same action
- the affected client(s) give written informed consent.

B. RELEVANT CASES

1. ***See In re Williams,* 971 N.E.2d 92 (Ind. 2012), *supra*.**
2. ***In re Colman,* 885 N.E.2d 1238 (Ind. 2008)**.
   - Respondent's client was arrested after the client sold a massive amount of marijuana to a confidential informant. In arresting the client, the police failed to find $50,000.00 that was on the client's premises. The client told Respondent about the undiscovered money, which Respondent retrieved the money and

deposited into his personal account. "The account was not an attorney trust account and contained Respondent's own funds." *Id*. at 1241.

- Respondent urged the client to transfer ownership of a condominium to Respondent to avoid forfeiture and indicated that the equity in the condominium would defray legal fees. The client believed that the arrangement would allow him to get the condominium back in the future. Respondent prepared a written agreement wherein he assumed responsibility for the mortgage balance and, thereby, purchased the condo. The agreement also transferred the contents of the condo to Respondent. In exchange, Respondent agree to forgo owed and anticipated attorney's fees.

- According to our Supreme Court:

  - "Respondent did not request an appraisal of the condominium or its contents. At the time of the Sale Agreement, [the client] had not been given any estimate of the future legal fees, and the hearing officer found that the amount of Respondent's future legal fees was entirely speculative. According to M.M., the condominium was worth approximately $95,000 to $98,000 and the value of the contents was $15,000, yielding a net equity of both of about $65,000. Respondent did not advise M.M. to seek independent counsel regarding the transaction. . . . Respondent did not formally assume the mortgage on the condominium, nor did he make timely payments. *Id*. at 1241-42. The hearing officer found that the agreement was unreasonable because it did not set out the value of services Respondent would perform, and that Respondent's charge of $65,000 for the representation was unreasonable.

  - By entering into this agreement, Respondent violated Professional Conduct Rule 1.8(a), which prohibits a lawyer from entering into a business transaction with a client unless the terms are fair and reasonable, the terms are fully and clearly disclosed, the client is given reasonable opportunity to seek independent counsel, and the client consents in writing to the transaction." *Id*. at 1243.

  - Respondent also charged an unreasonable fee, drafted a will for a non-relative "that would give Respondent or his son a substantial gift", represented a client "when there was a conflict of interest due to Respondent's personal interests," failed to hold property of a client separate from Respondent's property, failed to keep a client's funds in a clearly identified trust account.

  - Penalty: 3-year suspension without automatic reinstatement

VII. PUBLIC ATTORNEYS[8]

A.

Former and current government lawyers are not immune to potential conflicts of interest. In general, a lawyer who formerly worked as a public officer or employee of the government shall not knowingly use information related to the representation to the disadvantage of the government or reveal information relating to the representation, except as permitted or required under the RPCs. Nor shall a lawyer who formerly worked as a public officer or employee of the government and "represent a client in connection with matter in which the lawyer participated personally and substantially as a public officer or employee, unless the government agency gives informed consent to the representation, confirmed in writing. It is immaterial whether the lawyer is directly adverse to the former client. RPC 1.11(a).

Where the former government lawyer joins a firm and is disqualified from representation due to her past personal and substantial participation in the matter as a public officer or employee, no lawyer in the firm may knowingly undertake or continue the representation, unless the former government lawyer is timely screened from participation or from associated fees; and the government agency receives prompt written notice that allows the agency to assess the firm's compliance with RPC 1.11. RPC 1.11(b).

Except where the law allows, a lawyer in knowing possession of confidential government information "acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which

[8] RPC 1.6(a), 1.7(a)(2), -(b), 1.8(b), -(k).

the information could be used to the material disadvantage of that person." Confidential government information refers to "information . . . obtained under governmental authority and which, . . . the government is prohibited . . . from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public." A firm with such a lawyer "may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter" and does not receive any part of the fee from the matter. RPC 1.11(c).

A lawyer, who is currently serving as a public officer or employee, shall not participate in a matter in which the lawyer participated personally and substantially in private practice or in nongovernmental employment, unless the relevant governmental agency gives informed consent, confirmed in writing; or "negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially," subject to exception for judicial law clerks, other adjudicative officers, or arbitrators pursuant to Rule 1.12(b). Again here, it is immaterial whether the lawyer is directly adverse to the former client. RPC 1.11(d).

B. Relevant Case

- ***Matter of Burton*, 139 N.E.3d 211 (Ind. 2020), *supra***

VIII. FORMER JUDGE, ARBITRATOR, MEDIATOR, OR OTHER THIRD PARTY NEUTRAL[9]

Generally, subject to an exception in RPC 1.12(d), "a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator, mediator or other third-party neutral, or law

[9] RPC 1.12.

clerk to such a person, unless all parties to the proceeding give informed consent, confirmed in writing." RPC 1.12(a). Personal and substantial participation does not include the exercise of administrative responsibility in a court "where the [former] judge had previously exercised remote or incidental administrative responsibility that did not affect the merits." RPC 1.12, cmt. 1.

"A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to any such person may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the law clerk's employer." RPC 1.12(b)

Where a lawyer is disqualified due to past personal and substantial participation in a matter as judge or other adjudicative officer, arbitrator, mediator or other third-party neutral, or law clerk to such a person, conflicts of the disqualified lawyer will be imputed to all lawyers in the firm such that no lawyer in the lawyer's firm may knowingly undertake or continue representation in the matter, unless the firm timely screens the lawyer from participation in the matter and from the associated fee and provides prompt notice to the parties and tribunals "to enable them to ascertain compliance. . . ." RPC 1.12(c).

CONFLICTS OF INTEREST

ICLEF APPLIED PROFESSIONALISM

October 21, 2022

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BOSE MEANS BUSINESS℠

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Black's Law Dictionary:

- **<u>Conflict of Interest</u>**:
  - A real or seeming incompatibility between one's private interests and one's public or fiduciary duties.
  - A real or seeming incompatibility between the interests of two of a lawyer's clients, such that the lawyer is disqualified from representing both clients if the dual representation adversely affects either client or if the clients do not consent.
- Generally, conflicts of interest are governed by RPC Rules 1.7 through 1.13

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- Conflicts pose a potential minefield of risks for practitioners.
- Conflicts can arise:

  - in civil and criminal contexts
  - in litigation and transactional matters
  - regarding existing, prospective, and former clients.

  - Examples of circumstances that can give rise to conflicts:
    - Taking on a new job
    - Switching law firms
    - Going from government service into private practice (vice versa)
    - Payment arrangements for attorney's fees
    - Going into business with a client

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Rule 1.7. Conflict of Interest: Current Clients

- Generally, a lawyer shall not represent a client if the representation involves a concurrent conflict.

- A concurrent conflict exists if:
  - representation of one client will be directly adverse to another client; or
  - significant risk that the representation of 1+ clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person, or by a personal interest of the lawyer.

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Rule 1.7. Conflict of Interest: Current Clients

- Stated differently, a lawyer should not represent an individual in a matter against another person the lawyer represents, regardless of whether the matters are related; and, even absent any directly adverse representation.

- A lawyer should not represent an individual if the lawyer's responsibilities to an existing client, a former client, another individual, or the lawyer's own interests will materially interfere with the representation of the individual.

  - **KEY INQUIRY**: Is it likely that a difference in the clients' interests will arise? If it does, will it materially interfere with the lawyer's independent professional judgment in considering alternatives? Or will it foreclose courses of action that reasonably should be pursued for the client? RPC 1.7, cmt. 8.

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Rule 1.7. Conflict of Interest: Current Clients

- Where there is a concurrent conflict of interest, the representation can proceed if:
  - the lawyer reasonably believes that they will be able to provide competent and diligent representation to each affected client;
  - the representation is not prohibited by law;
  - the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
  - each affected client gives informed consent, confirmed in writing.

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Rule 1.7. Conflict of Interest: Current Clients

- Informed consent requires that each affected client be made aware of the relevant circumstances and of the material and reasonable foreseeable ways that the conflict could have adverse effects on the client's interests. RPC 1.7, cmt. 18.
- To obtain valid informed consent, confirmed in writing, it is not enough for a lawyer to obtain a document signed by the client.
    - The lawyer must apprise the client of the risks and advantages related to the conflict, provide reasonably available alternatives, and give the client time to think and ask questions. RPC 1.7, cmt. 20.

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PRACTICE POINTERS

- Adopt procedures to pre-screen clients for conflicts
- In screening for conflicts, employ the following framework, per RPC 1.7, cmt. 2:
  - Identify the client/clients
  - Determine if conflict exists
  - Decide if representation can go forward despite the conflict
  - Apprise the client(s) and obtain informed consent, confirmed in writing

- Significant risk that your representation of one client will materially limit your effectiveness in representing another client in a different case?

- Decline one of the representations, unless client gives informed consent.

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PRACTICE POINTERS

- Where a conflict exists before the representation commences?
  - Decline the representation, *unless* client gives informed consent.
- Where the conflict arises after the representation commences?
  - Withdraw from representation, *unless* the client grants informed consent.
  - More than one client involved?
    - The representation may continue *if* the lawyer is able to honor duties to the former client *and* adequately represent remaining clients.

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PRACTICE POINTERS

- Where unforeseen circumstances, i.e., firm merger, result in disqualifying conflicts?
  - Seek court approval as needed and honor client confidences.
- Client grants, but later revokes informed consent regarding a conflict?
  - Continuation of the representation depends on:

    (1) the nature of the conflict;
    (2) whether the revocation resulted from a material change in circumstances;
    (3) the reasonable expectations of the other client;
    (4) whether material detriment will result to other clients or the lawyer; and
    (5) other attendant circumstances. RPC 1.7, cmt. 21.

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RELEVANT CASES

- ***In Re McKinney*, 948 N.E.2d 1154 (Ind. 2011)**
  - Respondent, while collecting a salary as a deputy prosecuting attorney, collected attorney fees as a private lawyer bringing civil forfeiture suits re criminal defendants' property. Respondent entered into written fee agreements and conducted plea agreement negotiations in criminal cases with criminal defendants before and/or after Respondent engaged in settlement negotiations re related civil forfeiture actions with the same criminal defendants. Respondent acted knowing he would receive 25% of the amount transferred as personal compensation.
  - Violated RPC 1.7(a)(2), 1.7(b), 1.8(l), and 8.4(d)
  - Penalty: 120-day suspension with automatic reinstatement

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Reed v. Hoosier Health Systems, Inc., 825 N.E.2d 408 (Ind. Ct. App. 2005)

- Reed sued Hoosier Health Systems and Hoosier Living Centers and others regarding a shareholder dispute. Reed's complaint was dismissed without prejudice, and he refiled it. By the time of refiling, Reed's attorneys had joined a new firm, which was representing Hoosier Health Systems and Hoosier Living Centers in pending medical malpractice matters. Hoosier Health Systems and Hoosier Living Centers successfully moved to disqualify Reed's attorneys.

- In affirming the disqualification, Judge Mathias found that "IRPC 1.7(a) is violated . . . because (1) Reed's Motion to Reinstate litigation specifically names Hoosier Health and Hoosier Living as defendants, (2) Tabbert Hahn represents Hoosier Health and Hoosier Living in ongoing litigation, and (3) there is no evidence of [informed] consent." *Id.* at 411.

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Lawyers' Interests

- Generally, a lawyer **shall not**:
  - Enter a business transaction (or a more advantageous fee agreement renegotiation) with a client or knowingly acquire an interest adverse to a client unless: (1) the interest was acquired under terms that are fair and reasonable to the client, fully disclosed in a plain language writing; (2) the client is advised in writing to seek independent counsel regarding the interest, (unless the client is independently represented, in which case a written disclosure from the lawyer or the independent counsel suffices); and (3) the client gives signed, written informed consent that meets specific requirements enumerated in RPC 1.8(a)(3). RPC 1.8(a).

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LAWYERS' INTERESTS

- Generally, a lawyer **shall not**:
  - Use information regarding the representation to the client's disadvantage for the benefit of the lawyer or a third person, without informed consent, unless RPCs allow or require. RPC 1.8(b).
  - Solicit a substantial gift from a non-relative client. RPC 1.8(c).
    - Where the effectuation of the substantial gift requires the lawyer to draft a will or conveyance, the non-relative client must get independent legal advice.

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- Generally, a lawyer **shall not**:
  - Before a representation concludes, enter or negotiate an agreement that gives the lawyer literary or media rights to a portrayal or account based in substantial part or on information relating to the representation. RPC 1.8(d).
  - Provide financial assistance to a client for pending or anticipated litigation except to advance court costs and expenses "the repayment of which may be contingent on the outcome of the matter" or if the client is indigent. RPC 1.8(e).
  - Prospectively limit the lawyer's malpractice liability to a client who lacks independent representation regarding the agreement; or settle a malpractice liability claim with an unrepresented existing or former client, unless the client is advised in writing to seek independent counsel regarding the settlement. RPC 1.8(h).

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Lawyers' Interests

- Generally, a lawyer **shall not**:
  - Be paid for legal representation by anyone other than the client, except if: the client gives informed consent, the arrangement does not interfere with the lawyer's independent professional judgment or the client-lawyer relationship, and client's information is protected. RPC 1.8(f); *see* related RPC 5.8.
    - If there is a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's interest in the fee arrangement or by the lawyer's responsibilities to the payor, there is a conflict, and the lawyer must comply with RPC 1.6 (confidentiality) and RPC 1.7.
  - Where the lawyer represents two or more clients, enter or aid entry of: (1) an aggregated settlement of the claims of/against the clients; or (2) aggregated plea agreements in criminal matters, absent signed, written informed consent from each client and a detailed disclosure by the lawyer. RPC 1.8(g).

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Lawyers' Interests

- Generally, a lawyer **shall not**:
  - Acquire a proprietary interest in the action or subject matter of litigation in the lawyer's representation of the client, except for a lien to secure fee or expenses or a contract for reasonable contingent fees in civil cases. RPC 1.8(i).
  - Engage in sexual relations with a client, unless the consensual relationship predated the representation. RPC 1.8(j).
  - For part-time prosecutors or deputy prosecutors, represent private clients in matters involving issues over which the prosecutor has statutory prosecutorial authority of responsibilities, subject to exceptions for tort cases, qualifying infractions, and family law cases. A part-time deputy prosecutor may be granted a prior, express written limitation of duties that authorizes representation of private family law clients. RPC 1.8(l).

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Lawyers' Interests

- Generally, a lawyer **shall not**:
  - Act as advocate at a trial in which the lawyer is likely to be a necessary witness unless: (1) the testimony pertains to an uncontested issue; (2) the testimony pertains to the nature and value of legal services rendered in the case; or disqualifying the lawyer would cause substantial hardship to the client.
    - The dual role may give rise to a conflict that will require compliance with Rules 1.7 or 1.9., i.e., if there is likely to be substantial conflict between the client's testimony and that of the lawyer, the representation involves a conflict that requires compliance with Rule 1.7. RPC 3.7, cmt. 6.
  - A lawyer may act as an advocate in a trial in which a fellow firm lawyer may be called as a witness, subject to RPC 1.7 and RPC 1.9. If RPC 1.7 or RPC 1.9 disqualifies the testifying fellow firm lawyer, the other lawyers in the firm are also disqualified. RPC 3.7.

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RELEVANT CASES

- ***Camm v. State*, 957 N.E.2d 205 (Ind. Ct. App. 2011)**

  - During Camm's third trial and second re-trial for killing his family, the prosecutor from Camm's second trial hired a literary agent. Camm was found guilty. The literary agent negotiated a publishing deal, and the prosecutor received a book advance. After our Supreme Court overturned Camm's conviction, the prosecutor told his agent he intended to retry Camm; to proceed with writing the book; and to return the book advance to avoid the appearance of impropriety. The publisher cancelled the contract, and the prosecutor returned the advance. Camm's motion for a special prosecutor was denied.

  - On appeal, Camm alleged "an actual conflict of interest exist[ed] because, when [the prosecutor] signed the literary contract, he irreversibly divided his loyalties between his personal interests in his book and his duties as a prosecutor[.]" *Id.* at 209. In reversing the trial court, Judge Baker found clear and convincing evidence of an actual conflict of interest in violation of RPC 1.8(d).

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RELEVANT CASES

- ***In re Sniadecki*, 924 N.E.2d 109 (Ind. 2010)**

  - Respondent owned his firm's premises as tenant in common with a co-owner, and Respondent and Co-owner were responsible for the mortgage. Respondent subsequently entered into an oral agreement for the sale of the property to Client. "Client had no experience or expertise in purchasing real estate. Respondent did not advise Client that he did not hold clear title to the property, he did not put the terms of the sale of the Property in writing, and he did not advise [Client] to seek independent legal counsel regarding her purchase." *Id*. at 115-16.
  - Under pressure, Client made a partial payment for the property. When Client requested another inspection, she felt that Respondent intimidated her. Client backed out of the deal and demanded return of her partial payment, which Respondent failed to honor.
  - Our Supreme Court found violations of RPC 1.8(a) and 8.4(c) and disbarred Respondent.

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Rule 1.9. Conflict of Interest: Former Clients

- After a representation ends, a lawyer still owes duties to the client(s). Past representations can present weighty conflicts risks. Conflicts can arise:

(1) when a lawyer represents a new client, in the same way or a substantially similar way, as a former client with materially adverse interests;

(2) where a lawyer switches firms and possesses information that is material to the representation of the former client; and

(3) regarding the use of information acquired through a representation.

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Rule 1.9. Conflict of Interest: Former Clients

- "Matters are 'substantially related' if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." RPC 1.9, cmt. 3.

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Rule 1.9. Conflict of Interest: Former Clients

- A lawyer "shall not knowingly represent a person in the same or a substantially related matter" in which the lawyer's former firm "had previously represented a client whose interests are materially adverse to that person; and about whom the lawyer acquired material client information, unless the lawyer obtains the former client's written informed consent. *See* RPC 1.6, RPC 1.9(c).

- Additionally, "a lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter: (1) use information relating to the representation to the disadvantage of the former client," except as permitted or required by the RPCs or when the information is generally known; or (2) reveal information regarding the representation," except as permitted or required by the RPCs.

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Practice Pointer:

- When a lawyer was directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction is prohibited.

- On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct matter of that type, even though the subsequent representation involves a position adverse to the prior client. . . . ." *See* RPC 1.9, cmt. 2.

- **KEY INQUIRY**: Was the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter? *See* RPC 1.9, cmt. 2.

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RELEVANT CASES

- ***In re Smith*, 991 N.E.2d 106 (Ind. 2013)**

  - Smith had a long-term sexual relationship with a woman, who held a high-level government role. Smith represented the woman in multiple matters and "advanced money, made personal loans, permitted his credit card to be used, and provided personal assistance[.] Smith grew [ ] frustrated . . . over [the client's] lack of payments but continued to represent her . . . . Smith did not consider whether their personal relationship, including [the client]'s financial reliance on Smith, would materially limit his ability to represent her. . . ." *Id.* at 108-09.

  - Smith wrote an autobiography that included information acquired through the representation. Our Supreme Court disbarred Smith for "revealing confidential, sensitive information relating to his representation of a former client by publishing it in a book for personal gain" and by engaging in conduct involving dishonesty or misrepresentation. *Id.* at 107.

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Rule 1.10: Imputation of Conflicts

- RPC 1.10 provides that where a lawyer within a firm is prohibited from undertaking the representation of a client by RPCs 1.7, 1.9, or 2.2., no lawyer within the firm may knowingly represent that client, *unless* the prohibition relates to a personal interest of the prohibited lawyer and poses no significant risk of materially limiting the remaining firm lawyers' representation of the client. RPC 1.10(a).

- Notably, after a lawyer severs from a firm, the firm may represent a person with interests materially adverse to those of the former firm lawyer's client, who is not currently represented by the firm, except where "the matter is the same or substantially related to that in which the formerly associated lawyer represented the client"; and any lawyer remaining in the firm has material information that is protected by RPC 1.6 and RPC 1.9. RPC 1.10(b).

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Rule 1.10: Imputation of Conflicts

- Further, where a firm lawyer is disqualified from a matter, no lawyer in the firm can knowingly represent a person in the matter, unless "the disqualified lawyer lacked primary responsibility for the matter that caused the disqualification; the disqualified lawyer is timely screened from any participation in the matter "and is apportioned no part of the fee therefrom"; and any affected former client received prompt written notice "to enable it to ascertain compliance with the provisions of this rule." RPC 1.10(c).

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Practice Pointer

- Imputation of a conflict to the attorneys within a firm can be lifted with the informed consent of the affected client or the former client, as provided in RPC 1.7.

    - Basically, the lawyer must determine that the representation is not prohibited by RPC 1.7(b) and that "each affected client or former client has given informed consent to the representation, confirmed in writing." RPC 1.10, cmt. 7.

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Drake v. Dickey, 2 N.E.3d 30 (Ind. Ct. App. 2013)

- Law firm partner, Drake, owned a farm adjacent to land that Duke Realty intended to develop. Drake declined Duke Realty's offer to buy her farm. Drake's law firm recognized the conflict and stopped representing Duke Realty regarding the proposed development. Only after Drake and Duke Realty entered into a confidential Land Use Agreement "that limited how Duke Realty could develop its land near Drake's property" did the firm resume representing Duke Realty regarding the proposed development.

- The relationship between Drake and Duke Realty soured. Drake applied for a plan commission position, and Duke Realty threatened pull its business from the firm unless Drake withdrew her application; she did. Drake subsequently alleged Duke Realty had breached the land use agreement. Duke Realty met with the firm and again warned it would pull its business if Drake took further action against Duke Realty.

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Drake v. Dickey, 2 N.E.3d 30 (Ind. Ct. App. 2013)

- On appeal, Duke Realty argued "'had a legitimate business interest in exercising its unfettered right to end its attorney-client relationship with [the firm] .... not[ing] that 'the personal interests of a lawyer cannot 'be permitted to have an adverse effect on the representation of a client,' *id.* at 26 (citing RPC 1.7(a)(2), cmt. 1, 10) and that one lawyer's conflict of interest is generally imputed to that lawyer's entire firm, see RPC 1.10(a)." *Id*. at 40. Judge Najam reasoned:
  - "But our Rules of Professional Conduct do not justify a client's tortious behavior toward an attorney. While Duke Realty has an unfettered right to terminate its attorney-client relationship with [the firm], Duke Realty could have exercised that right without issuing a threat or ultimatum regarding Drake. A client's first-party right to terminate an attorney-client relationship does not include a corresponding third-party right to interfere with an attorney's partnership agreement." *Id*. at 40-41.

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Drake v. Dickey, 2 N.E.3d 30 (Ind. Ct. App. 2013), cont.

  - Judge Najam also found the firm's resumed representation of Duke Realty after Drake and Duke Realty executed their land use agreement "indicate[d] that . . . Drake's personal interest did not 'present a significant risk of materially limiting the representation of the client by the remaining lawyers of the firm.'" *Id*. at 41 (citing RPC 1.10(a)).

- Judge Najam affirmed in part, reversed in part, and remanded finding, in relevant part, the existence of a genuine issue of material fact regarding whether Drake's personal interest adverse to Duke Realty "present[ed] a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm." *Id*. at 42.

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FEES

- When a lawyer and client enter a fee agreement, the ensuing business relationship can give rise to a conflict of interest. When such agreements are modified for any reason, the lawyer must ensure that the client is fully apprised and is allowed to consult with independent counsel regarding the proposed modification.

- Under the RPCs, a lawyer may be paid for legal services rendered by a person other than the client, provided that the lawyer obtains the client's informed consent and the payment arrangement does not compromise the lawyer's duties of loyalty and independent judgment to the client. According to Comment 3 to RPC 1.8, the critical inquiry in assessing such a payment arrangement for a conflict of interest is <u>whether there is a significant risk that the lawyer's interest in accepting the payment agreement will materially limit the lawyer's representation of the client</u>. If such is the case, the lawyer should forgo the payment agreement, unless the affected client(s) gives written informed consent.

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FEES (cont.)

- Where there is significant risk that accepting the payment arrangement will materially limit the lawyer's representation of the client, the representation may still go forward if:
  - the lawyer reasonably believes the lawyer can provide competent and diligent representation to the affected client(s);
  - the representation is not prohibited by law;
  - the representation does not involve claims by one client against another in the same action; and
  - the affected client(s) give written informed consent.

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RELEVANT CASES

- ***In re Colman*, 885 N.E.2d 1238 (Ind. 2008)**.

  - Client was arrested for selling a cache of marijuana to a CI. Arresting officers failed to find $50,000.00 that was on the client's premises. Client told Respondent about the undiscovered money, which Respondent retrieved and deposited into his personal account. "The account was not an attorney trust account and contained Respondent's own funds." *Id*. at 1241.

  - Respondent urged the client to transfer ownership of a condominium to Respondent to avoid forfeiture and indicated that the equity in the condominium would defray legal fees. Client believed that the arrangement would allow him to get the condominium back in the future. Respondent prepared a written agreement wherein he assumed responsibility for the mortgage balance and, thereby, purchased the condominium. The agreement also transferred the contents of the condominium to Respondent. In exchange, Respondent agree to forgo owed and anticipated attorney's fees.

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RELEVANT CASES

- ***In re Colman*, 885 N.E.2d 1238 (Ind. 2008), cont.**

  - According to our Supreme Court:
    - Colman did not request an appraisal of the condominium or its contents.
    - Colman gave Client no estimate of the future legal fees.
    - The amount of Colman's future legal fees was "entirely speculative."
    - Colman did not advise Client to seek independent counsel re transaction.
    - The agreement did not set out the value of services Colman would perform.
    - Colman's charge of $65,000 for the representation was unreasonable.
    - Violations: RPC 1.8(a). Colman charged an unreasonable fee; drafted a will for a non-relative "that would give Colman or his son a substantial gift"; <u>represented a client "when there was a conflict of interest due to Colman's personal interests," failed to hold property of a client separate from Colman's property, failed to keep a client's funds in a clearly identified trust account</u>.
    - Penalty: 3-year suspension without automatic reinstatement.

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PUBLIC ATTORNEYS

- A lawyer who formerly worked as a public officer or government employee shall not knowingly use information related to the representation to the government's disadvantage or reveal information re the representation, except as RPCs allow.

- Nor shall a lawyer who formerly worked as a public officer or government employee "represent a client in connection with matter in which the lawyer participated personally and substantially . . . , unless the government agency gives informed consent to the representation, confirmed in writing. It is immaterial whether the lawyer is directly adverse to the former client. RPC 1.11(a).

- Where the former government lawyer joins a firm and is disqualified from representation due to her past personal and substantial participation in the matter . . . , no lawyer in the firm may knowingly undertake or continue the representation, unless the former government lawyer is timely screened from participation or from associated fees; and the government agency receives prompt written notice that allows the agency to assess the firm's compliance with RPC 1.11. RPC 1.11(b).

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PUBLIC ATTORNEYS (cont).

- Generally, a lawyer in knowing possession of confidential government information "acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person."

- Confidential government information refers to "information . . . obtained under governmental authority and which, . . . the government is prohibited . . . from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public."

    - A firm with such a lawyer "may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter" and does not receive any part of the fee from the matter. RPC 1.11(c).

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PUBLIC ATTORNEYS (cont).

- A lawyer, who is currently serving as a public officer or employee, shall not: participate in a matter in which the lawyer participated personally and substantially in private practice or in nongovernmental employment, unless the relevant governmental agency gives informed consent, confirmed in writing; or "negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially," subject to exception for judicial law clerks, other adjudicative officers, or arbitrators pursuant to Rule 1.12(b). It is immaterial whether the lawyer is directly adverse to the former client. RPC 1.11(d).

RELEVANT CASE

- ***Matter of Burton*, 139 N.E.3d 211 (Ind. 2020), *supra*.**

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RELEVANT CASES (cont.)

- ***Matter of Burton*, 139 N.E.3d 211 (Ind. 2020)**

- Burton was chief deputy to the elected Knox County prosecutor. A Vincennes detective interviewed a woman who faced meth-related charges in Greene Cty. The woman was involved in a long-term sexual relationship with Burton. After her conviction, the woman told Burton about the detective. Burton alerted the elected prosecutor, Carnahan, who filed a misconduct complaint against the detective.

- Respondent intimated that the woman's executed DOC sentence could be modified to home detention, which the woman could serve while she resided with Burton; offered to contact the Greene County prosecutor for the woman; and held himself out as her legal counsel.

- Violated RPC 1.7(a)(2), 8.4(d) and -(e)

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Matter of Burton, 139 N.E.3d 211 (Ind. 2020), cont.

- RPC 8.4(d), -(e): "[i]t is professional misconduct for a lawyer to: . . . engage in conduct that is prejudicial to the administration of justice; [or] state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the [RPCs] or other law. . . ."
- Our Supreme Court opined that Burton's violations constituted "more than an isolated conflict of interest"; and rather, "reflect[ed] an attempt by Burton to improperly leverage his prosecutorial authority to exact a personal vendetta" against the detective, who was "seeking to determine whether Burton or Carnahan had attempted to trade consideration of leniency in [the woman]'s criminal matters of the years for sexual contact"; *id*. at 213, and that Burton's "overriding motivation was not to further the public interest but rather to protect his own self-interest." *Id*. at 214.

•Penalty: 90-day suspension with automatic reinstatement, if eligible

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FORMER JUDGE, ARBITRATOR, MEDIATOR, 3rd PARTY NEUTRAL

- Generally, subject to an exception in RPC 1.12(d), "a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator, mediator or other third-party neutral, or law clerk to such a person, unless all parties to the proceeding give informed consent, confirmed in writing." RPC 1.12(a). Personal and substantial participation does not include the exercise of administrative responsibility in a court "where the [former] judge had previously exercised remote or incidental administrative responsibility that did not affect the merits." RPC 1.12, cmt. 1.

- "A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to any such person may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the law clerk's employer." RPC 1.12(b)

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FORMER JUDGE, ARBITRATOR, MEDIATOR, 3rd PARTY NEUTRAL (cont.)

- Where a lawyer is disqualified due to past personal and substantial participation in a matter as judge or other adjudicative officer, arbitrator, mediator or other third-party neutral, or law clerk to such a person, conflicts of the disqualified lawyer will be imputed to all lawyers in the firm such that no lawyer in the lawyer's firm may knowingly undertake or continue representation in the matter, unless the firm timely screens the lawyer from participation in the matter and from the associated fee and provides prompt notice to the parties and tribunals "to enable them to ascertain compliance. . . ." RPC 1.12(c).

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Section Three

Understanding the Ethics of Business Development & Marketing

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Section Three

Understanding the Ethics of
Business Development & Marketing………………. F. Anthony Paganelli
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9 Social Media Trends for 2022

Marketing Your Brains Out – Without Losing Your Mind! – (Reprinted with Permission)

9 Social Media Trends for 2022[1]

1. TikTok will become the most important social network for marketing (??!)

2. Big ad dollars will be spent on smaller networks

3. Clients will expect to buy your products/pay bills directly on social media

4. No one will want to talk about your brand on the phone

5. Long-form video is bust, except on YouTube

6. Individuals will outsource (at least some of) their engagement tactics to a Creator

7. Individuals will need to learn paid advertising (even if they don't do ads yet)

8. Individuals won't post anything without a social listening strategy

9. Your managing partner may ask you to develop a social audio strategy

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[1] These trends are from Hootsuite's Global Social Trends 2022 Report

Marketing Your Brains Out-- Without Losing Your Mind!℠

Author:
Reid F. Trautz

Written Materials for

ICLEF Applied Professionalism
October 2022

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Whether you are a seasoned lawyer or a newly minted one, marketing and client development are vital to your business. The flow of paying clients is the life-blood of every firm. Unfortunately, marketing is not taught in law school, and few lawyers have marketing degrees. So many of us try different activities to develop a stream of clients, but are unhappy with the total commitment of time and the ultimate results.

It doesn't have to be that way. Let's explore some of the concepts and secrets to efficiently and effectively create a practice full of paying clients, without losing your mind!

"The only place success comes before work is in the dictionary."
-Vince Lombardi

Marketing your practice is a crucial component in your success as a law practice entrepreneur. By definition, marketing is the total sum of activities to promote, sell and distribute a product or service. Many law practice entrepreneurs view marketing as just advertising and promotion when, in fact, it is much more. Marketing includes developing systems and procedures to service client needs in the marketplace, doing the legal work, charging the client and obtaining feedback about the legal services to improve those services for the next client. In this context, it is difficult to see how one can separate "marketing" from the other activities that make up the practice of law.

According to Michael Gerber, author of *The E-Myth Revisited*, most entrepreneurs are not entrepreneurs, just good "technicians" who decide to start a business so they can be a good technician. However, many "entrepreneurs" fail to understand they must consistently market the goods or services they offer, not just produce the product or provide the service. In other words, all law practice entrepreneurs must take time to develop new clients, analyze current client needs, and hone delivery of their services. Even lawyers who have a good client base must continue to market

their services to existing clients and to potential clients who will eventually replace clients whose need for legal services ends or diminishes.

> **"What you do with your billable time determines your current income, but what you do with your non-billable time determines your future."**
>
> **-- David Maister,** ***True Professionalism***

Marketing is an investment in your practice. It is this investment of time and creativity to raise public awareness of your law practice and develop systems and procedures to better serve clients who will sustain your practice over many years. While many other businesses have sales people that drive customers to the business, there is no separate sales force in a solo practice or small law firm--just lawyers and staff. However, lawyers and staff in solo practice and small firms can undertake numerous activities to market and develop a client base through existing clients and new clients.

The Nine Core Principals of Legal Marketing

1. **Understand Your Marketing Role.** Whether you are in a large or small firm, partner or associate or solo practitioner, you need to have a clear sense of your role in firm marketing. It today's environment, the differences in roles is truly just a matter of degree. Understand and accept that you are running a business, and that you must balance the roles of lawyer, entrepreneur and manager. Marketing will be forever.

2. **Have a Marketing Plan.** Keep it simple, and make it measurable. Use it to avoid a shotgun approach, which is the biggest waste of time and money. Approach marketing strategically. Do some simple market research, then act: What do I want my practice to look like? Where do my best clients come from? What is my most profitable type of client or work? Where can I find more of the work I want? Set goals that you can measure, such as "I will

review and update my LinkedIn profile in 30 days" or "I will review my client service delivery processes and update those processes within 90 days."

3. **Read Your Advertising Rules**: Legal advertising has certain limits that must be respected at all times. Learn to successfully market without getting close to the line known as "false, fraudulent, misleading, deceptive, self-laudatory or unfair statements or claims." Read the Indiana Rules of Professional Conduct advertising rules—numbered 7.1-7.5. Check your state bar for opinions, articles and publications to learn the limitations in Indiana.

4. **Understand your Marketplace.** Knowing who you serve (or want to serve) is the only way to target your marketing efforts. Who is your target market? What lawyer attributes are important to them? Does your marketing message fit the audience?

5. **Differentiate your firm from others in the marketplace.** This is also known as a Unique Selling Proposition. Common ways to differentiate include client service, practice area specialization, form of business model, and pricing; however, general claims and promises often are not effective. Be specific.

6. **Focus on client needs, not on the firm attributes.** When marketing to potential buyers of legal services, understand they are looking for a lawyer to solve *their* problem, not regal them with prior conquests. Make sure your marketing messages emphasize your understanding of their legal problems, not just how good you were for someone else. Follow-up by doing more listening than talking at the initial consultation.

7. **Leverage Technology.** Use common computer tools and emerging Internet services to increase the quantity and quality of your marketing efforts: Use a contact manager such as Outlook to organize your network and increase the frequency of contact with people in your network and simplify the process of meaningful communication. Build a blog that people find and use as a resource. Join and participate in social networking sites.

Buy a scanner that scans business cards and use it to build new relationships. If these are foreign concepts, start slowly, but start *now*.

8. **Know Who You Are**: Create, practice, and hone your own 5-second "sound bite" and 30-second "elevator" speech. These are your core personal marketing messages. Refine each one until they feel right. Develop variations based on different audiences/market segments.

9. **Develop an operational plan to handle your new client business.** Review your present ability to handle client work, and adapt or change process to handle more work. You may need new software, more administrative help, better work flow processes, and improved digital filing handling procedures just to name a few common operational changes.

Writing Your Marketing Plan

A marketing plan must be on paper. Period. There, I've said it as clear as I can. Why a plan? Because a goal without a plan is only a wish. A plan can be for a sole practitioner, an individual plan for one lawyer in a small firm, or a firm-wide plan for multiple lawyers. If your goal is to find and keep good clients, there must be a written plan. The plan does not have to be lengthy or full of marketing buzzwords, but it must contain concrete goals that are measurable.

So what's a marketing plan supposed to look like? In a nutshell, it should be a roadmap that has three to five separate roads that lead to groups of people from which some will emerge as paying clients. Clients for whom you will then do work and get paid, and who will then tell their friends, family and colleagues about your superb service. (Much more on that later.)

But before one can design the roadmap, you have to know where you are going. That takes a bit of analysis and goal-setting.

"If you don't know where you are going, what difference does it make what path you take?"

-- Lewis Carroll, Alice's Adventures in Wonderland

The start of the marketing plan is really the ending point. You should have a vision about how your practice fits into your personal and professional goals and what your practice will look like when it is built. It doesn't have to be a complete picture, but it should be more than just a few vague ideas. Even if you are currently in your own practice, ask yourself these questions to help get a more complete picture:

- What type of practice do I find the most personally and professionally fulfilling?
- What kind(s) of law do I want to practice? Is it enjoyable? Profitable? Exciting?
- What kinds of clients do I want? Who is my ideal client? Describe in detail.
- In what areas am I competent to practice with current resources and staff?
- What are the legal needs of the marketplace?
- How much do I want or need to earn?
- How many hours each week do I want to devote to my practice?
- Can I afford to take time to develop a "preferred" client base or do I need to start generating income more quickly?

Write the answers to these questions as part of your marketing plan. Then turn these thoughts into goals. (Yeah, this is the uncomfortable part; maybe a bit scary. Be assured this exercise will bring clarity to your plan.) The goals should create a picture of your practice. Be as definitive as possible. Be honest with yourself. Soar.

The goals could be sentences such as:

> I will represent international collegiate athletes who desire to become professional athletes. By choice, I desire to limit my practice to clients entering professional sports leagues--preferably no more than 20 clients annually so that I can concentrate on building quality relationships. I want to work no more than 45 hours each week with the assistance of a qualified paralegal and earn $150,000 annually.

Your goal may not be exclusivity as in this example; you may have totally different goals. It may take several thoughtful interludes (or discussions with partners) to complete your picture of your practice, but it will be worth it.

Now that we have an idea of where we are going, we can work on that roadmap to a practice full of loyal clients.

Developing Your Marketing Plan

Marketing studies tell us that personal referrals are the most significant source of business for the vast majority of practicing lawyers. Even publications that seek to educate legal consumers almost always instruct readers to ask friends and family for names of successful lawyers. In fact, all clients come from just five sources. Yep, just five.

• Family and Friends: Including spouses, law school classmates, neighbors, distant relatives, friends, and other lawyers who are friends, not necessarily business associates. These people can be the best source of referrals, especially when first starting in practice. In fact, these people should make up your initial marketing address list.

• Clients: Present and former clients who tell their friends, relatives and colleagues about their lawyer. Clients love to brag about their lawyer, sometimes to the level of "My lawyer can beat up your lawyer," but that's a story for another day.

• Repeat Clients: Former clients who are satisfied with your prior services will often return for additional legal work. One road in a good marketing plan is to periodically contact these satisfied clients to remind them you are appreciative of their trust; in turn your name will be “top of mind” when someone asks them for a lawyer referral.

• Other Professionals are a good source of referrals, including other lawyers whose clients also need your services (that they do not offer), CPAs, real estate agents, financial planners, etc. Often, these professionals are asked for the name of a good attorney by their clients. Examples include business lawyers who are asked by corporate clients for the name of a good tax or family law attorney as well as financial planners whose clients ask for trust and estate lawyers. According to law practice management expert, Paul McLaughlin, this referral is an important one because it often impacts on the relationship between the professional and the client; you must provide quality services to that mutual client or risk losing the other professional as a referral source.

• Self-referred Clients: These are clients who hear, see or read about your legal abilities and services through a vehicle other than a person; this includes social media platforms, TV and radio advertising and appearances, informative articles and news stories in newspapers and trade journals, law firm web sites, and lawyer networking sites. This type of referral also includes people who read about a seminar or other event you advertise and come to the event before engaging your services. Self-referred clients either do not have a trusted referral source or are dissatisfied with their present lawyer–a common theme in the legal marketplace today.

Often lawyers focus on attracting only self-referred clients, but the reality is that many lawyers find success just focusing on the first four sources. And with good reason.

Marketing experts agree that a consumer must usually have multiple contacts with a product or a service before they have enough confidence to take action. That usually means a consumer must hear or see information about a product or service six to eight times before being cognizant of it and willing to find out more and/or buy it. And it takes time to build this consumer trust. However, if another person whom that consumer trusts tells them to try the service, the trust in that person is transferred to the product or service, without having multiple exposures or contacts. Think Alex Trebek for Colonial Penn Life.

For example, a person seeking a good tax attorney receives a positive recommendation from a close friend to call Lawyer X. The inquiring person's trust in her friend is transferred to the recommended attorney, thereby bypassing the need for Lawyer X to have multiple contacts with that person because the trust is already there. (Although the lawyer must confirm, earn, and maintain that trust over time.)

All five sources can produce good clients, but the best are client referrals–people who have actually used and paid for your services and walked away satisfied. But in order to get these valuable referrals, you must provide a positive experience for the client that meets or exceeds all expectations.

The Top Ten Marketing Activities to Build Your Practice

1. Create a contact list, and then use it to prospect and mine for new business.

- Organize information about family members, friends, school classmates, business colleagues, etc.
- Decide what level of communication each contact should receive, such as a personal phone call, email newsletter, lunch meeting, holiday card, all of the above, etc.
- Schedule time on your calendar to complete these communications

2. Produce, Present, Distribute by writing, teaching and publishing. Create and present a seminar for your local bar, community organization or business group. Get a business card from all attendees and follow-up after with a note. Take the written materials and edit into two or three smaller articles. Submit your articles for publication to state bar magazines, business journals as well as national publications pertaining to the legal profession or those read by your target market. Send copies of the published article to clients and other interested people on your contact list.

3. Create a web site, then build traffic to it and referrals from it.

- Make it education-based, client focused, and easy to find
- Provide something of value for free in return for their contact information
- Develop a companion blog and link to other informative sites
- Consider Google AdWords and other web advertising but make sure you understand how it works before buying
- Explore Facebook Live and YouTube videos as part of your educational-based marketing approach
- Fully understand Search Engine Optimization before buying

4. Join and participate in several organizations.

- Build your reputation in your target market
- Get your name and abilities in front of decision-makers
- Consider, bar associations, business groups, community and religious organizations

5. Find new services to offer to existing clients.

- Inform clients of your total package of services
- Become a problem-solver to all your clients
- Offer preventive services to risk-proof business clients

6. Make your offices and services convenient for your intended market, such as:

- Office location
- Web-based intake forms
- Retail hours
- Free, no-hassle parking
- House calls

7. Join social media networks, then use them to prospect and mine new sources of clients:

- Pick 2-3 networks, such as LinkedIn, Facebook, or Instagram
- Don't just do a personal profile, add a separate page for your business
- Use connections to leverage introductions to potential clients
- Know that 70% of Facebook users are outside the US
- Use your posts and tweets to deepen relationships

8. Test on-line directories and referral services for your target market.

- Choose wisely among sites such as Avvo or one provided by your state bar
- Understand the multiplier effect of referrals—can help or hurt your practice

9. Publish a periodic e-newsletter.

- News about your firm, information on the law in your legal niche; include a personal touch too, if appropriate
- You must commit to a publishing schedule and keep it
- Send to your contact list and web visitors
- Consider web services such as Constant Contact to assist your efforts

10. Refer business out to others—no strings attached.

- Marketing is not cheap, so don't just turn away clients seeking your services—send them to your referral network

- Don’t request reciprocity or *quid pro quo* unless your ethics rules allow it
- Search business journals and newspapers for business opportunities to forward to others in your network

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Reid F. Trautz is a lawyer, author, and practice management advisor who helps lawyers improve their businesses and the delivery of legal services to their clients. He serves as Director of the American Immigration Lawyers Association’s Practice & Professionalism Center. He is frequent speaker at legal conferences throughout North America on the issues of management, technology, legal ethics, and attorney-client communications. Reid is co-author of the book *The Busy Lawyer's Guide to Success: Essential Tips to Power Your Practice*, published by the ABA. In 2012, he served as the chair of ABA TECHSHOW, the legal profession’s premier technology conference. Today he serves as Co-Chair of the ABA Law Practice Division Futures Initiative and co-authors the *Future Proofing* column for *Law Practice* magazine.

Section Four

Vignettes of Legal Ethics

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Section Four

Vignettes of Legal Ethics……………………………………….James J. Bell
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3 Things to Know About Withdrawing From a Case

3 Things to Know About Reporting Ethics Violations

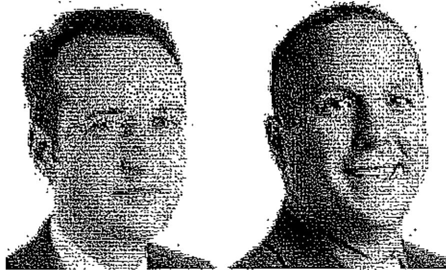
3 Things to Know About the Ethics of Files

3 Things to Know About Requests for Client Information

The Top Ten: A Summary of Recent Professional Liability Cases – 2021 Update

Bell/Gaerte: 3 things to know about withdrawing from a case

James Bell , K. Michael Gaerte February 12, 2014



James J. Bell K. Michael Gaerte

Unfortunately, there comes a time in some attorney-client relationships when breakup is inevitable. You may have tried to "work things out" with your client, but things only got worse. So what do you do?

You could try telling your client that "it's not you, it's me," even if deep down you know that "it's not you, it's your client." The reality is that you have lost whatever spark there was at the beginning of the case, and you and your client don't see the case the same way anymore. Worst of all, you don't share the same goals. You feel your passion for the case slipping away. Oh – there is one other thing. There is that little problem with money: You haven't received any.

At the risk of sounding like Dr. Phil, it sounds like you need to "move on" and "let go." But before you do, grab Rule 1.16 of the Indiana Rules of Professional Conduct and make certain you are withdrawing from the case ethically.

Here are three things to know about withdrawing from a case:

1. There are times when you must terminate the attorney-client relationship

Whether you want to or not, and regardless of what Dr. Phil advises, there are situations when you must break up with your client. These situations are outlined in Rule 1.16(a) of the Indiana Rules of Professional Conduct. These include times when the "representation will result in a violation of the Rules of Professional Conduct or other law," "the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client" or "the lawyer is discharged." For example, if your representation of the client will result in your assisting a client in fraud, then under Rule 1.16(a)(1), you must withdraw from the case.

2. When withdrawing, do not make the client's situation worse

Rule 1.16(b)(1) states that a lawyer may withdraw from representing a client if "withdrawal can be accomplished without material adverse effect on the interest of the client." What does that mean? That means you likely will not be able to withdraw from a case that is set for trial in a week. Furthermore, it also means that under Rule 1.6, you shall not reveal confidential information relating to the case.

If the reason for withdrawing is that your client has not paid you, state in your motion to withdraw that the "client has not fulfilled his obligations to the undersigned." Do not say, "The client lied to me about his willingness to pay my fees and I am upside down to the tune of $30,000." If the reason for

withdrawing is that, pursuant to Rule 1.16(b)(4), the "client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement," place in your motion something like "there has been a breakdown in the attorney-client relationship." It likely would have a materially adverse effect on the client to state something along the lines of, "My client insists that I present a conspiracy theory to the court, accuse the judge of criminal activity and otherwise impugn the impartiality of the tribunal."

3. In formal litigation, the court has the final say on the breakup

Rule 1.16(c) states that "a lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation." That means that the attorney must check the court's local rules prior to filing the motion to withdraw. Some rules require advance written notice to clients and that notice can include advice regarding the securing of new counsel, as well as notice of upcoming court dates.

Finally, Rule 1.16(c) states that "[w]hen ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." In other words, the breakup is not always the lawyer's call. In many cases, a judge must approve a lawyer's termination of representation. Oftentimes, the longer a lawyer is in a case, the less likely it is that a judge will allow the lawyer to withdraw. When the attorney-client relationship begins, look for signs that "things weren't meant to be." If the case goes on too long, not only will breaking up be hard to do, but it maybe impossible.•

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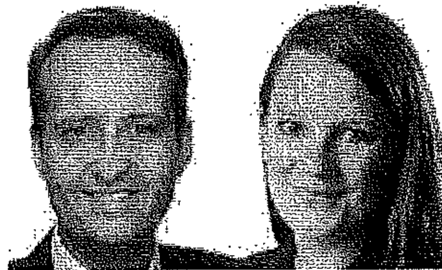
Bell/Whelan: 3 things to know about reporting ethics violations

James Bell , Jessica Whelan November 4, 2015


3 THINGS TO KNOW
James J. Bell Jessica Whelan

If you're like us, you're a lawyer who enjoys giving advice to others. As attorneys who represent other attorneys in disciplinary matters, we often receive requests to give ethics advice to lawyers. As luck would have it, we like lawyers and generally enjoy giving advice to lawyers when we can.

One request that we don't particularly like, however, is when we are asked to advise an attorney as to whether he or she "should turn in" another attorney to the Disciplinary Commission. Responding to these requests can be problematic for many reasons. Luckily, the duty to report (and most of what you need to know about it) is spelled out in the Indiana Rules of Professional Conduct. Here are three things you should know about an attorney's duty to report an ethics violation by another lawyer.

1. Not all violations of the Rules of Professional Conduct need to be reported

Rule 8.3(a) of the Indiana Rules of Professional Conduct states that "[a] lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."

In examining Rule 8.3, it is clear that the lawyer must "know" of the other attorney's violation. Rule 1.0(f) states that "'knows' denotes actual knowledge of the fact in question." Although it goes on to say that a "person's knowledge may be inferred from circumstances," it is clear that an attorney is not required to report anything unless they have "actual knowledge" of the violation.

Furthermore, the word "substantial" is placed in the rule for a reason. Our rules did not intend for every missed phone call to be reported as a lack of diligence or a failure to communicate. In fact, as outlined in the rule, if the alleged misconduct of the other attorney does not cause you to question the lawyer's honesty, trustworthiness or fitness as a lawyer, you can report the violation, but you are not required to do so.

Even if the attorney has actual knowledge of another's misconduct that is covered by Rule 8.3, confidentiality trumps the mandatory reporting provision. Specifically, Rule 8.3(c) of the Indiana Rules of Professional Conduct states that the rule "does not require reporting of a violation or disclosure of information if such action would involve disclosure of information that is otherwise protected by Rule 1.6."

Please keep in mind that Rule 1.6 is far broader than the attorney-client privilege. Rule 1.6 states that a

lawyer "shall not reveal information relating to the representation of a client unless the client gives informed consent," or there is another exception. Therefore, if you learn of an attorney's misconduct through the representation of a client and the client will not consent to your report to the Disciplinary Commission and no other exception to Rule 1.6 applies, you are required to forever hold your peace.

2. You are required to self-report convictions for crimes

Rule 8.3 is written in terms of "another lawyer." We define "another lawyer" as "any lawyer but me." That leads to the question of whether there is a time when an attorney is required to tell on "me?"

In Indiana, an attorney is required to self-report a criminal conviction. According to the Indiana Admission & Discipline Rule 23, § 11.1(a)(2), "[a]n attorney licensed to practice law in the state of Indiana who is found guilty of a crime in any state or of a crime under the laws of the United States shall, within 10 days after such finding of guilty, transmit a certified copy of the finding of guilt to the Executive Secretary of the Indiana Supreme Court Disciplinary Commission." Judges who are aware of an attorney's criminal conviction have a similar duty. See Admis. Disc. R. 23, § 11.1(a)(1).

3. Do not threaten to report an ethics violation to obtain an advantage in litigation

If you know that another attorney has committed an act of misconduct that would trigger a mandatory report, then follow the rule and report the attorney. Do not seek to report the attorney for your own personal gain – it could result in disciplinary sanctions.

For example, in the *Matter of Lehman*, 861 N.E.2d 708, 709 (Ind. 2007), the respondent filed an emergency request for a continuance of trial. The respondent "called opposing counsel and told him that his clients wanted to report opposing counsel for unethical conduct, but if opposing counsel agreed to the continuance, respondent thought he could dissuade his clients." The Indiana Supreme Court found that the respondent violated Rule 8.4(d) of the Indiana Rules of Professional Conduct, which prohibits conduct "prejudicial to the administration of justice, by communicating to opposing counsel a willingness to attempt to dissuade his clients from filing a complaint against opposing counsel as a *quid pro quo* for opposing counsel's agreement to a continuance of the trial."

Lehman and other cases demonstrate that a threat of a report to the Disciplinary Commission should not be used as a weapon in litigation. The disciplinary process serves an important purpose in regulating the legal profession. Trying to use the disciplinary process for self-serving purposes, such as to get an advantage in a case, is prohibited.•

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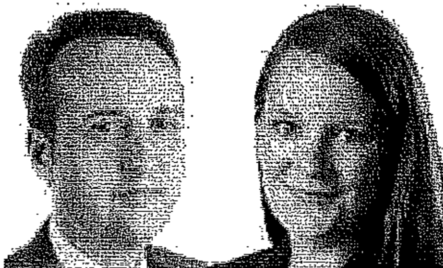
3 things to know about the ethics of files

James Bell , Jessica Whelan September 9, 2015


3 THINGS TO KNOW
James J. Bell Jessica Whelan

Due to renovations, we had to move our offices last week which meant we had to clean out our desks. And as you may know, when you clean out your desk, you learn about yourself. What we learned is that we should be featured on the TV show "Hoarders" due to the amount of "stuff" that we had hidden in our desks over the years. We also learned that James still has mini-cassettes in his desk in case he gets the urge to dictate into a handheld cassette recorder.

Another thing we learned was that we had files from matters that have long since ended. That led us to many questions like: Is that file mine? Or is it the client's? And if it is the client's, why am I paying to store someone else's property? And finally: How long do I have to keep this file? The answers to these questions are not as clear as maybe they should be. As we struggle to answer them, here are three things to know about storing files.

1. Whose file is it anyway? Some parts of the file are the client's

Most files contain a wide array of documents and other things — original documents from the client, lawyer notes, documents from other parties, court documents and even tangible property. Rule 1.16(d) gives some guidance on what to do with these materials. It states that "[u]pon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . surrendering papers and property to which the client is entitled." In fact, some attorneys have been disciplined for failing to return client materials after client requests. *See Matter of J.G.*, 700 N.E.2d 464, 465 (Ind. 1998).

But which materials are the client materials to which the client is entitled? A formal opinion recently issued by the American Bar Association's Standing Committee on Ethics and Professional Responsibility sheds light on this question. It states that at a minimum, when requested, a lawyer must surrender any materials provided to the lawyer by the client, legal documents filed with a tribunal (or those completed, ready to be filed, but not yet filed), executed instruments (like contracts), orders or other records of a tribunal, and correspondence of the lawyer connected to the representation on relevant issues, including email. ABA Comm. on Prof'l Ethics & Prof'l Responsibility, Formal Op. 471 (2015).

2. Parts of the files are yours

Although some parts of the file are the client's, the client is not entitled to papers and property that the lawyer generated for the lawyer's own purpose while working on the client's matter. *Id.* For example, the lawyer does not necessarily need to provide to the client: drafts or mark-ups of documents to be filed with a tribunal, drafts of legal instruments, internal legal memoranda and research materials, internal conflict checks, personal notes, hourly billing statements, firm assignments, notes regarding an ethics

consultation, a general assessment of the matter or documents that might reveal the confidences of other clients. *Id.*

However, this general rule comes with an exception: When the lawyer's representation of the client in a matter is terminated before the end of the matter, protection of the client's interest may require that the lawyer give the client certain materials generated for the lawyer's own purpose. *Id.* For example, if a filing deadline is imminent in a continuing matter for which the lawyer's representation has been terminated, and the lawyer has drafted but not finalized documents in connection with the filing deadline, the lawyer's drafts should be provided to the client.

3. How long do I have to keep this file? 5 years. Maybe more. Maybe less.

We wish we could give you a definitive answer. We looked to ABA Informal Opinion 1384 for guidance and it stated that "[w]e cannot say that there is a specific time during which a lawyer must preserve all files and beyond which he is free to destroy all files. … Good common sense should provide answers to most questions that arise." ABA Comm. on Ethics and Prof'l Responsibility Informal Op. 1384 (1977). (Gee, thanks for your clear guidance. (Speaking of hoarding, did we just quote an opinion from when Elvis was alive?)).

If you are looking for something better to hang your hat on than "good common sense," at least one Indiana authority gives a specific time frame for a specific kind of property. Rule 1.15(a) gives clear guidance for the maintenance of trust account records. It states that "Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation."

Since this area lacks bright-line rules, a tip for good practice would be at the end of the case, when you know you will not need the file anymore, to send notice to the client and ask them to come and get their file. Make sure to get a receipt showing that the client did, in fact, take the file. If you decide it is prudent to destroy files, keep a record of which files you have destroyed. And last, but not least, throw out those old mini-cassette tapes and go digital — it just makes "good common sense."•

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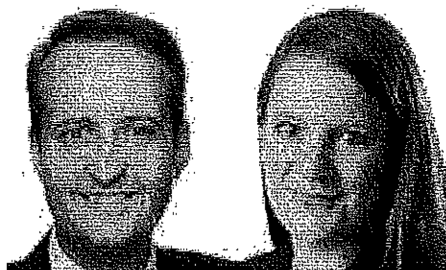
Bell/Whelan: 3 things to know about requests for client information

James Bell , Jessica Whelan September 7, 2016



3 THINGS TO KNOW
James J. Bell Jessica Whelan

You're sitting at your desk, minding your own business. You're conducting yourself ethically in every possible way. For one serene moment, the practice of law is as peaceful as a pattering brook wandering down a mountain. When you speak to yourself, you use your "Deep Thoughts by Jack Handey" voice. Everything is coming together. Everything is calm. The only thing that could change the balance you have achieved in the practice of law is for someone else to . . .

There is a knock on the door. For the sake of this story, let's say it's the FBI. Or the IRS or the State Police. Maybe it's someone serving a subpoena. Maybe it's the fictional attorney who likes to make face-to-face visits instead of sending out nasty emails. (Wait, who are we kidding?) No matter who it is, the person is a zen-destroyer because he only wants one thing: to ask you about your client.

Here are three things to know when a third party requests information about your client.

1. Don't be cooperative, civil or otherwise charming. You're a lawyer. You're a good person. You try to get along. Clients compliment you on your ability to "bridge the divide" or get to the "solution" in a case. So while the Zen-Destroyer is standing in your doorway with his demands for information, you may instinctually say "OK. How can I help you?" Don't follow that instinct. This is one of the few times in the practice of law when it is better to get the answer from a law book than it is to follow your gut (That said, if your instinct calls for you to obstruct, be discourteous and act like a brick wall, follow that instinct. You're going to like what we are about to say next).

Rule 1.6 of the Indiana Rules of Professional Conduct says that unless you have client consent, you have a duty to resist. For example, Comment [13] to Rule 1.6 of the Indiana Rules of Professional Conduct says:

"A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, **the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law.** In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order."

Id. cmt. 13 (emphasis added).

Secondary legal authorities also demonstrate the lawyer's duty to resist disclosure. For example, the Restatement of the Law Governing Lawyers holds that a lawyer may disclose confidential information when required by law, but only "after the lawyer takes reasonably appropriate steps to assert that the information is privileged or otherwise protected against disclosure." Restatement (Third) of the Law Governing Lawyers § 63 (1998).

2. Confidentiality relates to more than privileged communications. While you're making the Zen-Destroyer comfortable on your office couch and pouring him coffee, you may feel the urge to talk "a smidge" about your client's case. After all, not everything is a privileged communication, right?

Well, everything may not be privileged, but everything is likely confidential. Rule 1.6 of the Indiana Rule of Professional Conduct is broad. It provides:

"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 the disclosure is permitted by paragraph (b)." (Emphasis added).

What could you possibly talk about that does not "relat[e] to the representation of a client?"

If you think we are reading this too broadly, look at the comment to Rule 1.6. It explains: "A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer **must not** reveal information relating to the representation." *Id.* cmt. 2 (emphasis added). The comment also states that the "confidentiality rule ... applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." *Id.* cmt. 3 (emphasis added).

3. Make sure you have cover. Rule 1.6 lists several instances when confidential information can be shared. Informed consent of the client is one of those instances. Under Rule 1.4 of the Rules of Professional Conduct, if at all possible, you should be sharing the request for information with your client. If your client gives informed consent, then you have cover. If not, you may need to seek guidance from a court to make sure you are in compliance with your ethical obligations.

Make sure that you have cover and make sure that cover is documented. After all, as we said above, you're a lawyer. You're a good person. Don't make a Zen-Destroyer's request for information your problem.•

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The Top Ten: A Summary of Recent Professional Liability Cases 2021 UPDATE

Chuck Kidd,
Kevin McGoff &
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INTRODUCTION

The heart of this work revolves around the ways in which lawyers earn discipline from the Indiana Supreme Court. We also cite cases wherein lawyers face civil liability and may be exposed to disciplinary action.

One important disclaimer: This work identifies our categorization of the top ten ways in which lawyers get themselves sanctioned. That does not mean these are the *only ways* lawyers get themselves sanctioned. There are, of course, other ways in which lawyers face both disciplinary action and civil liability. In fact, lawyers often find new ethical problems, either intentionally or unintentionally, that cause legal problems for them personally.

Finally, the ten categories we have identified are discussed in *reverse* order. The most fertile sources of disciplinary problems appear last in this listing. In truth, all but the last two or three statistically occur with about the same frequency. Cases involving communications and diligence occur in surprisingly greater numbers than any other type of disciplinary action. In fact, these issues also surface in conjunction with the other types of lawyer conduct discussed herein.

Number **10**

DUTIES OWED TO OPPOSING OR THIRD PARTIES

In ***Matter of Blickman*, 164 N.E.3d 708 (Ind. 2021)**, Respondent, outside counsel to a private high school engaged in conduct prejudicial to administration of justice. Respondent represented the school with respect to a report that a teacher at the school had engaged in inappropriate conduct with a student and had received sexually graphic images from the student. In connection with this representation, Respondent attempted to prevent the student and her family from cooperating with law enforcement and the Department of Child Services. This improper demand for silence in connection with the school's settlement payment was "contrary to public policy and sought to subvert justice." *Id.* at 714. The Court reasoned: "After all, had the efforts to silence those involved been successful, the result would have been to shield [the teacher] from answering for his crimes and to turn loose a child predator to teach and coach at another unsuspecting school." *Id.*

Respondent was also charged with violations of Rule 1.1 (incompetence) and 1.2(d) (counseling or assisting a criminal act) because he failed to immediately advise the school to report the suspected child abuse as required by statute. The Court rejected these claims on the basis that it was reasonable for Respondent to require a few hours to research his client's obligations and Respondent did not encourage or participate in his client's scheme to avoid reporting.

Finally, Respondent was charged with a violation of Rule 8.4(b) (criminal conduct reflecting adversely on the lawyer's honest, trustworthiness, or fitness in other respects). This charge was based on Respondent's own failure to directly report the suspected child abuse and his possession of the sexually explicit images of the minor student in connection with his representation. The Court rejected these claims, reasoning that the law with respect to attorney reporting of child abuse is unsettled, and "guessing incorrectly about an unsettled legal matter, upon which reasonable minds can differ and indeed have differed, does not reflect adversely on Respondent's honesty, trustworthiness, or fitness as a lawyer." *Id.* at 718. Likewise, Respondent's possession

of the images was for the purpose of preserving evidence, not for any purpose that would reflect on his fitness as a lawyer. *Id.* at 718-19.

***Matter of Steele*, 19S-DI-427 (Ind. Aug. 6, 2021)**, presents the question of whether an an attorney's demand that disciplinary grievances filed by an opposing party in a civil matter be withdrawn as a condition of settlement be "prejudicial to the administration of justice" within the meaning of Rule 8.4(d) when those grievances were meritless? The Court held that "a coercive threat to file a grievance with the Commission, or (as here) a quid pro quo demand that a grievance be withdrawn, violates Rule 8.4(d)." Respondent was suspended for 30 days, in part because during the disciplinary proceedings, his conduct was abusive to the Commission, the Commission's staff, and the hearing officer.

In ***Matter of McClarnon*, 165 N.E.3d 989 (Ind. 2021)**, Respondent represented a child's "Paternal Grandmother" following the father's death. Respondent initiated a guardianship action by filing a petition for guardianship, naming and serving "Mother" as an interested party. On December 2, 2019, Respondent filed on Paternal Grandmother's behalf a petition for emergency custody in the guardianship action. Mother's counsel objected, and the guardianship court issued an order on December 4 denying the petition for emergency custody.

Meanwhile, on December 3, 2019, Respondent also filed a "Verified Petition for Emergency Ex Parte Custody of Minor Child" in a separate, pre-existing paternity case involving the same child. This petition did not contain a certificate of service or comply with the notice requirements of Trial Rule 65(B). A hearing on this petition was held on December 5 in the paternity case, and neither Mother nor her counsel were present. The paternity court granted this emergency petition on December 6. Mother's counsel subsequently obtained a change of judge in the paternity case and filed a motion to correct error, which was heard by the successor judge in early 2020. Following that hearing successor counsel appeared for Paternal Grandmother and Respondent's appearance was ordered withdrawn.

Respondents conduct violated Rule 3.5(b) (engaging in an improper ex parte communication with a judge); Rule 8.4(d) (engaging in conduct prejudicial to the administration of justice); and Rule 8.4(f) (assisting a judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law). Respondent received a public reprimand.

In ***Matter of Martin*, 166 N.E.3d 345 (Ind. 2021)**, Respondent represented "Husband" in ongoing post-dissolution litigation involving Husband's marriage to "First Wife." In August 2018, a domestic dispute between Husband and "Second Wife" led to criminal charges against Second Wife and Husband's petition for marital dissolution from Second Wife. Respondent also represented Husband in this dissolution action. Respondent deposed Second Wife in the post-dissolution proceedings without notifying Second Wife's counsel in her own dissolution and criminal matters involving Husband. Respondent also provided a copy of the deposition to the prosecutor handling the

Second Wife's criminal matter. Respondent violated Rule 4.2 by speaking to a represented party about the subject matter of the case in which she is represented. Respondent received a public reprimand.

In ***Matter of Hudson*, 105 N.E.3d 1089 (Ind. 2018)**, Respondent, a deputy prosecuting attorney in Porter County, was prosecuting "Defendant" who was charged with four counts of child molesting based solely on statements made by the Defendant's stepchildren to the police, there was no physical evidence. Nearly a week before trial, Respondent interviewed one of the stepchildren. In the interview, the child admitted he had lied regarding Count II at the request of his biological father. Although Respondent believed the Defendant's stepchild had lied about the Count II allegations, Respondent did not drop the charge at any point. During trial, Respondent avoided asking about Count II during direct examination. Ultimately, the truth was revealed at trial, and the trial court addressed Respondent's failure to disclose the stepchild's recantation.

The Disciplinary Commission brought several charges against the Respondent, and although Respondent conceded to a violation of Rule 3.8(a), she sought review of the hearing's officer conclusions that she violated Rule 3.8(d) and 8.4(d). The Court held that because the Respondent did not give any indication that Count II was being abandoned, she had violated Rule 3.8(a). Additionally, the Court held that Rule 3.8(d) required Respondent to disclose the stepchild's recantation to the defense as it was information that tends to negate the guilt of the accused. The Court also held that the Respondent had violated Rule 8.4(d) because her conduct was prejudicial to the administration of justice. As a result of the Respondent's conduct, the Court imposed an eighteen month suspension without automatic reinstatement.

In ***Matter of Anonymous*, 43 N.E.3d 568 (Ind. 2015)**, Respondent violated Indiana Professional Conduct Rule 3.5(b) by communicating *ex parte* with a judge without authorization. Respondent represented the maternal grandparents of a child. The grandparents were concerned about the child's welfare; the putative father's paternity had yet to be established, and the mother was allegedly unemployed and addicted to drugs, threatening to take the child from the grandparents' home.

Respondent prepared an "Emergency Petition" to appoint the grandparents as the child's temporary guardians. An associate attorney of Respondent's presented the Petition to the judge, who signed it. Respondent did not provide advance notice to the putative father and mother before the presentation. By failing to certify efforts to provide notice, the Respondent also was not in compliance with Trial Rule 65(b).

While noting that there will be situations where an emergency justifies a lack of notice, Respondent's actions "did not justify dispensing with the mandatory procedures designed to protect the rights of other parties with legal interests in the proceedings." As a result, Respondent received a private reprimand.

In ***Matter of Drendall*, 53 N.E.3d 404 (Ind. 2015)**, Respondent violated Indiana Professional Conduct Rules 3.5(b), 8.4(d), and 8.4(f). Respondent represented the

maternal grandparents in a custodial action of their five-year-old grandson because the child's mother had just died. The child's father did not live in Indiana, was in arrears on child support, and had very little contact with his child. The grandparents were from Kenya and wanted to take their grandson there after the funeral. Respondent filed a motion in probate court seeking leave for the grandparents to intervene and for the court to award custody to the grandparents. Respondent did not serve the motion on the father.

A hearing was held two days later, but Respondent did not provide the father with notice of the hearing and did not ask the court to delay the hearing so that the father could be heard. Further, Respondent did not allege an emergency as Trial Rule 65(B) requires. After the court awarded custody to the grandparents, they took the grandson to Kenya. The father filed a motion to correct error and the grandparents had to bring the child back to the US. At the subsequent hearing, the court awarded custody to the father. Respondent consented to discipline and was subject to public reprimand.

Although one of the more important cases decided on the issue of the lawyer's duties to an opponent, ***Smith v. Johnston*, 711 N.E.2d 1259 (Ind. 1999)**, is no longer a recent case, its concepts are important to continue to review. *Smith* involved the appeal of a default judgment in a medical malpractice case. The plaintiff's lawyer fought her case through the medical review panel and got a decision in her client's favor. She then made a demand on the defendant's lawyers. Although a negative response to the demand was eventually made, the plaintiff's lawyer filed suit in Marion Superior Court and served the defendant physician only (as permitted under the Trial Rules). The physician did not respond or notify his lawyers. About six weeks after the complaint was filed, the plaintiff's lawyer applied for a default judgment. In her affidavit in support of the default, the lawyer indicated that she had received no pleading from the physician, "nor has any attorney contacted the undersigned regarding entering their appearance on behalf of Defendant in this case since the filing of this cause." The default was granted and the plaintiff took a judgment for $750,000. When served with the judgment, the defendants' lawyers appeared and filed a motion to set aside the default under Trial Rule 60(B)(1) [excusable neglect] and (3) [fraud or misrepresentation by an opponent.] The Supreme Court rejected the excusable neglect argument, but set aside the default on the basis of Rule 60(B)(3) because of the misconduct on the part of the plaintiff's lawyer. The Court held,

> [W]e conclude that the overriding considerations of confidence in our judicial system and the interest of resolving disputes on their merits preclude an attorney from inviting a default judgment without notice to an opposing attorney where the opposing party has advised the attorney in writing of the representation in the matter. Accordingly, we hold that a default judgment obtained without communication to the defaulted party's attorney must be set aside where it is clear that the party obtaining the default knew of the attorney's representation of the defaulted party in that matter.

The Court also spoke directly to lawyers about their ethical duties. The plaintiff's lawyer in this case argued that, if the Court adopted the defendant's arguments, it would become harder for a lawyer to take a default judgment against a health care provider. In response, the Court shot back,

> We hope so. A default judgment against a health care provider or any other party is an extreme remedy and is available only where that party fails to defend or prosecute a suit. It is not a trap to be set by counsel to catch unsuspecting litigants. . . [W]e reject the gaming view of the legal system. . .

The point is clear: the lawyer's duties to the client are pre-eminent, but there are duties owed to others as well. In *Smith*, the lawyer failed in her duties to the opposing party, his counsel and the judicial system. In its simplest form, the message is: fair play matters.

Number 9 | CRIMINAL CONDUCT

Obviously, lawyers are like any other segment of the population when it comes to criminal misconduct. Lawyers have been convicted of crimes ranging from alcohol problems (*Matter of Spencer*, 863 N.E.2d 1299 (Ind. 2007) to murder (*Matter of Angleton*, 638 N.E.2d 1257 (Ind. 1994). Some examples of the types of criminal conduct for which lawyers have been disciplined follow.

In ***Matter of Cooper*, 161 N.E.3d 362 (Ind. 2021)**, the Respondent—an elected prosecutor—plead guilty to confinement, domestic battery, identity deception, and official misconduct arising from an incident in which he brutally beat his girlfriend and used her phone to send text messages purporting to be from her. He exacerbated the conduct by making misrepresentations to justify his actions. Respondent was found liable for violating Rules 8.4(b) and (c) and suspended for four years, without automatic reinstatement.

***Matter of Hill*, 144 N.E.3d 184 (Ind. 2020)**, involved the elected Attorney General of the State of Indiana being charged with violated of Rules 8.4(b) and (d) as a result of allegations that he groped women at a political event. The Court found that his conduct constituted criminal battery and that as an "officer charged with administration of the law," like a prosecutor, his misconduct was prejudicial to the administration of justice. The Court found that Respondent's conduct did not exhibit offensive personality in violation of the Oath of Attorneys. Respondent was suspended for 30-days, with automatic reinstatement.

***Matter of Lennox*, 144 N.E.3d 181 (Ind. 2020)**, resulted in the disbarment of the Respondent. Respondent converted client funds, which resulted in attorney being charged with several felonies. Respondent failed to cooperate with the Disciplinary Commission's investigation and also neglected three client matters and failed to communicate with clients.

In ***Matter of Brewer*, 110 N.E.3d 1141 (Ind. 2018)**, Respondent faced 13 counts of

attorney misconduct that were brought against her by the Disciplinary Commission. Counts 1 through 11 involved Respondent neglecting eleven different cases of clients who had hired her for criminal and family law matters. Respondent failed to attend hearings and timely file briefs, failed to return a client's file after being terminated, failed to keep clients informed about their status of their case, etc. She later admitted to using cocaine during these representations.

Count 12 involved an incident where Respondent was served with a bench warrant. While serving the warrant, law enforcement found Respondent incoherent and impaired. They found cocaine, marijuana, and drug paraphernalia and charged Respondent with a Level 6 felony and two misdemeanors. Count 13 resulted from Respondent not participating in the disciplinary process.

In addition to violations of Rules 1.3, 1.4(a)(3), 1.16(d), 8.1(b), and 8.4(b), the Court found that Respondent violated Rule 1.16(a)(2) when she failed to withdraw from representation when her ability to represent the client became impaired. The Court was unable to find any mitigating circumstances as she neglected multiple client cases and failed to cooperate in several disciplinary proceedings. Finding reasonable grounds for a lengthy suspension, the Court suspended Respondent for three years without automatic reinstatement.

In ***Matter of Smith*****, 97 N.E.3d 621 (Ind. 2018)**, Respondent violated Indiana Professional Conduct Rule 8.4(b) when he committed a criminal act that reflected adversely on his honesty, trustworthiness, or fitness as a lawyer. During a phone conversation between the Respondent and his wife, the Respondent threatened to murder his wife with an axe. He then drove to his wife's house, with the axe in the front seat, and was trying to enter her home when the police arrived. The Court points out the "profoundly troubling" facts of this case and states that there was a "heightened possibility that Respondent might have carried out his threat" if his wife had not left the house and called the police before he arrived.

After this incident, the Commission filed a "Disciplinary Complaint" against the Respondent. However, he never appeared, responded, or participated in the disciplinary proceedings. The Court took the nonparticipation into account in their opinion by concluding that it reflected "exceedingly poorly" on the Respondent's "commitment to his responsibilities as an attorney and his fitness to practice." Ultimately, the Court concluded that "the serious nature of Respondent's misconduct, his resulting felony conviction, his noncooperation with the disciplinary process, and his failure to participate in these proceedings, collectively persuade a majority of this Court to conclude that disbarment is the appropriate sanction in this case."

In ***Matter of Johnson III*****, 74 N.E.3d 550 (Ind. 2017)**, Respondent, who was the chief public defender in Adams County and married, had an affair with "Jane Doe" ("J.D.") who had a conviction for operating while intoxicated. Shortly after Respondent's wife left him, Respondent began harassing Jane Doe by phone and Facebook, including a phone call where Respondent was crying and shooting a gun during the phone call. Eventually, a protective order was issued, but was thereafter violated. The Court held

that a suspension for a period of not less than one year, without automatic reinstatement, was warranted for Respondent's pattern of harassment of Jane Doe. The Court declined to determine whether Respondent's criminal stalking, harassment, and invasion of privacy conduct violated Rule 8.4(b) because the hearing officer did not make specific findings on these allegations.

In ***Matter of Schenk*, 83 N.E.3d 695 (Ind. 2017)**, Respondent was convicted of operating a vehicle while intoxicated ("OWI") with an alcohol concentration equivalent of .15 or more in 2011. A few years later, in 2016, Respondent pled guilty to a charge of possession of marijuana. Neither of these convictions were reported to the Commission by Respondent, which violated Admission and Discipline Rule 23(11.1)(a)(2) (2016). Respondent was later arrested and charged with multiple OWI-related offenses, of which prosecution was deferred pending completion of the Allen County Alcohol Deterrent Program. Respondent violated Indiana Professional Conduct Rule 8.4(b) and Admission and Discipline Rule 23(11.1)(a)(2) (2016). The Court suspended Respondent for 180 days with 30 days actively served and the remainder stayed subject to Respondent completing at least 24 months of probation with JLAP monitoring.

In ***Matter of Chamberlain,* 87 N.E.3d 447 (Ind. 2017)**, Respondent was suspended from practicing law for three years, without automatic reinstatement when he committed counterfeiting. "Respondent endorsed a check payable to a third party, siphoned off $10,000 for himself, and provided the payee with a cashier's check for the remainder" without the knowledge or permission of the payee. Respondent violated Indiana Professional Conduct Rules 8.4(b) and 8.4(c) and was required to pay restitution to the victim before petitioning for reinstatement.

In ***Matter of Robertson*, 78 N.E.3d 1090 (Ind. 2016)**, Respondent drove to the Shelby County Courthouse for a small claims hearing while intoxicated. Once Respondent arrived, he "made repeated physical sexual advances on the court's receptionist." As a result of his behavior, the judge and a security officer were called. Respondent was given a breath test, which showed an alcohol concentration equivalent of .15. Following these results, the judge held a contempt hearing. At the hearing, the Respondent could not stand out without leaning on something. After finding Respondent in direct contempt, the judge ordered Respondent to stay in jail until his alcohol concentration equivalent was at zero.

The small claims hearing Respondent was attending was continued to another day and the incident delayed the court's schedule by at least an hour. The Respondent was charged with multiple crimes and pled guilty to operating while intoxicated as a Class A misdemeanor. Respondent violated Professional Conduct Rules 8.4(b) and 8.4(d), as well as Admission and Discipline Rule 22 for his offensive advances and remarks toward the court's receptionist. Respondent was suspended for one year, with 90 days actively served, and the remainder of the suspension stayed subject to the completion of at least two years of probation under the Court's terms.

In ***Matter of Keaton*, 29 N.E.3d 103 (Ind. 2015)**, Respondent was a married

attorney who began an intimate relationship with his daughter's college roommate ("JD"). The Respondent and JD maintained a long-distance relationship for three years. JD permanently ended the relationship in March 2008.

During the ensuing months, Respondent left numerous threatening, vulgar, manipulative, and abusive voicemails for JD. At least 90 of the voicemails were saved by JD. Additionally, Respondent sent at least 7,199 emails to JD, mostly consisting of expletives and threats. On numerous occasions, Respondent threatened to harm JD and himself if she did not reply to his voicemails or emails. In order to solicit a response from JD, Respondent hosted and maintained a sexually explicit website containing intimate images of JD that were obtained during their relationship. Respondent would routinely travel from Fort Wayne to Bloomington to stalk and confront JD at her law school. In 2009, the associate dean for students at JD's law school contacted Respondent in an attempt to stop the stalking and harassment. In his response, Respondent claimed that he was not violating any laws or ethical rules and was thus "blameless in this matter," and that JD was "happily engaged in" the communications.

Thereafter, JD sought help from the Indiana University Police Department ("IUPD"). In August 2009, a detective from IUPD phoned Respondent and advised Respondent to stop contacting JD. Respondent's response to the detective was similar to his response to the associate dean. Following the phone call, Respondent sent a series of threatening emails to JD, warning her against seeking a protective order. In April 2010, JD received an *ex parte* protective order against Respondent in response to the stalking and threats.

In May 2010, Respondent was arrested and criminally charged in Monroe County with felony stalking. The criminal case was dismissed by the State in April 2011 based on personal privacy concerns raised by JD. After the dismissal, Respondent continually attempted to contact JD in 2011 both by phone and by email. JD did not reply.

In February 2012, the Commission notified Respondent that it was investigating his conduct involving JD. Ten days later, Respondent, *pro se*, filed a civil complaint in state court against JD alleging malicious prosecution and abuse of process. In May 2012, Respondent, *pro se*, filed a second complaint in federal court against JD, and others, alleging unlawful arrest.

Throughout the disciplinary proceedings, Respondent made contradictory and false statements to the Commission alleging that JD had been less than truthful with the various law enforcement officers and attorneys with whom she had communicated with. Among other things, the Commission found that Respondent violated Indiana Professional Conduct Rule 8.4(b)-(c) for engaging in conduct involving dishonesty, fraud, deceit or misrepresentations and for committing criminal acts (stalking, harassment and intimidation) that reflect adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer. In a stern opinion, the Court concluded that Respondent should be disbarred because:

> In short, Respondent's repugnant pattern of behavior and utter lack of remorse with respect to the events involving JD, his deceitful responses and lack of candor toward the Commission…his inability or unwillingness to appreciate the wrongfulness of his misconduct, and his propensity to shift blame to others and see himself as the victim, all lead us unhesitatingly to conclude that disbarment is warranted and that Respondent's privilege to practice law should be permanently revoked.

In ***Matter of Philpot*, 31 N.E.3d 468 (Ind. 2015)**, Respondent was convicted of two counts of mail fraud and one count of theft from a federally-funded program - all felonies. The convictions resulted from his use of federal funds to pay himself impressible bonuses in connection with work that he performed in his capacity as the elected Clerk of Lake County, Indiana. Respondent had no prior criminal record and repaid with interest the monies in question. The parties agreed that Respondent violated Indiana Professional Conduct Rule 8.4(b), by committing criminal acts that reflect adversely on his honesty, trustworthiness or fitness as a lawyer. The Court suspended Respondent from the practice of law for four years for his misconduct.

In ***Matter of Hollander*, 27 N.E.3d 278 (Ind. 2015)**, Respondent was employed as a public defender. Respondent came across a police report of a woman who had been arrested for engaging in prostitution. The report contained the woman's personal phone number. The Respondent recognized the phone number from an online escort service and proceeded to send text messages to the phone number. Respondent told the woman that a former client had given him her information and that he could help with the woman's situation; stating he would "work with" her regarding her attorney fees.

At the time the messages were sent, the phone was in the possession of the Indiana Metropolitan Police Department ("IMPD"). An IMPD police officer, pretending to be the woman, responded to the several text messages and calls from Respondent and set up a meeting with him in a hotel room. Respondent went to the hotel around where he attempted to hug and kiss an undercover officer, made statements conveying he wanted sex in return for his legal services, and began to undress. Respondent was subsequently arrested for patronizing a prostitute.

Respondent violated Rules 1.2(d), 1.5(a), 1.7(a), 1.8(j), 7.3(a), and 8.4(a)-(d). The violations stemmed from Respondent's improper attempt to charge and engage in sex for legal services, making dishonest or false representations, committing a criminal act that reflects adversely on the lawyer's honesty, and engaging in conduct prejudicial to the administration of justice. The Court suspended Respondent from practicing law for one year, without automatic reinstatement.

Number 8 | CONFLICTS OF INTEREST

This is one of the areas of ethics that concerns practicing lawyers the most, but appears to be one of the least well understood by the bar. In essence, the conflict of interest rules govern different aspects of the lawyer's duty of loyalty to the client. Some rules act to protect the client from conflicts with other clients, other rules act to protect the client from their own lawyer and still others act to protect *former* clients from some of the dangers of conflicting interests after the representation is over.

Cases are legion which explore all the contours of this area of ethics. Certainly any written work exploring this subject would be a respectable tome. In the final analysis, these cases revolve around the question: "to whom does the lawyer's loyalty run?" If the answer isn't unequivocally, "the client," then a conflict of interest almost undoubtedly exists. One case illustrates the extent to which conflict questions can be simultaneously complex and very apparent. In ***Matter of Watson*, 733 N.E.2d 934 (Ind. 2000)**, Respondent wrote a will for an 85-year-old man who was the largest single shareholder in an Indiana telephone company. The Respondent's mother was the second largest shareholder in the company.

Subsequently, Respondent prepared for the testator a codicil which granted an option to the company, upon the testator's death, to purchase these shares at a price reflecting the stated book value. After the testator died, the board of directors elected to exercise the option to purchase the estate's shares at the listed book value. About two years later, Respondent, his mother, and the company's remaining shareholders sold all of the company's stock, realizing an amount per share in excess of two times that paid to the testator's estate for the shares. The Supreme Court found that the Respondent knew or should have known that the option for the company to buy the shares at book value was setting a price which could be substantially less than fair market value. Respondent was found to have violated Rule 1.8(c) because he drafted the codicils when it was reasonably foreseeable that the instruments had the potential for providing a substantial gift to him and his mother. As a result, Respondent was suspended from the practice of law for sixty days.

***Matter of Thoms*, 166 N.E.3d 344 (Ind. 2021)**, involves a lawyer who sent his Client a series of sexually explicit text messages evincing Respondent's desire to engage in sexual acts with Client. Respondent and Client were not involved in a personal relationship prior to the representation. Respondent's conduct violated the following Rules:

- 1.7(a)(2): Representing a client when the representation may be materially limited by the attorney's own self-interest.
- 1.16(a)(1): Failure to withdraw from representation when the representation will result in violation of the Rules of Professional Conduct or other law.
- 8.4(a): Attempting to violate the Rules of Professional Conduct; specifically, by attempting to engage in an improper sexual relationship with a client.

Respondent was suspended for 30 days, with automatic reinstatement.

***Matter of Burton*, No. 139 N.E.3d 211 (Ind. 2020)**, involved a chief deputy prosecutor who committed attorney misconduct by abusing his prosecutorial authority as part of a campaign of retaliation against a detective. Specifically, Respondent improperly leveraged his prosecutorial authority to exact a personal vendetta against a police detective who was seeking to determine whether attorney had attempted to trade consideration of leniency in a female defendant's criminal matters over the years in exchange for sexual contact; attorney acted not to further the public interest, but rather to protect his own self-interest, in violation of Rule 8.4(d) & (e). Further, Respondent gave the defendant legal advice despite his role at the prosecutor's office, in violation of Rule 1.7(a)(2). Respondent was suspended for 90 days, with automatic reinstatement.

In ***Matter of Daley*, 116 N.E.3d 457 (Ind. 2019)**, Respondent was appointed as a public defender to represent one of two co-defendants (in the Order, the Court refers to the two co-defendants as JB and KW) in a burglary case. Respondent's client was JB and he told the Respondent about the codefendant's involvement and stated that he wanted to testify against his codefendant as the prosecution's witness. The Respondent never read the probable cause affidavit, which listed KW as the codefendant, and made no effort to find the identity of the codefendant.

Two months later, KW was arrested and he and Respondent entered into an agreement where Respondent would privately represent KW in the case. Respondent also accepted $1,450 as a partial retainer from KW. Respondent told his paralegal to file an appearance and other documents for KW's case. However, the Respondent did not supervise the paralegal to ensure that this was done, and as a result, neither the appearance nor the other documents were filed.

When Respondent initially met with KW, he never mentioned the codefendant. KW's probable cause affidavit, which Respondent did read, only identified JB by his nickname. After KW's pretrial conference, Respondent learned that he was representing both codefendants. Respondent immediately requested to withdraw from both cases, returned the $1,450 retainer to KW, and apologized.

The Court found Respondent in violation of Rules 1.1, 1.7(a), and 5.3(b) and imposed a

public reprimand for his misconduct.

In ***Matter of Henderson*, 78 N.E.3d 1092 (Ind. 2017)**, Respondent was the elected prosecutor in Floyd County and was tasked with prosecuting a former police officer charged with murdering his wife and two minor children. The officer was convicted twice, but when he appealed, both convictions were reversed. In a third trial, the officer was acquitted. The Respondent was the prosecutor in the officer's second trial and attempted to continue representing the State as they began preparations for the officer's third trial until he was removed from the case as a result of a conflict of interest.

Within days of the jury returning a guilty verdict in the officer's second trial, Respondent entered into an agreement with a literary agent, with the intent to write and publish a book about the Camm case. After the Court issued a decision reversing Camm's convictions and remanding for a third trial, Respondent wrote to the literary agent, expressing his belief that "this is now a bigger story" and asking the literary agent to seek a "pushed back time frame" for publication and "to push for something more out of the contract." Respondent violated Professional Conduct Rules 1.7(a)(2), 1.8(d), and 8.4(d) and received a public reprimand.

In ***Matter of Kirsh*, 83 N.E.3d 699 (Ind. 2017)**, Respondent was retained to represent clients who were seeking to adopt children. The "Birth Mother" decided to select another set of adoptive parents after the Respondent provided her with profiles of other candidates seeking to adopt. Respondent acted without consulting with his clients and attempted to have the clients sign a release form, which would bar clients from seeking an action against Respondent with the Disciplinary Commission. Respondent violated Indiana Professional Conduct Rules 1.7(a), 1.8(b), 8.4(d) and was disciplined with a public reprimand.

In ***Matter of Hanley II*, 19 N.E.3d 756 (Ind. 2014)**, Respondent hired an attorney ("Associate") to work in his law office pursuant to an employment agreement in 2006. Respondent's law practice focuses primarily on Social Security disability law. The employment agreement included a non-compete provision that prohibited Associate from practicing Social Security disability law for two years in the event his employment with Respondent was terminated. In 2013, Respondent fired the Associate. Thereafter, Respondent sent letters to Associate's clients stating he no longer worked at the firm and that Respondent would be taking over their representation. Additionally, in those letters, Respondent included Appointment of Representative forms for the clients to complete in order for Respondent to replace Associate as the clients' representative before the Social Security Administration.

Associate continued to practice Social Security disability law after leaving the firm, and at least two of Associate's existing clients chose to keep Associate as their lawyer. Respondent did not attempt to enforce the non-compete provision and provided Associate with files for Associate's clients after disciplinary grievances were filed against him. The parties agreed that Respondent violated Indiana Professional Conduct Rule 1.4(b), for failure to explain a matter to the extent reasonably necessary to permit a

client to make informed decisions regarding the representation, and 5.6(a) for making an employment agreement that restricts the rights of a lawyer to practice after termination of the relationship. The Court imposed a public reprimand for Respondent's misconduct.

Number 7

ATTORNEY FEES

Like conflicts of interest, lawyers often mistakenly believe that claims about unreasonable fees are a prime source of disciplinary cases. In truth, the Disciplinary Commission's annual reports traditionally show that allegations involving the lawyer's fee only account for three to five percent of the total grievances received. As a general rule, unreasonable fee cases are about just that - unreasonable fees. However, the Supreme Court has had the opportunity to interpret the reasonableness requirement under many different circumstances.

This summary is updated annually and some of the older decisions are replaced by more recent case law. However, on the topic of attorney fees, there are cases the court decided some years ago that set forth the current state of the law. These summaries continue to be published for that reason.

In ***Matter of Rios*, 139 N.E.3d 704 (Ind. 2020),** "Client" hired Respondent to assist him with an immigration matter. Client paid Respondent $1,420 – more specifically, a $1,000 retainer for legal work and a $420 anticipated filing fee. After Respondent had done a minimal amount of work and before anything was filed, Client terminated Respondent and asked for a refund of the filing fee and any unearned attorney fees. Respondent wrote Client a check for $920 (the $420 filing fee and $500 in unearned legal fees), but the check bounced. After Respondent refused to write Client another check, Client sued Respondent in small claims court and obtained a default judgment in January 2017 for $920 plus $101 in court costs and post-judgment interest at the rate of 8% per annum. In May 2019, Respondent provided Client a $1,000 cashier's check in partial satisfaction of the amount she owes to Client. Respondent violated Rule 1.16(d) by failing to timely refund advance payment of fees and expenses that were not earned or incurred and was publicly reprimanded.

In ***Matter of Saar*, 106 N.E.3d 1037 (Ind. 2018)**, "Client" entered into a representation agreement with "Law Firm." The agreement indicated Law Firm would receive a 35% contingent attorney fee if the case was resolved without trial, 45% plus expenses if the case was resolved with trial and a $175 per hour of work performed on the case if the case was discharged by Client prior to an eventual settlement recover. Respondent was an associate with Law Firm, however, while Client's case was ongoing, Respondent left

Law Firm and began work with a new law firm. Client chose to have Respondent continue to represent him under the same fee terms. When the case was settled, Respondent kept 35% as her fee and negotiated a $2,000 settlement with Law Firm for the time spent on the case. This resulted in the Client being charged 46% of the settlement amount. Rule 1.5(a) prohibits the collection of an unreasonable fee, but the Respondent returned the excess amount to Client upon facing disciplinary charges. The Court issued a public reprimand for Respondent's misconduct.

In ***Matter of Emmons*, 68 N.E.3d 1068 (Ind. 2017)**, Respondent was appointed guardian of an 88-year old incapacitated woman where his duties included being a signatory on her bank accounts. Respondent wrote three checks to himself from the PTSB account, totaling $20,000, indicating that they were for legal fees. The Court ordered Respondent to file accounting records and appear before the court, which Respondent failed to do. The Court held that first, Respondent was under an indefinite suspension due to his noncooperation with the Commission's investigation, and second, a suspension of not less than three years was warranted for Respondent's misconduct regarding converting guardianship funds.

In ***Matter of Peters*, 23 N.E.3d 660 (Ind. 2014)**, Respondent represented a client on a contingency basis in a civil action brought against the client's landlord. A trial resulted in judgment for the client for over $46,000. A dispute between the client and Respondent arose after the judgment because Respondent had failed to provide the contingent fee agreement in writing. The parties agreed that Respondent's lack of a written contingency agreement was an oversight and did not stem from a dishonest or selfish motive.

Additionally, the parties agreed that Respondent violated Rule 1.5(c), which requires contingent fee agreements to be in writing and signed by the client. The Court issued a public reprimand for Respondent's misconduct.

In ***Matter of Corcella*, 994 N.E.2d 1127 (Ind. 2013)**, Respondent filed suit in federal court on behalf of a client against several defendants. Summary judgment was eventually entered in favor of the defendants in 2011. The parties' fee agreement called for a billing rate of $175 an hour. However, Respondent billed the client for more than 60 hours of work at $200 an hour, which was her usual hourly billing rate at the time. After the client filed a grievance, Respondent refunded the $1,580 overcharge to the client. In July 2009, Respondent and her client changed the fee agreement to provide for a contingent fee. In December 2009, they again changed the fee agreement to provide for a blended hourly and contingent fee. One or both of the changes resulted in a fee agreement that was more advantageous to Respondent than the previous agreement. Respondent did not advise the client in writing of the desirability of seeking the advice of independent counsel before agreeing to the changes. Respondent was publicly reprimanded for her actions.

In ***Matter of Snulligan*, 987 N.E.2d 1065 (Ind. 2013)**, Respondent was hired to represent a client charged with Dealing Cocaine, a class A felony, and Possession of

Cocaine, a class C felony. The Respondent quoted a flat fee of $12,000 for the case, and the parties agreed that $6,000 should be paid in advance. A month later, the family sent Respondent a letter terminating her services, requesting an itemization of services already performed, and requesting a refund of the unused fees paid in advance. Respondent did not keep ongoing records of the work she did on the case, and she sent a response to the family purporting a billing rate of $175 per hour for 37.8 hours. The hearing officer found Respondent's attempt to reconstruct time records unreliable, and found she did little actual work to move the case forward. Respondent was ordered to refund $5,000. For this misconduct, Respondent was suspended from the practice of law for not less than thirty days, without automatic reinstatement.

In ***Matter of Canada*, 986 N.E.2d 254 (Ind. 2013)**, Respondent represented a client who was accused of Conspiracy to Commit Dealing in Methamphetamine, a Class A felony. The client made it clear to Respondent that he wanted to resolve the case through a plea agreement.

Respondent entered into a flat fee agreement with the client for $10,000, to be paid from the cash bond posted by the client's father. The agreement stated that, barring a failure to perform the agreed legal services, the fee was non-refundable because of the possibility of preclusion of other representation and to guarantee priority of access. The hearing officer found the fee was reasonable on its face for someone of Respondent's skill and experience.

After Respondent procured a plea offer, the client stated he was going to hire a different lawyer to see if he could get a better deal. Respondent estimated he had spent about twenty hours working on the client's case. Client was eventually sentenced similarly to the offer Respondent procured, and the $10,000 bond was released to Respondent for his fee. The court examined whether Respondent improperly collected and failed to refund an unearned portion of the flat fee.

The Court discussed the fact that the client was free to discharge Respondent at any time and retain a different attorney. The Court examined whether any portion of the $10,000 fee was unearned in this instance. Herein, the client retained the Respondent to negotiate a plea agreement. Respondent spent time on the case and negotiated an agreement with the prosecutor, to which the client initially agreed. The Court determined the Commission did not prove by clear and convincing evidence that the Respondent did not fully earn his flat fee, and entered judgment for Respondent.

In ***Matter of O'Farrell*, 942 N.E.2d 799 (Ind. 2011)**, the law office Respondent works in uses an "Hourly Fee Contract" or a "Flat Fee Contract" in most cases when it represents a party in a family law matter. Both types of contract contain a provision for a nonrefundable "engagement fee." The law office charged a "client 1" a $3,000 engagement fee for the cases, plus $131 for filing fees, which the client 1 paid. On November 28, 2006, Respondent filed motions to withdraw as the client's attorney in the divorce case and in the PO Case. Both cases eventually were dismissed. The law office refused to refund any part of the $3,000 the client had paid, saying that the fee was

earned upon receipt pursuant to the Flat Fee Contract.

Another client agreed to pay an “engagement fee” of $1,500 and signed the law office’s Hourly Fee Contract. Due to the client’s unwillingness to pay any additional fees for further services rendered, Respondent and the law office ended their representation of the client and withdrew as her attorney. The law office refused to refund any part of the fee paid by the client, saying that all fees were earned upon receipt and nonrefundable. The Court concluded that in charging nonrefundable flat fees, Respondent violated Indiana Professional Conduct Rule 1.5(a) by making agreements for and charging unreasonable fees. For Respondent’s professional misconduct, the Court imposed a public reprimand.

An important case was decided in ***Matter of Stephens,*** **851 N.E.2d 1256 (Ind. 2006)**. Therein, Respondent entered into a medical malpractice employment agreement with a client, which provided that the client agree to pay Respondent as much of the first $100,000 obtained from the health care providers as is necessary to equal one-third of the total recovery. The client then agreed to pay a non-refundable retainer of $10,000 in addition to the contingency fee. The client paid Respondent $10,000, but about 18 months later, the client demanded the return of her file and accused Respondent of breaching their contract. The client sought a refund of the $10,000, but Respondent declined to refund the money because it was “non-refundable.” After the commencement of disciplinary proceedings, Respondent refunded the full $10,000 to the client.

Indiana’s medical malpractice statutes limit a plaintiff’s attorney’s fees to fifteen percent (15%) of any recovery from the Patient Compensation Fund. While the medical malpractice statutes do not restrict the amount of attorney fees taken from the first $100,000 recovered, the Court stated that the Indiana Rules of Professional Conduct do set standards for attorney fees and held that Respondent’s agreement violated Rule 1.5(a), which requires that a lawyer’s fee be reasonable. Regardless of the source of the fee, an attorney’s compensation must still meet the reasonableness requirements of Rule 1.5(a) and the 15% limitation of I.C. 34-18-18-1.

The Court also held that the nonrefundable retainer provision of Respondent’s agreement violated Rule 1.5(a), saying “[b]y locking a client to a lawyer with a non-refundable retainer, the lawyer chills the client’s right to terminate the representation.” Finally, the Respondent’s second fee agreement, which gave Respondent a pecuniary interest adverse to the client, was obtained without a separate written consent from the client, which violated Rule 1.8(a). The Court held that a public reprimand was appropriate.

The Indiana Trial Lawyers Association intervened following this decision and asked that the Court reconsider its conclusion that the Respondent had improperly attempted to circumvent the limitations on attorney fees recoverable under the malpractice act. The Supreme Court issued a subsequent opinion, ***Matter of Stephens*****, 867 N.E. 2d 148 (Ind. 2007)**. The Court acknowledged that each case is unique and must be evaluated on its own merit. Those plaintiffs lawyers engaged in medical malpractice cases are

given guidance as to what is a reasonable total fee in those cases.

The Court recognized that the legislature only limited attorney fees from those monies recovered from the fund. The reasonableness of the total fee is for the Supreme Court to determine, using the Rules of Professional Conduct. It recognized attorney fees of up to 35% are commonly considered reasonable in tort litigation and at times, higher percentages are not out of line. Additionally, parties are free to enter into contracts of their own making.

The Court recognized that limiting plaintiff's attorneys to fees of 15% of the fund recovery plus no more than the customary percentage from the provider, would result in fees that may be too low for lawyers to consider taking medical malpractice cases. The consumers of legal services could be negatively affected.

The sliding scale fee agreement concept, where a lawyer might receive 100% of the non-fund recovery is acceptable. The key is to be certain the lawyer's fee agreement results in a total fee within the typically acceptable range in tort litigation. If you practice in this area of the law, you should read the second *Stephens'* opinion.

In another case relating to attorney's fees, the lawyer required certain clients to pre-pay a portion of his fees before he performed any services. ***Matter of Kendall*, 804 N.E.2d 1152 (Ind. 2004)**. These arrangements were set forth in contracts and specified that the advanced fee payments were "non-refundable." Notwithstanding this provision, it was Kendall's practice to refund any unearned portion of the fees. In the interim, the advance fees were deposited into Kendall's operating account. Subsequently, Kendall's firm was placed into bankruptcy, and he was unable to refund the unearned portions of the fees. Two issues were addressed in the case: (1) were the fees required to be segregated until earned?; and (2) were the fees reasonable? The Supreme Court took the opportunity to clarify the difference between advance fee payments and flat fees. The Court defined a "flat fee" as a "fixed fee that an attorney charges for all legal services in a particular matter, or for a particular discrete component of legal services." Furthermore, the Court described an advance fee as "a partial initial payment to be applied to fees for future legal services."

The Court then determined that Indiana Professional Conduct Rule 1.15(a) generally requires the segregation of advance payments of attorney fees until actually earned. However, the segregation and accounting requirements are not applicable to flat fees, as discussed in *Matter of Stanton*, 504 N.E.2d 1 (Ind. 1987). In determining whether the fee was reasonable, the Court relied on ***Matter of Thonert*, 682 N.E.2d 522 (Ind. 1997)**. In *Thonert*, the Court noted that nonrefundable retainers are not per se unreasonable, but that one should be justified by value received by the client or detriment incurred by the attorney. When such justification exists, the Court emphasized that it should be included in the fee agreement. Thus, the Court held that an assertion that an advance payment is nonrefundable violates the requirement in Rule 1.5(a) that a fee be reasonable. In the case of a flat fee, the agreement should reflect the fact that such a flat fee is nonrefundable except for failure to perform the agreed legal services.

In August of 2003, the Supreme Court held, as a matter of first impression, an attorney's recovery of a contingency fee on settlement funds that were not to be received until the future, without discounting future settlement payments to present value, amounted to collection of an unreasonable fee. ***Matter of Hailey*, 792 N.E.2d 851 (Ind. 2003)**. The Court reasoned that the fee agreement must be based on the value to the client, unless some other method is clearly spelled out. Here, the agreement called for 40% of the settlement, so the attorney was entitled to 40% of the present value. The Court noted that there is nothing wrong with a lawyer receiving the full amount of his fee in current dollars and the client receiving payment in future dollars, so long as the relationship between the present value of the two is in proportion to the percentage of the lawyer's fee agreed to in the fee agreement. The attorney in this case received a public reprimand for this and other fee-related violations.

The amount and computation of the lawyer's fee is a subject about which lawyers give considerable thought. These cases show, however, that communicating the fee and the method by which it is calculated is equally important for the client to understand. Lawyers who do not commonly give detailed explanations of the fee deals with their clients would be well advised to do so.

The Indiana Supreme Court's most significant pronouncement in this area came in the case of ***Galanis v. Lyons & Truitt*, 15 N.E.2d 858 (Ind. 1999)**, not a recent case, but certainly an important decision. Although somewhat dated, it is still worth reading. In *Galanis*, the lawyer entered into an attorney client relationship with the plaintiff to represent her in a personal injury case. The lawyer undertook the matter on a contingency fee basis. After doing some work on the case, the lawyer was discharged and the plaintiff hired a second lawyer who brought the case to a conclusion. Ultimately, a declaratory judgment action was filed and the case eventually made its way to the Supreme Court. Among other issues, the Court addressed the method of determining the reasonableness of the lawyer's fees and the use of the equitable doctrine of *quantum meruit*:

> The trial court in this case held that the reasonable value of Lyons' work should be determined commensurate with the hourly rate of a community attorney charging for similar services. Judge Staton, dissenting in the Court of Appeals in this case, read this as requiring a fee equal [to] 'the hourly rate of a community attorney…' [citation omitted]. The parties apparently make the same assumption. Lyons challenges this method of calculating the reasonable value of the firm's work. If a fee agreement provides for an hourly rate in the event of a pre-contingency termination, it is presumptively enforceable, subject to the ordinary requirement of reasonableness. See Indiana Professional Conduct Rule 1.5. We agree with Lyons that, in the absence of such an agreement, the value of a discharged lawyer's work on a case is not always equal to a standard rate multiplied by the numbers of hours of work on the case. Where the lawyers have agreed to work on contingent fees and there is no

> contractual provision governing payment in the event of discharge, compensating the predecessor lawyer on a standard hourly fee could produce either too little or too much, depending on how the total hourly efforts of all lawyers compare to the contingent fee.

One of the most important features of this analysis is the duty of courts that are faced with fights like this to make not only a quantitative evaluation of the lawyer's time, but a qualitative evaluation of the lawyer's efficiency and productivity for the client.

The Indiana Supreme Court reiterated the *Galanis* standard in its opinion in ***Cohen & Malad LLP v. John P. Daly, Jr. and Golitko Legal Group PC*, 27 N.E.3d 1084 (Ind. 2015).** Therein the Court quoted from *Galanis*, stating, "a lawyer retained under a contingent fee contract is discharged prior to the contingency is entitled to recover the value of services rendered if there is a subsequent settlement or award[,]" and in that case, "the fee is to be measured by the proportion of the total fee equal to the contribution of the discharged lawyer's efforts to the ultimate result[.]"

Number **6**

MALPRACTICE

Most lawyer malpractice cases do not end in disciplinary action. That fact does not make them significantly more popular for the defendant lawyer, however. Some cases are worthy of note.

In ***Matter of Welke*, 2019 WL 4264738 (Ind. Sept. 10, 2019)**, Respondent violated Rules 1.1, 1.3, 1.4(a)(2), 1.4(b), 5.3(b), and 8.1(a). In 2010, "Client" was charged with murder. Client was not proficient in English and was represented by an experienced public defender, who was utilizing an interpreter in their meetings. Client claimed he acted in self-defense, however, the public defender did not believe that a self-defense argument would stand up in court, but thought that it would be a mitigating factor. The public defender and the deputy prosecutor were in the process of working out a plea agreement, where Client would plead to voluntary manslaughter.

Before the plea deal was worked out, Respondent's nonlawyer assistant began to meet with Client's family in an effort to convince them to hire himself and Respondent to defend Client's murder charge by telling them that Client would likely be successful in his self-defense argument and saying that the public defender would "sellout" the Client. The family agreed and they paid Respondent a $6000 retainer. $1000 of that retainer was to be used to hire an interpreter.

Respondent had never worked on a murder case, and had very little experience with major felonies. Respondent and his nonlawyer assistant could not communicate with client, did not hire an interpreter, did not meet with Client in jail, and delegated nearly all of the casework to the nonlawyer assistant. The nonlawyer assistant brought an "interpreter" to only one meeting with Client. The interpreter was "an untrained and unpaid woman who needed community service credit for her own criminal conviction" and was tasked with interpreting the nonlawyer's opinions that Client had a strong likelihood of success on a self-defense theory.

Respondent looked at post-mortem pictures of the victim for the first time right before the trial was set to begin and realized that a theory of self-defense or voluntary manslaughter would not be possible. The State offered Client a plea to voluntary manslaughter, with a

fixed sentence of 40 years, during the final pretrial conference. The Respondent did not consult Client, tried to accept the State's offer, and was only stopped from accepting the plea because Client complained.

As expected from these facts, when Client's murder trial began, Respondent was not prepared and did not arrange for an interpreter. As the trial progressed, the State offered a new deal; Client would plea to murder and serve a fixed term of 45 years. During a recess, Respondent had one of Client's friends interpret this new offer. Respondent advised Client to accept because of how weak their case was and Client followed Respondent's advice.

When the Commission conducted its investigation, Respondent lied to the Commission. Respondent told them that Client was fluent in English and that he had been to see Client in jail multiple times.

In the Court's discussion, they spent a significant amount of time discussing their disapproval of how Respondent and nonlawyer assistant exploited "inaccurate stereotypes about public defenders and the particular vulnerability of defendants and their family members to unrealistic expectations." They went on to say, "In the end, switching from the public defender to Respondent earned Client a lighter wallet, comprehensively shoddier legal representation, weakened bargaining power, the inability to meaningfully participate in his own defense, and ultimately a higher-level conviction and several more years in prison than he otherwise would have received." Respondent was suspended from the practice of law for a period of not less than three years, without automatic reinstatement.

In ***Matter of Crosley*, 99 N.E.3d 643 (Ind. 2018)**, Respondent failed to supervise an attorney who was performing work in Indiana but was not licensed in Indiana. The attorney worked for a Texas firm with which Respondent had an "of counsel" relationship; the agreement between Respondent and the firm was that a Texas firm attorney would complete the work and Respondent would sign off on documents and present them in court to expunge criminal records. The Texas law firm's attorney who completed the work and filed with the court was not admitted with temporary admission to the Indiana bar, yet she still represented herself as attorney on these Indiana expungement cases.

When Respondent learned of the Texas attorney's representations to the court, the Respondent apologized for the error. All of the expungement clients received the services they had paid for and the Court held that the appropriate discipline would be a 30-day suspension.

In ***Matter of Straw*, 68 N.E.3d 1070 (Ind. 2017)**, Respondent advanced a series of frivolous claims and arguments in four lawsuits, three of which were filed on his own behalf. The first suit was a defamation suit where opposing counsel sought information from Respondent and in response, Respondent sued opposing counsel in federal court, alleging racketeering activity and seeking $15,000,000 in damages and injunctive relief.

The second suit was in federal court against the ABA and 50 law schools, alleging violations of the Americans with Disabilities Act ("ADA"), which was dismissed for lack of standing. Respondent lost the third suit, an employment discrimination claim, because he let the statute of limitations lapse without filing. The fourth case was a post-dissolution proceeding where Respondent filed suit alleging defendants had violated the ADA by discriminating against the former husband, which was dismissed. The Court held that a suspension for a period of 180 days, without automatic reinstatement, was warranted for Respondent's misconduct.

In ***Matter of Bernacchi*, 83 N.E.3d 700 (Ind. 2017)**, Respondent hired an independent paralegal and instructed his client to pay a "non-refundable" retainer fee to the paralegal. The client was directed to ask the paralegal about any questions regarding the case. During the first court hearing for the case, Respondent incorrectly asserted that he represented the opposing party. At the second hearing, Respondent failed to advocate for his client's wishes to obtain child support and instead argued against the opposing party having to pay child support. The client was not present at any of these hearings and was later informed by the Respondent of his actions.

Client requested the Respondent to correct this in court, but Respondent refused. Client asked for a refund, but it was not granted to her until two years later when she already lost her house due to insufficient funds. During this time, Respondent harassed client into dropping her grievance against him with the Commission. As a result, Respondent violated Indiana Professional Conduct Rules 1.1, 1.5(a), 5.3, 5.4(a), 8.4(d), and Guideline for the Use of Non-Lawyer Assistants 9.1. He was suspended from practicing law for one year, without automatic reinstatement.

In ***Matter of Ellison*, 87 N.E.3d 460 (Ind. 2017)**, Respondent entered into an agreement with a client to represent client in an expungement appeal. However, Respondent failed to timely file an appellant's brief and neglected to truthfully tell client that he did not file the brief. Client's appeal was dismissed and Respondent failed to notify the client of the dismissal or have the appeal reinstated. Therefore, Respondent violated Rules 1.1, 1.3, 1.4(a)(3), 1.4(b), 3.3(a)(1), 8.1(a), and 8.4(c).

The Court imposed a 90-day suspension, without automatic reinstatement. In the Court's discussion of the appropriate sanction, they stated that the Respondent had no prior discipline and if he had only neglected one appeal, the sanction may have been minor (a 30-day suspension, as opposed to 90 days). However, the Court highlights the Respondent's continued dishonesty throughout the expungement matter. Respondent lied to his client, the Court of Appeals, and the Commission. The Court states that this dishonesty "elevates this into a much more serious offense." In their explanation of why they imposed a longer sentence, the Court also points out that the Respondent did not accept responsibility for his wrongdoing, did not participate in proceedings before the hearing officer, and he filed a one-page sanction brief in which he did not mention any of his dishonest acts.

Number 5 | ADVERTISING AND IMPROPER REFERRALS

This is another area of the law of ethics that is confusing and generally not well understood by lawyers. In a nutshell, truthful lawyer advertising is protected speech under the First Amendment of the U.S. Constitution. The states are free to regulate lawyer advertising if the speech is "false, fraudulent, misleading, deceptive, self-laudatory or unfair." This term is found in Rule 7.1(b) of Indiana's Rules of Professional Conduct. It is further defined in subsections (c) and (d) of the Rule to include prohibitions on the use of statistics, opinions about the quality of the legal services and testimonials that contain any representation the lawyer could not personally make in a public advertisement. Rules 7.2 through 7.4 further regulate lawyer solicitations regarding letterhead, in-person solicitation and advertising of "specialty" practices.

The biggest trend in the enforcement of limitations on lawyer referral services is discipline of lawyers who assist non-lawyers in providing legal services to clients. Although traditional advertising violations are often not charged in these cases, any lawyer approached to assist a corporation in providing consumer legal services should consider whether the corporation solicits clients in a manner that the lawyer could not. If a lawyer is offered a client pipeline that is "too good to be true," the lawyer should carefully vet the proposal to ensure that it would not be viewed by the Court as loaning out his or her bar card.

***Matter of Homan*, 149 N.E.3d 1184 (Ind. 2020)**, involved a Respondent who associated as "of counsel" with a Texas law firm that offered expungement services. The law firm forbade Respondent from negotiating his own fees, communicating with clients, or event attending hearings. Respondent had not control of the firm's completion of work for the clients. Some clients cases were delayed causing prejudice to their immigration status. This relationship was found to violate myriad rules of professional conduct related to diligence and client communication as well as assisting in the unauthorized practice of law and allowing non-lawyer sot usurp the lawyer's

professional judgment. Unrelated to these issues, Respondent also lost his license due to a DUI and continued to drive while his license was suspended. This conduct resulted in a violation of Rule 8.4(b). Respondent was suspended for 90 days, by agreement.

In ***Matter of Wray*, 91 N.E.3d 578 (Ind. 2018)**, Respondent used a referral system with non-lawyers to solicit clients for claims against a mobile and modular home manufacturer. During his solicitation of the homeowners, Respondent and his agents would have clients sign agreements regarding Respondent's representation without discussing the merits of their claims. These agreements inaccurately reflected how litigation costs would be advanced and Respondent misled homeowners to settle their existing claims in anticipation of new potential claims. Respondent also did not properly manage trusts and ledgers for the clients. The Court held that Respondent's relationship with the non-lawyers who were soliciting clients for him constituted an agent relationship and that the signed agreements and statements to clients were misleading and deceptive. The Court found that Respondent violated Rules requiring reasonable consultation and communication with clients; prohibiting unreasonable fees; requiring lawyers to maintain trust account records; requiring reasonable efforts to supervise nonlawyers employees; prohibiting the sharing of fees with nonlawyers; prohibiting direct solicitation and payment in exchange for a referral; and prohibiting dishonesty. The Court suspended Respondent from practicing for nine months without automatic reinstatement.

In ***Matter of Wall*, 73 N.E.3d 170 (Ind. 2017)**, Respondent worked with a Florida corporation ("CAS") that offered legal services to consumers outside of Indiana. The typical transaction involved an intake and representation agreement with a CAS paralegal, followed by a nonrefundable fee. Respondent was paid $75 per agreement signed where his sole role was to convince the client to undergo mortgage modification. For the most part, CAS provided the bulk of legal services and Respondent was minimally involved. The Court held that a 30-day suspension from practice of law, with automatic reinstatement, was appropriate sanction where he assisted in charging and collecting an unreasonable fee in violation of Rules 1.5(a) and 8.4(a); engaged in improper fee splitting in violation of Rule 1.5(e); and assisted in the unauthorized practice of law in violation of 5.5(a).

In ***Matter of Fratini*, 74 N.E.3d 1210 (Ind. 2017)**, Respondent was affiliated with a California corporation that advertised various debt-relief services nationwide via a website and direct mail solicitation. The debtors were screened by nonlawyers who asked clients to sign nonrefundable retainer agreements. The retainer agreements contained a $399.00 fee, a legal fee equal to 18% of the total debt at issue, and monthly payments toward escrow and legal fees over a four-year span. The Respondent's only role was to review and sign the retainer agreements after they had been signed by the debtor and the USLSG nonlawyer. The Court approved a Conditional Agreement which stipulated that Respondent violated: Rules 1.4(a)(1) and (5), Rule 5.3 and Guideline 9.3 by failing to reasonably supervise nonlawyers, Rule 5.5(a) by assisting in the unauthorized practice of law, and Rule 8.4(a) by knowingly assisting another to violate the Rules (charging and collecting an unreasonable fee and

using an improper trade name). The Court suspended Respondent from the practice of law for a period of not less than six months, without automatic reinstatement.

In ***Matter of Westerfield*****, 64 N.E.3d 218 (Ind. 2016)**, Respondent, who was licensed to practice law in Indiana but not in Florida, was hired by a non-lawyer marketing representative to quiet title actions for homeowners. Thereafter, Respondent accepted flat fees for representation, but did not complete any quiet title actions or fully refund her clients. In May of 2015, the Indiana Commission filed a four-count complaint against Respondent for improperly soliciting clients, failing to refund unearned fees, and engaging in the unauthorized practice of law in another state (Florida). The Court also found that Respondent had a "lengthy disciplinary history" and was "disingenuous and evasive" about her relationship with the marketing representative. The Court held that an eighteen-month suspension, without automatic reinstatement, was an appropriate sanction for Respondent's misconduct.

In ***Matter of Anonymous*****, 6 N.E.3d 903 (Ind. 2014)**, Respondent entered into agreement with American Association of Motorcycle Lawyers ("AAML") to have them advertise for him on their website. AAML's direct phone line was connected to Respondent's so that when potential clients called the AAML they would reach Respondent. Lawyers that the AAML advertised on behalf of were referred to as "Law Tigers" on the AAML website. The AAML website contained examples of previous results obtained by "Law Tigers." A tab led to "Client Testimonials" from persons who claim to have utilized "Law Tigers" in seeking advice and/or representation regarding a motorcycle-related legal matter. None of the settlements, verdicts, or testimonials related to Respondent, but that was not disclosed on the website. The Court found these advertisements to be misleading and issued a private reprimand. The lessons to take from the Law Tigers case are: 1) recitation of actual results is considered a violation of Rule 7.1 because it can be considered misleading; and 2) lawyers are liable for advertisements that are associated with them, and should be vigilant of communications made by referral networks or other entities marketing in multiple states.

Number 4 | CLIENT CONFIDENCES AND PRIVILEGE

***Matter of Meisenhelder*, 153 N.E.3d 221 (Ind. 2020)**, involved a Respondent who represented two clients in unrelated matters. Respondent filed a pleading in the first client's case that revealed confidential information about the second client's case. Respondent's motive is not revealed by the facts recited in the order approving the agreed discipline, but he agreed that he violated Rule 1.6(a) by revealing information relating to representation of a client without the client's informed consent and Rule 1.9(c)(2) by revealing information relating to the representation of a former client except as rules permit or require.

In ***Matter of Smith*, 991 N.E.2d 106 (Ind. 2013)**, Respondent engaged in attorney misconduct by, among other things, revealing confidential information relating to his representation of a former client by publishing the information in a book for personal gain. Respondent revealed that he and his former client engaged in a sexual relationship, and he also communicated that partial motivation for writing the book was to recoup legal fees he felt the former client owed him. In addition to violations of Rule 1.9 for revealing information related to the representation of a former client, Respondent was found to have violated Rule 1.7 (conflict of interest); 7.1 (false statements about his services); 8.4(c) (engaging in dishonest or fraudulent conduct); and 8.4(e) (stating or implying the ability to influence a government official). The Court disbarred Respondent.

In ***Matter of Anonymous*, 932 N.E.2d 671 (Ind. 2010)**, Respondent represented an organization that employed "AB." AB asked Respondent for a referral to a family law attorney after an altercation with her husband. AB and her husband soon reconciled. In 2008, Respondent was socializing with two friends, one of whom was also a friend of AB. Unaware of AB's reconciliation with her husband, Respondent told her two friends about AB's filing for divorce and about the altercation. Respondent encouraged AB's friend to contact AB because the friend expressed concern for her. When AB's friend called AB and told her what Respondent had told him, AB became upset about the revelation of the information and filed a grievance against Respondent. The Court concluded Respondent violated Rule 1.9(c)(2) by improperly revealing information relating to the representation of a former client. For Respondent's professional misconduct, the Court imposed a private reprimand.

Number 3 | CONDUCT INVOLVING DISHONESTY

Unfortunately, cases involving dishonest attorneys are all too common.

In ***Matter of Lee*, 169 N.E.3d 407 (Ind. 2021)**, Respondent represented a client in criminal cases pending in Dearborn County, Indiana and in Ohio. Respondent repeatedly continued the Indiana matter because he believed that a motion to suppress evidence in the Ohio case would be successful and beneficial in the Indiana case. However, Respondent never filed the suppression motion and misled his client about the status of the case. Respondent entered into a conditional agreement for a 180-day suspension, with automatic reinstatement as a result of his violations of Rule 1.3 (failure to act with reasonable promptness and diligence) and 8.4(c) (engaging in conduct involving dishonesty fraud, deceit, or misrepresentation). The suspension was later converted to suspension *without* automatic reinstatement because Respondent failed to comply with the obligations of a suspended attorney under Admission and Discipline Rule 23(26) and with the terms of our disciplinary order.

In the Matter of Gupta, 140 N.E.3d 287 (Ind. 2020), resulted in the disbarment of Respondent who committed a wide-ranging, severe, and long-lasting pattern of misconduct including criminal tax evasion client neglect, and serious issues commingling client funds with his own. "Many of Respondent's actions were intended to unjustly enrich himself and affiliated consultants at the expense of his clients and the public fisc. Several of Respondent's clients have suffered significant prejudice as a result of Respondent's neglect of their cases and financial mismanagement. Respondent continued to accept clients long after it had become apparent that he could not capably represent them, and he ceased practicing only when forced to do so by an emergency interim suspension." *Id.* at 291. Respondent was suspended for three years by agreement, but the Court noted that had he not entered into a conditional agreement to discipline, disbarment may have been a more appropriate sanction.

In ***Matter of Fraley*, 138 N.E.3d 262 (Ind. 2020)**,the Respondent repeatedly commingled her own funds with client funds and converted client funds for her own use. Then upon investigation of her trust account mismanagement and theft, Respondent repeatedly lied to the Commission and the Court and falsified evidence to hide her misconduct. Respondent

was disbarred. The Court reasoned: "Respondent's total lack of insight during these proceedings into the wrongfulness of failing to account for client funds and using those funds to pay personal expenses, and her utterly inexplicable decisions during the progression of this case to double and even triple down on her demonstrably false statements, persuade us that her fitness to practice law is not capable of being restored."

***Matter of Hudspeth*, 95 N.E.3d 515 (Ind. 2018)** includes four complaints against the Respondent and his honesty. First, Respondent did not communicate with a client about a bankruptcy case, did not respond to discovery requests, and lied in a letter to the client that the case had been dismissed due to lack of evidence after Respondent did not attend the dismissal hearing. The client then filed a grievance with the Court. Furthermore, the Court found the Respondent created the dismissal letter during the disciplinary process and did not send it to the client. Next, the Respondent did not respond to the Commission's inquiry into the grievance. Then, the Respondent lied to a client, telling her the case was pending when it had already been dismissed. Finally, the Respondent used websites to inaccurately represent his experience, the size of his practice, and his specialties within the law. The Court found the Respondent's willful dishonesty harmful to his clients and the public and suspended Respondent for 18 months, without automatic reinstatement.

In ***Matter of Mulvany*, 83 N.E.3d 72 (Ind. 2017)**, Respondent represented clients in federal court seeking judicial review of Social Security claims where he applied for attorney fees that did not accurately reflect his "actual time," which was a statutory requirement. Respondent was found to have a tendency to round up to the nearest hour on each of his tasks. Upon review of the inappropriate timekeeping practices, the parties agreed that the Respondent was in violation of knowingly making a false statement of fact to a tribunal and engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. The Court held that a public reprimand was warranted for the Respondent's misconduct.

In ***Matter of Jun*, 78 N.E.3d 1100 (Ind. 2017)**, Respondent was hired by a United States citizen to assist his wife, a citizen and resident of South Korea, in immigrating to the United States to live permanently. Respondent proposed that the client's wife enter the United States on a non-immigrant visa or visa waiver, and then seek a permanent residency status. Respondent knew that to obtain the non-immigrant visa or visa waiver, his client's wife would have to state falsely on her application that she intended to leave at the expiration of her non-immigrant visa period, fail to reveal her marital status to a United States citizen, or make other false or misleading statements. When the client's wife arrived in the United States, she was denied entry based on false statements to customs officials and forced to take the next return flight to South Korea. The Court found that Respondent counseled or assisted his client to engage in conduct he knew to be criminal or fraudulent in violation of Rule 1.2(d) and imposed a public reprimand.

In ***Matter of Yudkin*, 61 N.E.3d 1169 (Ind. 2016)**, Respondent, knowingly made several misrepresentations regarding the timeliness of a motion to correct error ("MTCE") during trial. In May of 2013, the trial court ruled in favor of the Respondent, but the appellate

court found that Respondent's statements were misleading. In response, Respondent filed a frivolous federal lawsuit against the opposing party, alleging defamation. Upon review, the Commission found that Respondent had "selectively quoted the language of Trial Rule 59(C) in a manner that suggested" the opposing party's MTCE would have been untimely regardless of the misrepresentation. The Court suspended Respondent for 90 days, without automatic reinstatement.

In ***Matter of Epstein*, 87 N.E.3d 470 (Ind. 2017)**, the Respondent represented a defendant that recorded their phone conversations. The phone conversations demonstrated that Respondent improperly bragged about his personal relationships with the judges, which implied that he could influence the judges' decisions; used derogatory terms when discussing another client's race; and told the defendant that he could flee to avoid or delay criminal prosecution. Respondent violated Rules 1.2(d), 8.4(e), and 8.4(g). Thus, Respondent was suspended from the practice of law for 90 days, without automatic reinstatement.

In ***Matter of Cooper*, 78 N.E.3d 1098 (Ind. 2017)**, the Respondent was one of the deputy prosecutors on a capital murder case. The Respondent handled the case at both the trial and sentencing phases. The presiding judge recused himself from the proceedings and a special judge was appointed. The Respondent released a public statement in which he indicated that he was suspicious of the transfer of the case to the special judge and then offered purported support for that suspicion which was false, misleading, and inflammatory in nature. The Supreme Court concluded that the statements concerning the special judge's qualifications and integrity were made with reckless disregard as to its truth or falsity. The Court found that the Respondent violated Indiana Rule of Professional Conduct Rule 8.2(a) (making a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge). The Court issued a public reprimand.

In ***Matter of Powell*, No. 76 N.E.3d 130 (Ind. 2017)**, Respondent committed attorney misconduct by falsifying evidence and knowingly making false statements to the Court in his efforts to be reinstated to the practice of law. Respondent was previously suspended for actions undertaken during his representation of a client, T.G. The client received a settlement in a personal injury action and was in an abusive relationship and involved with drugs. Her then lawyer, not the Respondent, acted as settlor of a special needs trust in the benefit of T.G. in order to avoid the rapid depletion of the proceeds of her settlement. The lawyer acted without the consent of T.G. T.G. then consulted with the Respondent about how to get access to her trust funds and the Respondent became the successor trustee. He then quickly disbursed $30,000 from the trust account to T.G. and $15,000 to himself after expending only minimal effort. The Court determined that the fee was unreasonable, and suspended him for four months. Simultaneously, T.G. dissipated her assets on drugs and other expenditures.

The Respondent then sought reinstatement and was denied because the Court found that he had practiced law during his suspension, forged signatures, and filed a false affidavit with the Court. He then filed another petition for reinstatement three days later,

which was again denied. In July of 2014, the Respondent tracked T.G. down to Iowa in order to make "restitution." He convinced her to forge a notarized document purporting to give her $15,000 in restitution but only actually gave her $1,500. He presented this document to the Commission during his reinstatement hearing, but T.G. testified that she never received anything greater than $1,500. The Court determined that the "Respondent's elaborate scheme to convince the Commission and this Court that he made full restitution to T.G. when in fact he had not –are but the culmination of a years-long endeavor to game the system." The Court ultimately disbarred the Respondent.

In ***Matter of Fox,*** **78 N.E.3d 1096 (Ind. 2017)**, Respondent moved for leave to correct a one-page Table of Contents and a four-page Table of Authorities. The Court granted the motion and specifically ordered Respondent not to make any substantive changes. However, when Respondent filed a corrected brief it contained a thirty-six page Table of Contents and fifty-nine additional sources. The Court held that a public reprimand was warranted for Respondent's misconduct.

In ***Matter of Ogden*****, 10 N.E.3d 499 (Ind. 2014)**, Respondent made several allegations about a judge in order to have him removed from a case involving the administration of an estate. He alleged that the judge committed malfeasance in the initial stages of the administration of the Estate by allowing it to be opened as an unsupervised estate, by appointing a personal representative with a conflict of interest, and by not requiring the posting of a bond. He also alleged that the judge allowed the personal representative to engage in misconduct over the course of the administration. The Court found that the Commission met its burden of proof in proving that Respondent had violated Rule 8.2(a), which provides that "A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge . . . ." The judge had not actually presided over the administration of the estate during the time that the personal representative was involved. The Court found that Respondent could have easily acquired this information prior to making the allegations, which represented to them that Respondent made the statement without any reasonable basis for believing it to be true, and suspended him from the practice of law for 30 days.

In ***Matter of Alexander*****, 10 N.E.3d 1241 (Ind. 2014)**, Respondent, in one case, hired a former attorney who had resigned from the bar and allowed him to perform law-related tasks such as legal research, client interviews, and assisting Respondent at counsel table during trial.

In a second matter, Respondent was involved in a case where a driver had left a steakhouse intoxicated and was then involved in an accident that injured Respondent's clients.

Respondent's clients argued that the driver was visibly intoxicated and the steakhouse served him anyway. A waitress at the steakhouse was willing to testify that this was true, but eventually contacted Respondent to let him know that she had changed her mind and that she had lied initially when she spoke with him. As part of the discovery

process, the restaurant served interrogatories to Respondent's clients. The Respondent did not include the waitress's name in the appropriate part of the response to interrogatories, although he disclosed the name in another part of the discovery. Respondent was found to be in violation of Indiana Trial Rule 26(E)(2)(b) which provides that, "A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which . . . he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment." Respondent was suspended from the practice of law for 60 days.

In ***Matter of Usher*, IV, 987 N.E.2d 1080 (Ind. 2013)**, Respondent was a partner at a law firm, and pursued a consistently unrequited relationship with a summer intern. Their previous friendship declined because of his insistent pursuit of a romantic relationship. Respondent received a movie clip featuring the intern in a state of undress. After Respondent communicated his possession of the clip to the intern, she ended their friendship.

Respondent then began efforts to humiliate the intern and to interfere with her employment. Respondent sent the clip to attorneys at the firm where she had accepted a job offer in an effort to adversely affect her employment. Respondent sent Intern an email accusing her of lying and misleading him, and Respondent drafted a fictitious email thread with the subject line "Firm slogan becomes 'Bose means Snuff Porn Film Business' w/addition of [Jane Doe] "Bose means Snuff Porn Film Business" w/ addition of [Jane Doe]", and suggested the Intern was a danger to female professionals.

Respondent recruited a paralegal to disseminate the email with directions on how to avoid having the e-mail linked back to them. Respondent was out of town when the email was sent. Thereafter, the intern served him with a protective order with the email attached.

Respondent's firm demanded he resign, and he complied. The hearing officer found the email was a "vindictive attempt to embarrass and harm [Intern] both personally and professionally." The Court found that Respondent violated Professional Conduct Rule 3.3(a)(1) by knowingly submitting false responses to RFAs in defense of Intern's civil action against him. Respondent admitted to originally misrepresenting his involvement with the email.

The Court concluded that Respondent violated Indiana Professional Conduct Rules 3.3(a)(1), 8.1(a), 8.1(b), 8.4(a), 8.4(c), and 8.4(d), by, among other things, engaging in a pervasive pattern of conduct involving dishonesty and misrepresentation that was prejudicial to the administration of justice. For Respondent's misconduct, the Court suspended Respondent for three years, without automatic reinstatement.

Number 2 | TRUST ACCOUNTS

Misconduct involving the funds of clients and third parties is one of the most serious acts of misconduct a lawyer can commit. As a result, the sanctions for misconduct in these cases are equally serious. What follows are highlights of recent cases provided for a flavor of the kind of sanctions the Supreme Court metes out for violations in this area.

***Matter of Williams*, 148 N.E.3d 317 (Ind. 2020)**, involved ongoing trust account mismanagement as well as failure to communicate with clients or make meaningful efforts to make progress on their cases. Respondent also failure to refund unearned fees, despite promises to do so. Respondent entered into a conditional agreement admitting liability for violations including lack of competence and diligence, commingling his property with the client's property, making a false statement to the Commission, and mismanagement of his trust account. Respondent was suspended for 180-days, *without* automatic reinstatement.

In ***Matter of Gabriel*, 120 N.E.3d 189 (Ind. 2019)**, Respondent was appointed as guardian of her incapacitated father's person and estate by the guardianship court. The Respondent spent considerable sums of her own money taking care of her incapacitated father, which significantly depleted her personal assets. After the sale of her father's residence, the guardianship received approximately $40,000. The Respondent started taking withdraws and making payments to herself from the estate without obtaining the requisite court approval and in violation of a restraining order that had been issued by the guardianship court. The Respondent also failed to file an accounting with the court and subsequently failed to comply with a court order to do so.

The Commission and the Respondent agreed that the Respondent violated Rule 3.4(c) based on her failure to comply with the court order, but the Commission also alleged violation of Rule 8.4(b). The Court, however, found that the Respondent's actions did not violate Rule 8.4(b) because the Respondent's conduct did not rise to the level of criminal exploitation. The Court suspended Respondent for 90 days, with automatic restatement.

In ***Matter of Schuyler*, 97 N.E.3d 618 (Ind. 2018)**, Respondent stole at least $550,000

from the estates of six clients. One of the estates filed a grievance against the Respondent and the Commission found that Respondent did not comply with orders for accounting and distribution of assets. Respondent did not appear at multiple hearings and a warrant was issued for his arrest. He was eventually charged with fifteen felony counts and pled guilty, leaving him to spend 8 years incarcerated and to pay restitution. The Court disbarred Respondent.

In ***Matter of Mercho*, 78 N.E.3d 1101 (Ind. 2017)**, Respondent misappropriated funds from his attorney trust account over a period of several years, making dozens of disbursements of client funds for purely personal purposes. At least two of these instances involved disbursement of funds Respondent was holding in trust for another attorney and that attorney's client. During the Commission's investigation, Respondent made numerous false statements, and submitted a client ledger containing false entries, in an attempt to extricate himself from the disciplinary process. The Court held that a suspension for a period of 180 days, with 90 days actively served and the remainder stayed subject to completion of at least one year of probation was warranted for Respondent's misconduct.

In ***Matter of James*, 70 N.E.3d 346 (Ind. 2017)**, Respondent significantly overdrew his trust account, mismanaged his trust account, converted client funds, made unauthorized withdrawals, and failed to cooperate with the Disciplinary Commission. During this case, Respondent was already under suspension in two other cases for failure to cooperate with the Commission. The Court disbarred Respondent.

In ***Matter of Ulrich*, 78 N.E.3d 1097 (Ind. 2017)**, Respondent represented his client in a personal injury lawsuit where the settlement was $100,000. The settlement was deposited into Respondent's trust account where he held the client's funds while Respondent sued the client's insurer. The client was only able to obtain its settlement claim after bringing suit under new legal representation. During this time, Respondent failed to keep individual client ledgers, withdrawal fees earned, and unauthorized withdrawals. The Court held that a suspension for a period of six months, all stayed subject to completion of at least two years of probation, was warranted for Respondent's misconduct.

In ***Matter of Safrin*, 24 N.E.3d 417 (Ind. 2015)**, Respondent maintained two attorney/client trust accounts ("Trust Accounts"), neither of which were registered as an Interest on Lawyers Trust Account ("IOLTA"). Respondent did not notify the banks that the Trust Accounts were subject to overdraft reporting to the Commission. On his Attorney Annual Registration Statements from 2008 through 2011, Respondent falsely stated that he was exempt from maintaining an IOLTA. Over several years, Respondent shared signatory authority for the Trust Accounts with another lawyer, who stole money from the Trust Accounts. This resulted in overdrafts, which were not reported to the Commission because the accounts were not registered as IOLTA accounts. Additionally, Respondent falsely claimed to the Commission that his fee arrangements never contained a nonrefundable fee provision. The parties agree that Respondent violated Rules 1.5(a), 1.15(g), 8.1(a)-(b) and 8.4(c). The violations stemmed from Respondent

falsely certifying he was exempt from holding an IOLTA trust account, making an agreement for an unreasonable fee, providing false statements to the Commission, and engaging in dishonesty and deceit. The Court suspended Respondent from practicing law for six months, without automatic restatement.

In ***Matter of Thomas*****, 30 N.E.3d 704 (Ind. 2015)**, Respondent initially employed various experienced persons to manage his law office and attorney trust account. However, at some point between 2002 and 2004, Respondent's wife took over management of Respondent's trust account. The wife had no prior experience with trust accounts or fiduciary accounting. Beginning in 2004 or 2005, Respondent gave control of his trust account to his wife and did not adequately supervise her. In 2006, Respondent became aware that his trust account was in poor shape and needed to be "untangled." Despite knowing his wife's accounting was incorrect, during the next several years Respondent failed to take appropriate measures to supervise his wife or reconcile his trust account issues. Throughout 2009 and 2010, Respondent's wife signed Respondent's name to the drawer's line on trust account checks and opened trust account bank statements received in the mail prior to giving them to Respondent. Monies from Respondent's trust account and operating account would routinely intermix. In 2009, Respondent filed for bankruptcy but failed to list his attorney trust account in his Statement of Financial Affairs. The Court concluded that Respondent violated Rules 1.1, 1.15(a), 3.3(a)(1), 5.3(a)-(c), 8.4(a)-(b), for failing to diligently supervise his wife, commingling client and attorney funds, and engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. Respondent was suspended from the practice of law for eight months.

Number 1 | NEGLECT AND LACK OF COMMUNICATION

By far and away, year after year, this is the most common complaint grievants make about their lawyers...or former lawyers. Almost invariably, the reported decisions involving this form of misconduct are multiple count matters which result in the lawyer's suspension or disbarment. For illustration, what follows is a partial list of recent disciplinary actions involving these elements which resulted in public discipline.

Matter of Adams, No. 139 N.E.3d 209 (Ind. 2020), involved five counts of client neglect, communications of false status reports to multiple clients, and significant delay in refunding unearned fees to clients. Respondent further incorrectly certified that his business account was an IOLTA. Respondent was charged with the following rule violations:

- 1.3: Failing to act with reasonable diligence and promptness.
- 1.4(a)(3): Failing to keep a client reasonably informed about the status of a matter.
- 1.4(a)(4): Failing to comply promptly with a client's reasonable requests for information.
- 1.15(g): Failing to certify that all client funds which are nominal in amount or to be held for a short period of time are held in an IOLTA account.
- 1.16(d): Failing to refund unearned fees after termination of representation. The parties further agree that Respondent's failure to properly certify his IOLTA account with the Clerk also violated Admission and Discipline Rule 2(f).

Respondent was suspended for 180 days, with 60 days actively served and the remainder stayed subject to completion of at least two years of probation with JLAP monitoring. The Court noted Respondent's engagement with JLAP and efforts to overcome his practice management issues in mitigation of his misconduct.

In ***Matter of Ricks*, 124 N.E.3d (Ind. 2019)**, Respondent committed attorney misconduct by neglecting clients' cases on four separate occasions and by failing to cooperate with the disciplinary process. In Client 1's case, Respondent accepted a retainer payment to assist the client with an expungement petition. Respondent failed to advance the client's case for nearly three years and did not return client's initial retainer payment.

In Client 2's case, Respondent again collected a retainer payment to assist the client with a post-conviction relief action. Over the course of three years, Respondent grew less responsive to inquiries from Client 2 and ultimately failed to appear for a hearing where the court entered judgment against the client.

In Client 3's case, Respondent again accepted a retainer payment to assist the client with a post-conviction relief action and ultimately failed to advance the case. The court removed Respondent as counsel for failing to appear at a hearing. In Client 4's case, Respondent charged and collected an advance payment to assist the client with a sentence modification but quickly grew unresponsive and ultimately failed to advance the case. Respondent had been suspended twice before for almost identical transgressions, and the Court ultimately found the Respondent in violation of Professional Conduct Rules 1.3, 1.4, 1.16, 8.1, and 8.4. As a result, the Court suspended Respondent from the practice of law for two years, without automatic reinstatement.

In ***Matter of Elliott*, 137 N.E.3d 254 (Ind. 2020)**, Respondent represented "Wife" in a dissolution matter, and another attorney represented "Husband." The negotiated resolution reached by the parties contemplated that Husband would be awarded portions of Wife's four retirement accounts. Under the terms of the decree, Respondent was to prepare qualified domestic relations orders ("QDROs") for two of those accounts within 90 days, and opposing counsel was to prepare QDROs for the other two accounts within 90 days. (Neither Respondent nor opposing counsel did so). Respondent violated Indiana Professional Conduct Rule 3.2 by failing to make reasonable efforts to expedite litigation consistent with the interests of his client and received a public reprimand. ***See also Matter of Lytle*, 135 N.E.3d 156 (Ind. 2019)** (same underlying facts, but Lytle was also found to have violated Rule 1.4(a) & (b) for failing to respond to her client's requests for information and keep him adequately informed.

In ***Matter of Coleman*, 67 N.E.3d 629 (Ind. 2017)**, Respondent falsely represented that he was associated with a law firm while soliciting employment with a client. During the representation, the client had difficulty communicating with Respondent, and Respondent failed to keep client informed about events in the case, made decisions about the case without consulting the client, and failed to appear at a pretrial conference. Despite the client's prior instructions that he did not want to enter a plea agreement, Respondent negotiated a plea agreement without consulting the client. The client then fired Respondent and hired new counsel. Respondent did not withdraw his representation or forward a copy of the client's file to new counsel until after a show cause proceeding was initiated against him. The Court found Respondent's conduct to be "wide-ranging, pervasive, retaliatory, and deceptive." Respondent also struck his wife in the presence of four children. The Court suspended Respondent for two years, without automatic reinstatement.

In ***Matter of Staples*, 66 N.E.3d 939 (Ind. 2017)**, Respondent appeared as successor counsel for a criminal defendant. Respondent did not appear for a pretrial conference and did not timely respond to inquiries from court staff regarding his absence. When the client was unable to appear at a hearing due to his hospitalization, Respondent did not

file a motion to continue although ordered to do so, and failed to appear during the show cause proceedings that ensued. Respondent was found in contempt, and failed to appear for a sanctions hearing. Respondent was ordered to appear with the client at a hearing; the client appeared, but Respondent did not. The trial court again found Respondent in contempt. The Court imposed a public reprimand for Respondent's misconduct.

In ***Matter of Jackson*, 24 N.E.3d 419 (Ind. 2015)**, Respondent signed an agreement with Consumer Attorney Services ("CAS"), a Florida firm, to be "of counsel" and to provide services to CAS's Indiana loan modification and foreclosure defense clients. CAS paid Respondent $50 (later raised to $75) for every Indiana loan modification client and $200 for each foreclosure client assigned to him. Non-lawyer employees of CAS performed all intake work for clients assigned to Respondent and drafted pleadings to review and file.

An Indiana resident hired CAS and was assigned to Respondent. The client was not informed that Respondent's role in his representation would be limited, nor was he informed about how fees would be shared between CAS and Respondent. The fee agreement called for an initial nonrefundable retainer followed by monthly payments for the duration of the representation. Other than making an initial brief phone call to the client and signing the fee agreement on behalf of CAS, Respondent had no involvement in attempting to obtain a loan modification from the client's lender. The client was eventually served a complaint for foreclosure. Following the foreclosure notice, a non-lawyer at CAS sent the client a "retainer modification agreement," which increased the client's monthly payments for continued representation. The lender of the home mortgage sought summary judgment, and Respondent filed a response on the client's behalf that was initially drafted by a non-lawyer at CAS. Throughout the proceedings, Respondent did not keep the client informed about the status of the litigation, did not consult with the client about the availability of a court-ordered settlement conference, and did not raise any substantive defenses. The client eventually terminated his relationship with CAS. CAS did not notify Respondent of the termination, and Respondent did not withdraw his appearance from the foreclosure action. The client eventually obtained a loan modification by directly negotiation with his lender. The client sought a refund of unearned fees held by CAS but was unsuccessful.

The parties agreed that Respondent violated the following Rules of Professional Conduct: 1.4(a)(1)-(3),(5), 1.4(b), 1.5(e), 5.3(b), 5.4(c), 5.5(a), 8.4(a), (c)-(d). Among other things, Respondent failed to reasonably communicate and keep his client informed about the status of a matter, failed to obtain a client's required approval of a fee division, knowingly assisted another to violate the Rules of Professional Conduct, and engaged in deceitful misrepresentations. The Court suspended Respondent from practicing law for 120 days, with automatic reinstatement.

This has been an exposition of ten of the most common sources of disciplinary action and personal liability for lawyers. Although the list covers most of the territory, it is by no means an exclusive listing. There are new and different forms of misconduct appearing regularly for lawyers.

One purpose of this work is (hopefully) to cause lawyers to re-examine their practices and, where problems exist, formulate a plan for preventing or correcting some of the problems described herein.

These materials were originally prepared by Charles M. Kidd and Kevin McGoff.

They were last updated in August 2021 by Margaret M. Christensen of Dentons Bingham Greenebaum LLP.

Section Five

Trust Account Management for Lawyers

Seth T. Pruden
Staff Attorney
Indiana Supreme Court Disciplinary Commission
Indianapolis, Indiana

Section Five

Trust Account Management for Lawyers……………………………………………………... Seth T. Pruden

PowerPoint Presentation

TRUST ACCOUNT MANAGEMENT FOR LAWYERS

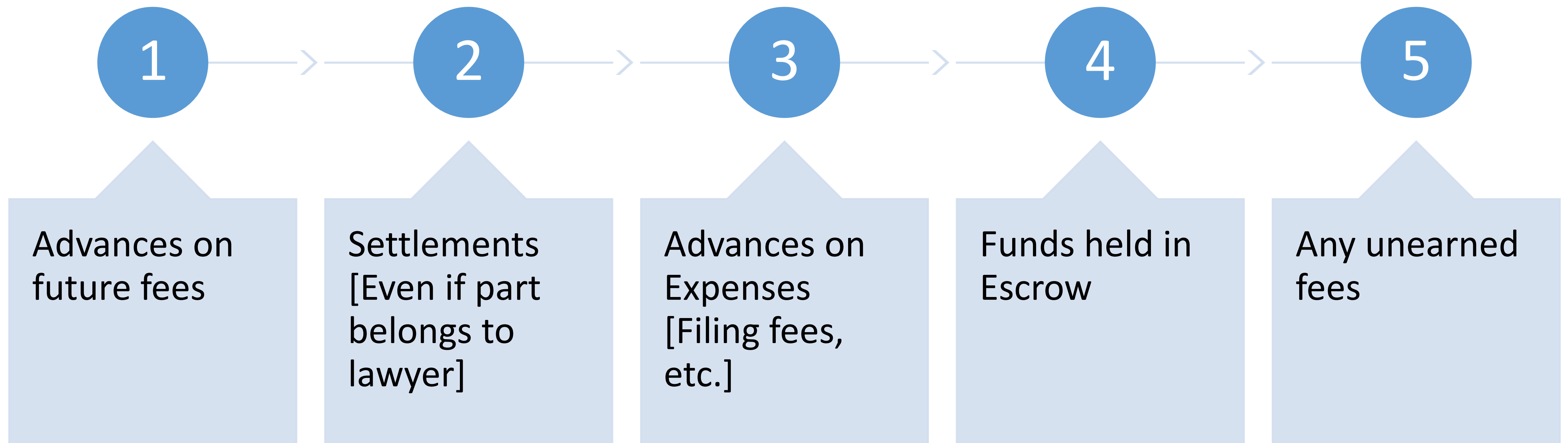
RESOURCES

- RULES OF PROFESSIONAL CONDUCT; 1.15
- ADMISSION AND DISCIPLINE RULE 23; SECTION 29
- REVIEW ATTORNEY DISCIPLINE CASES INVOLVING TRUST ACCOUNTS

LAWYER IS FIDUCIARY

- **FUNDS HELD FOR BENEFIT OF CLIENT OR THIRD PERSON**
- **NOT LAWYER’S MONEY**

NOT LAWYER'S MONEY DEPOSIT IN TRUST



FIDUCIARY

- **PURPOSE IS TO PROTECT INTERESTS OF THE PERSON FOR WHOM THE FUNDS ARE HELD**
- **MUST KEEP ACCUARATE AND TIMELY ACCOUNTING**
- **MUST MAINTAIN INTEGRITY OF FUNDS AND RECORDS**

SEPARATE ACCOUNTS REQUIRED

Rule 1.15(a)

OFFICE OR PERSONAL ACCOUNT	**TRUST ACCOUNT**
[Your Money]	[NOT Your money]

NOMINAL BALANCE RULE

- **Rule 1.15(b)**

“A lawyer may deposit his or her own funds reasonable sufficient to maintain a nominal balance.”

Seth’s Rule: $100 to open the account.

DISPUTED FUNDS?

Rule 1.15(e)

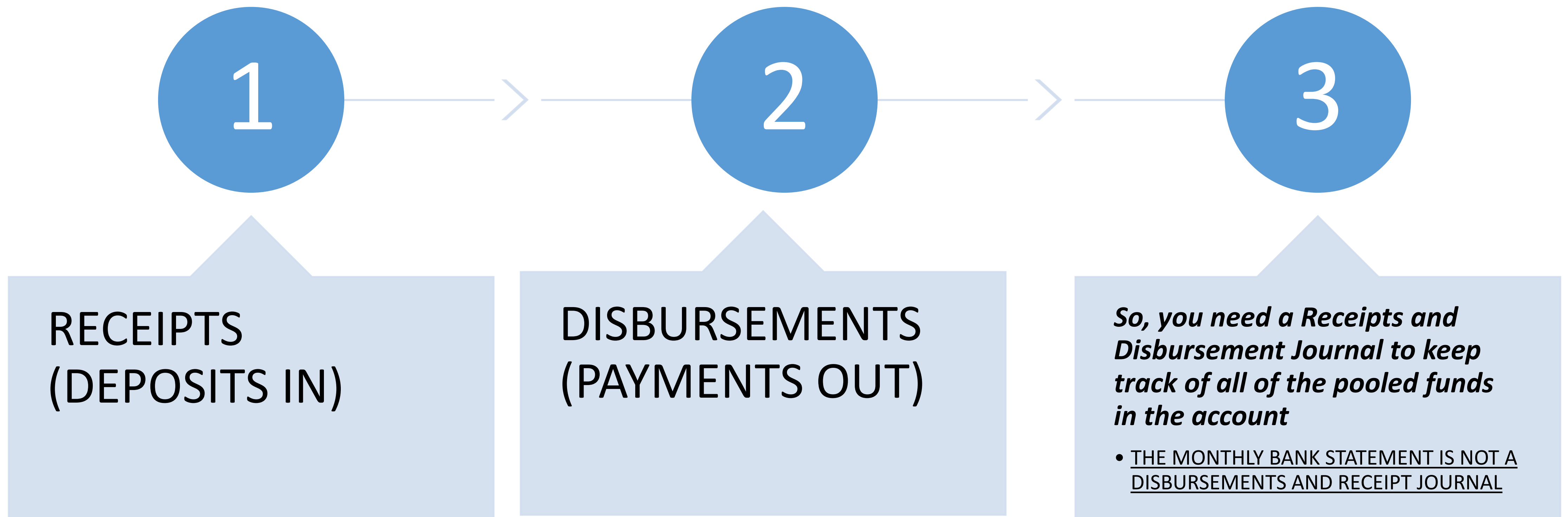
Any disputed funds must remain in trust account until dispute is resolved.

***Matter of Young*, 802 N.E.2d 922 (Ind. 2004)**

DISBURSEMENTS

- **ONLY FOR BENEFIT OF CLIENT/ THIRD PERSON FOR WHOM THEY ARE BEING HELD**
- **MUST WAIT FOR DEPOSIT TO CLEAR**
- **NO CASH WITHDRAWALS**
- **NO ATM WITHDRAWLS**

RECORD KEEPING



KEEPING TRACK OF FUNDS FOR EACH INDIVIDUAL CLIENT OR MATTER

- **In a bank, each account has a number and is individually accounted. Lawyers must do the same thing for their clients' funds.**

- **Pooled funds are a result of those individual accounts being added together.**

So, you must keep a ledger or accounting journal for each individual client, or client matter (if necessary) or third person, for whom funds are being held (including the lawyer's "nominal amount" ledger).

DETAILS FOR EVERY DEPOSIT AND DISBURSEMENT

Admis.Disc. R. 23, Section 29

Date
Source of Funds (Deposits)
Payor (Disbursements)
Description
Amount
Client or Third Person (What case?)
Running Total of Balance

SUPERVISION BY LAWYER

- **NON-LAWYERS MAY MANAGE THE ACCOUNT; HOWEVER…**

- **LAWYER IS RESPONSIBLE AND MUST OVERSEE**

***Matter of Thomas*, 30 N.E.3d 704 (Ind. 2015)**

BANK STATEMENT

RECONCILIATION OF THE ACCOUNT

Admis. Disc. R. 23, Section 29(c)(ii)

Lawyer Must Supervise the Account (although non-lawyer can do the work) and Must Supervise Periodic Reconciliation of the Account

RECORDS MUST BE KEPT FOR 5 YEARS

- **Fee Agreement**
- **Checkbook Registers**
- **Monthly Bank Statements**
- **Cancelled Checks (if any)**
- **Receipt and Disbursement Journal and Client Ledgers**
- **Reconciliation Reports**

Records can be paper, electronic or photographic, so long a paper image can be created.

SETTING UP THE ACCOUNT

Know the Rules: Admis.Disc.R. 29, Section 30

- Approved Financial Institution
- Overdraft Reporting Release Form
- IOLTA Agreement
- Certification of Account (s) on Annual Registration Form

ATTORNEY TRUST ACCOUNT MUST AUTHORIZE OVERDRAFT NOTIFICATION TO DISCIPILNARY COMMISSION

ATTORNEY MUST RESPOND TO OVERDRAFT INQUIRY

CREDIT CARDS

PROBLEMS WITH UNEXPECTED

“TAKING” OF CLIENT FUNDS

TRANSACTION FEES

“CHARGE BACKS”

SOLUTIONS

- **MERCHANT CREDIT CARD PROVIDER (BANK) AGREES NEVER TO TAKE TRANSACTION FEES FROM TRUST ACCOUNT**

and

- **MERCHANT CREDIT CARD PROVIDER (BANK) AGREES NEVER TO DEDUCT CHARGE BACKS FROM TRUST ACCOUNT**

- **SEE “LAWPAY.COM”**

IOLTA

INTEREST ON LAWYER'S TRUST ACCOUNT

WHERE DOES THE MONEY GO?

- **State Bar Foundation**

  Administers the IOLTA Program

- **Pro Bono Commission Funded**

DO ALL FUNDS HELD FOR CLIENTS OR 3RD PERSONS GO INTO IOLTA ACCOUNT?

1. **NOMINAL IN AMOUNT**

   -or-

2. **HELD FOR SHORT PERIOD OF TIME**

WHAT IF A DEPOSIT IS LARGE OR INTENDED TO BE HELD FOR LONG PERIOD?

MULTIPLE TRUST ACCOUNTS

CREDIT ON ACCOUNT?

NOT AN EARNED FEE. MUST BE HELD IN TRUST.

FLAT FEE?

STILL NOT ACTUALLY EARNED. HOWEVER….

DOES NOT NEED TO BE DEPOSITED IN TRUST

In re Kendall, 804 N.E.2D 1152, 1158 (Ind. 2004)

See also, *Matter of Stanton*, 504 N.E.2D 1 (Ind. 1987)

CAN ATTORNEY MAKE ADVANCES "NON-REFUNDABLE?"

SHORT ANSWER: "NO."

WE ARE FREE TO CONTRACT, AREN'T WE?

First, Rule 1.5(a) requires fees to be "reasonable."
That includes both the amount and the terms.

Reasonable to Whom?

Also…

Client has the legal right to terminate the representation at any time.

No refund would chill the client's ability to exercise that right.

Also…

As a fiduciary, we are supposed to look out what is best for the client.

KNOW THE LAW ON FEES AND REFUNDS

Matter of O'Farrell, 942 N.E.2d 799 (Ind. 2011)

In Re Kendall, 804 N.E.2D 1152 (Ind. 2004)

Matter of Stephens, 851 N.E.2d 1256 (Ind. 2006)

Matter of Zirkle, 911 N.E.2d 572 (Ind. 2009)

**Matter of Canada*, 986 N.E.2ND 254 (Ind. 2013)

SURROGATES

REQUIRED FOR
SOLOS

ATTORNEY SURROGATE

ADMISSION AND DISCIPLINE RULE 23, SECTION 27

ANNUAL REGISTRATION FORM TO CLERK

APPLICABILITY

- **DEATH**
- **DISAPPEARANCE**
- **DISABILITY**
- **DISBARMENT, SUSPENSION UNDER CERTAIN CIRCUMSTANCES**

COURT ORDER REQUIRED

- **NOT AUTOMATIC**
- **FILE PETITION FOR APPOINTMENT IN COURT OF"COMPETENT JURISDICTION" READ: CIRCUIT COURT**

POWERS

- **TAKE POSSESSION OF FILES**
- **RECORDS OF LAW OFFICE**
- **NOTIFY PERSONS WHO APPEAR TO BE CLIENTS**
- **APPLY FOR EXTENSIONS**
- **GIVE NOTICE TO AFFECTED PERSONS**
- **TAKE POSSESSION OF TRUST ACCOUNTS**
- **DELIVER FILES TO CLIENTS, MAKE REFERRALS**

FINALLY, WHEN NOTHING ELSE WORKS….

WARRANT OUT FOR YOUR ARREST?

I KNOW A GUY
WHO KNOWS A GUY
WHO WILL TAKE CARE OF IT.

BETTERCALLSAUL.COM

Saul Goodman
ATTORNEY AT LAW

Section Six

A Call for Help: The Judges & Lawyers Assistance Program (JLAP)

Ashley E. Hart
United States District Court
Indianapolis, Indiana

Section Six

A Call for Help: The Judges & Lawyers Assistance Program (JLAP)……………………………….... Ashley E. Hart

PowerPoint Presentation

We Get By with a Little Help from Our Friends

What We Will Talk About Today

- JLAP: Why, What, and How
- Mental health and substance use in the legal profession
- What we can do to promote well-being for ourselves, our colleagues, and the profession

Improving lives.
Fostering connection.

JLAP provides confidential, compassionate support to all judges, lawyers, and law students by promoting well-being, improving lives, fostering connection, and thereby elevating the competence of our profession.

Who We Helped in 2021

Attorney, Inactive/Retired 2%

Other 2%

Law Student 10%

Judicial Officer 7%

Court Staff 2%

Bar Applicant 2%

Attorney, Suspended/Disbarred 3%

Attorney, Active 72%

Age Groups We Helped

70+ 7%

<30 15%

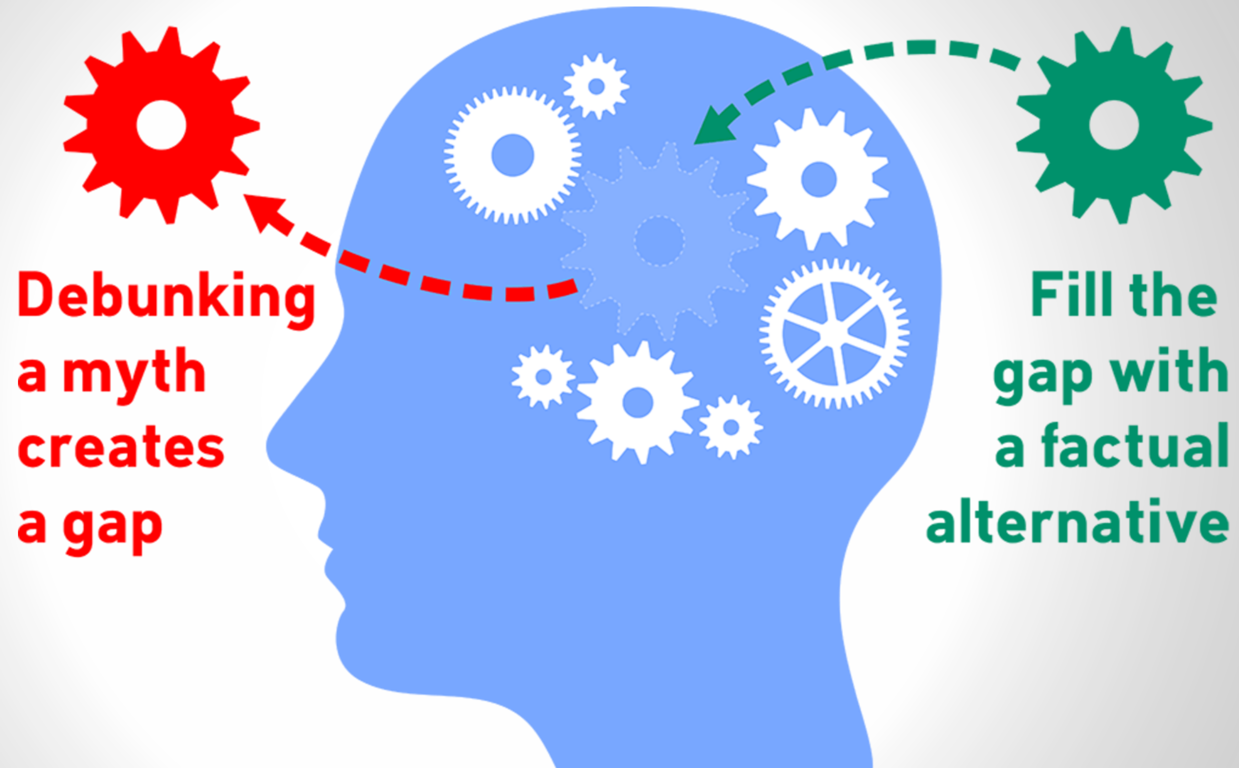
60-69 14%

30-39 23%

50-59 19%

40-49 22%

Sometimes We Say We're Fine When We're Not



Some myths you may have heard

jlap

"JLAP is just for people who drink too much."

We Help with More than You Think

Age-Related Health Issues 2%

Career Change/Employment Issues 3%

Substance Use 13%

Grief 6%

Legal Issues 1%

Mental Health 23%

Situational Stressors 40%

Physical Health 5%

Practice Management Issues 1%

Request for Information 5%

Retirement 1%

"JLAP only works with lawyers who have already gotten in trouble with the Disciplinary Commission."

"If I call JLAP for help they will take my law license away."

JLAP ≠ Discipline

JLAP is an entirely separate entity from the Disciplinary Commission:

- It is the Disciplinary Commission's job to administer lawyer discipline, with the Supreme Court having the final decision
- JLAP's job is to provide help and support to judges, lawyers, law students, and bar applicants

JLAP Provides a Safe Place to Seek Help

- Most people working with JLAP come to us voluntarily
- Less than 5% of our cases are formal referrals
- The rest are either self-referred or are referred by a concerned friend, family member, or colleague

JLAP is CONFIDENTIAL

Any contact you have with JLAP is held in strict confidence under ADMISSION AND DISCIPLINE RULE 31 and PROFESSIONAL CONDUCT RULE 8.3. Whether you are calling for yourself or out of concern for a colleague or friend, no one will know about your call unless you give your permission.

What Happens When You Call

Ask for help

Can be via phone or email

Staff person on call after hours

Completely confidential

We will ask your name & demographic info but you may choose to be anonymous

Initial contact

We listen & provide support

We may answer questions or provide resources

We may schedule a follow up call or appointment

Follow up

Still completely confidential and no cost to you

We can meet by phone or video

Together we will develop a plan

Other JLAP services

You may agree to be paired with a JLAP volunteer for additional support (no cost to you)

You may decide to attend a JLAP support group (no cost to you)

We may refer you to a counselor/other provider (you are responsible for that cost)

jlap provides

professional support

education

consultation

intervention

monitoring

information

connection

referrals

peer support

support groups

Mental Health and Substance Use in the Legal Profession

Mental Wellness

- the ability to learn
- the ability to feel, express and manage a range of positive and negative emotions
- the ability to form and maintain good relationships with others
- the ability to cope with and manage change and uncertainty

Sometimes Things Go Wrong…

Hello my name is Grief

Hello my name is Anxiety

Hello my name is Phobia

Hello my name is POST-TRAUMATIC STRESS

Hello my name is STRESS

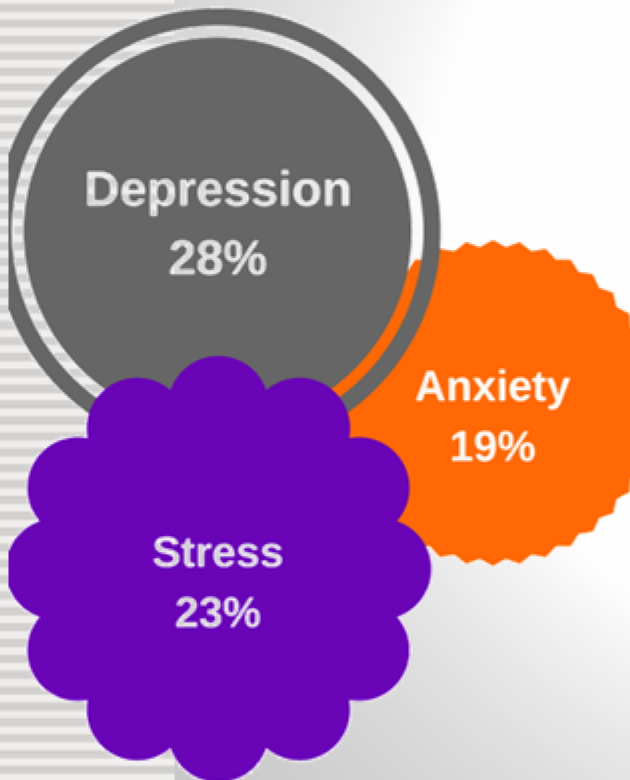
Hello my name is Shame

Hello my name is DEPRESSION

Hello my name is PANIC

Mental Health in the Legal Profession

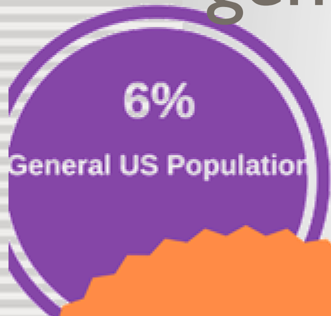
Lawyers report depression 4x the rate of the general population

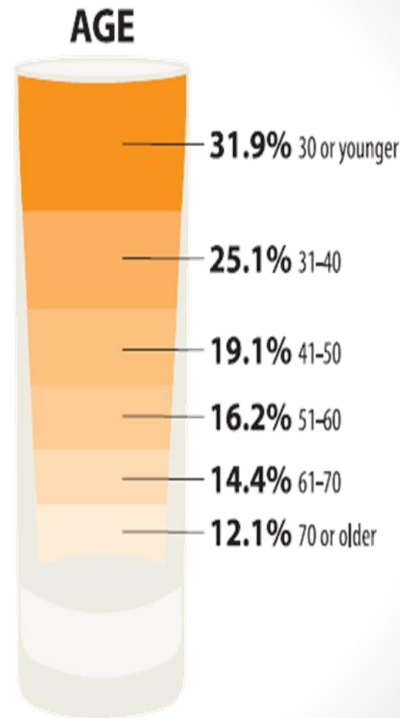


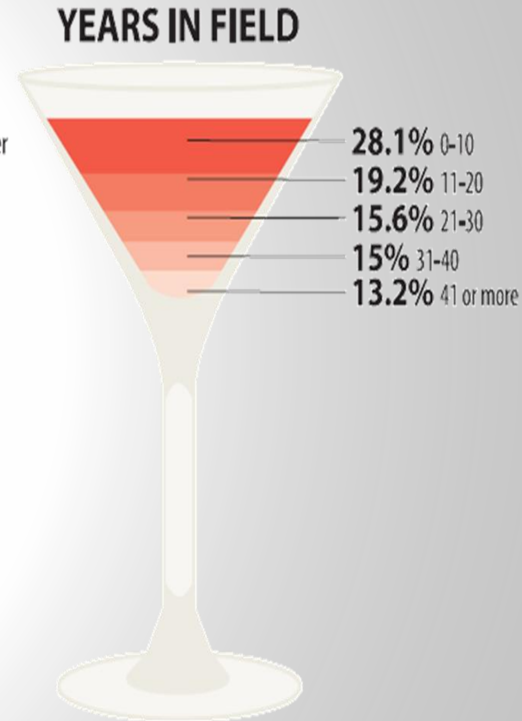
Younger and newly admitted attorneys at highest risk

Problematic Drinking and Lawyers

Lawyer rate of problem drinking over 3x general population







Younger and newly admitted attorneys at highest risk

Contributing Factors

- Isolation
- Expectation to be "expert"
- Pressure to perform
- Perfectionism
- Pessimism
- Vicarious trauma
- Adversarial system
- Others?

HOW

CAN

YOU

HELP?

Help Ourselves to Stay Well

Sleep

Take breaks

Allies/friends

Yoga/mindfulness

Well-balanced meals

Exercise/movement

Let it be

Laugh

Help Others by Watching for Changes from Baseline

- Everyone has a baseline for personality traits and behavior
- Warning signs are always relative to the person's baseline

Read the MAP*

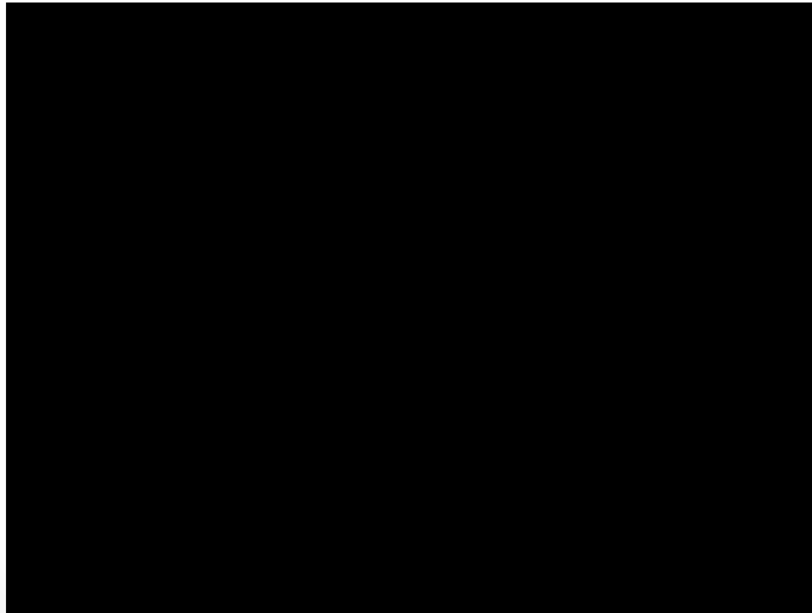
- Mood or attitudinal disturbances
- Appearance or physical changes
- Productivity and quality of work

*Belleau & Pacione , ABA Solo Practice Journal 2015

Supporting the First Step(s)

- Recognize changes from baseline
- Share your observations
- Listen
- Respond with empathy, not sympathy or fixing
- Let them know about JLAP – their call is completely confidential
- You can call JLAP for help in locating resources or reaching out to someone

jlap



JLAP is Here To Help

improving lives. fostering connection.

we're all in this together

friends in the legal community: you are the helpers, but please remember to ask for help for yourself in these trying times

jlap is here for you. call today to talk with one of our staff or schedule an appointment

our services are free and confidential

we are providing the following peer support groups via Zoom

connection: every wednesday at noon est

addiction issues: 2nd & 4th wednesdays at 6pm est

caregiver support: 2nd thursday at noon est

grief and loss: 4th thursday at noon est

mental health/wellness: 3rd wednesday at 6pm est

join us for jlap gentle yoga thursdays at 6pm est

for more information call 317-833-0370 or visit in.gov/courts/jlaphelps

45 minutes of gentle movement, easefully held shapes, and mindful breathing to restore your body and soul
no yoga experience necessary
all bodies and abilities are welcome

see available dates and register at
https://jlapyoga.as.me/gentleyoga

all classes are currently hosted virtually via zoom

MINDFULNESS IN LAW SOCIETY

MILS—Indiana
Offerings include guided meditation, yoga, labyrinth walks, mindful conversation, and more.

All are welcome! To learn more and register, visit
https://www.mindfulnessinlawsociety.org
Navigate to “Chapters” and click on “Indiana.”

jlap

other supports for you

Jill Carnell

An Introduction to the Brahmavihāras: For Lawyers, Law Students, & Judicial Officers

This course is the creative portion of Jill Carnell's Master of Arts in Mindfulness Studies thesis project. It contains seven modules, which offer an introduction to the Brahmavihāras, the Buddha's heart teachings, as well as supports for ongoing practice. The course is freely offered.

thought KITCHEN

https://thought-kitchen.com/

Elevate YOUR Life AND Career

Confidential Support for Indiana Judges, Lawyers, & Law Students

If you or someone you know needs guidance, please contact us.

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Section Seven

Malpractice Insurance Coverage Needs for Today's Legal Practice

Eric C. Redman
Ritman & Associates, Inc.
Noblesville, Indiana

Section Seven

Malpractice Insurance Coverage
Needs for Today's Legal Practice…………………………… Eric C. Redman

PowerPoint Presentation

Presented by Eric C. Redman, Ritman & Associates

Legal Malpractice Insurance

- **Rules of Professional Conduct 27(g):**

A professional corporation, limited liability company or limited liability partnership shall maintain adequate professional liability insurance or other form of adequate financial responsibility for any liability of the professional corporation, limited liability company, or limited liability partnership arising from acts of fraud, defalcation or theft or errors or omissions committed in the rendering of professional legal services by an officer, director, shareholder, member, partner, other equity owner, agent, employee or manager of the professional corporation, limited liability company or limited liability partnership.

(1) "Adequate professional liability insurance" means one or more policies of attorneys' professional liability insurance or other form of adequate financial responsibility that insure the professional corporation, limited liability company or limited liability partnership or both;

(i) in an amount for each claim, in excess of any insurance deductible or deductibles, of fifty thousand dollars ($50,000), multiplied by the number of lawyers practicing with the professional corporation, limited liability company or limited liability partnership; and

(ii) in an amount of one hundred thousand dollars ($100,000) in excess of any insurance deductible or deductibles for all claims during the policy year, multiplied by the number of lawyers practicing with the professional corporation, limited liability company or limited liability partnership.

The Top Ten Malpractice Traps

- Lack of adequate documentation
- Inappropriate involvement in client interests
- Overzealous pursuit of past due legal fees
- Stress and substance abuse
- Technology Malpractice
- Missing deadlines
- Conflicts of interest and matter
- Client relations that stink
- Ineffective client screening
- Inadequate research and investigation

Legal Malpractice Insurance

- Claims made and reported policy form.
- First made during policy period or extended reporting period
- No prior knowledge OR prior notice
- Act, error or omission AFTER the retro date
- All other terms and conditions of policy

What are considered Legal Services?

- Services performed by an Insured for other as a:
  - Lawyer, arbiter, mediator, expert witness, title agent, notary public, etc., etc.
  - Can also include administrator, conservator, receiver, executor, guardian, trustee or fiduciary capacity
  - Also author of legal papers, or legal seminars
  - No standard policy language – each policy is unique
  - REVIEW YOUR POLICY FOR DETAILS

Who is considered an insured?

- Current lawyers of the firm
- Current non-lawyer employees of the firm
- Former lawyers of the firm
- Former non-lawyer employees of the firm
- Current and Former Independent Contractor and Of Counsel Attorneys

Firm only vs. Career Coverage

What other coverages does the policy include?

- Disciplinary Defense Coverage
- Subpoena Assistance Coverage
- Loss of Earnings
- Cyber/EPLI (Endorsement)

Every policy has different limits and conditions for these ancillary coverages. Review your policy for details. Typically not subject to a deductible.

Common Exclusions

- Equity interest in a client
- Services as an Officer/Director/Manager
- Dishonest, Fraudulent, Criminal, or malicious act or omission
- Dispute of legal fees

Please review your policy for further exclusionary language!

Extended Reporting Period (Tail Coverage)

- Firm is closing
- Attorney is departing the firm
- Retirement from practice of law, or private practice of law
- Death or Total Disability

Endorsement covers claims that arise in the future based on prior legal services when no current policy is available to provide coverage.

Choosing Limits of Liability

- What areas of practice are you in?
- What are the values of the biggest cases you are handling?
- Do you have limit requirements from clients/contracts/referral source?

First Dollar Defense and Claims Expense Outside Limits endorsements can bulk up coverage for small amount of additional premium.

What drives the policy premium?

- Areas of practice – Big range of risk associated with different practice areas.
- Number of attorneys – Each attorney is rated for premium
- Claim Experience – Carrier typically look back 5-10 years

Cyber Risk Insurance

Rules of Professional Conduct: 1.1.6 Amendment:

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with the technology relevant to the lawyer's practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Common Cyber Claims

- Disclosure of a client's Personally Identifiable Information or confidential attorney/client information
- Ransom and Extortion attacks
- Social Engineering Fraud attacks

Mitigating your Cyber Risk

- Continuous defense. This is an on-going process. Do not set it and forget it!
- Patch/Update software immediately and regularly
- Implement Multi-Factor Authentication
- Implement encryption
- Regular employee training
- Intrusion testing
- Regularly back up data

Cyber Liability Insurance!!

Other Coverages

- Crime
- Fiduciary
- Employment Practices Liability
- Directors and Officers Liability
- ERISA Bond
- General Liability
- Workers Compensation

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Specializing in Professional Liability

Insurance for Attorneys

Section Eight

ICLEF
Applied Professionalism

HIDDEN BUT OBVIOUS TIPS FOR SUCCEEDING

Three Key Principles and 21 Practical Tips
to Accelerate Your Career Development

October 21, 2022

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Section Eight

Hidden But Obvious Tips for Succeeding

Key Principles and 21 Practical Tips to Accelerate Your Career Development

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- *Second.* Implement the Concept of Internal Clients
- *Third.* Execute and You Distinguish Yourself from Many Others

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PREFACE

By Greg Utken[*]

You invested hundreds of hours and thousands of dollars in obtaining your law degree. Now it is time to begin making those investments pay off. And the sooner you become successful the better. But successful careers rarely are based on luck or chance. So, how can you maximize your development in the early years of your legal career?

These materials share things many wish they had known *before* they started practicing. I wish someone had shared them with me. Instead, too often I learned them through embarrassing or uncomfortable experiences.

The "tips" in these materials not only can help set you apart from others at your stage and accelerate your development but they also can better position you to succeed. The sooner you know these tips, the sooner you can apply them, and then the greater the opportunity for you to advance your career.

None of the information is *rocket science* and once you read it, may seem rather obvious – common sense (hence the title *Hidden but Obvious).* But in my experience, most law school graduates and those in the early years of their career do not have these concepts on their radar screen. That is because these are things that one usually learns through years of practical experience.

What you do, the responsibilities you are given, and how quickly you grow will be determined by your commitment, initiative, planning, enthusiasm, and how you distinguish yourself. So right out of the chute, you want to be putting the building blocks for success in place. Taking an active role in planning your professional development can make the difference between advancing and "treading water."

A summary listing of the Principles and Tips is in **Appendix A**.

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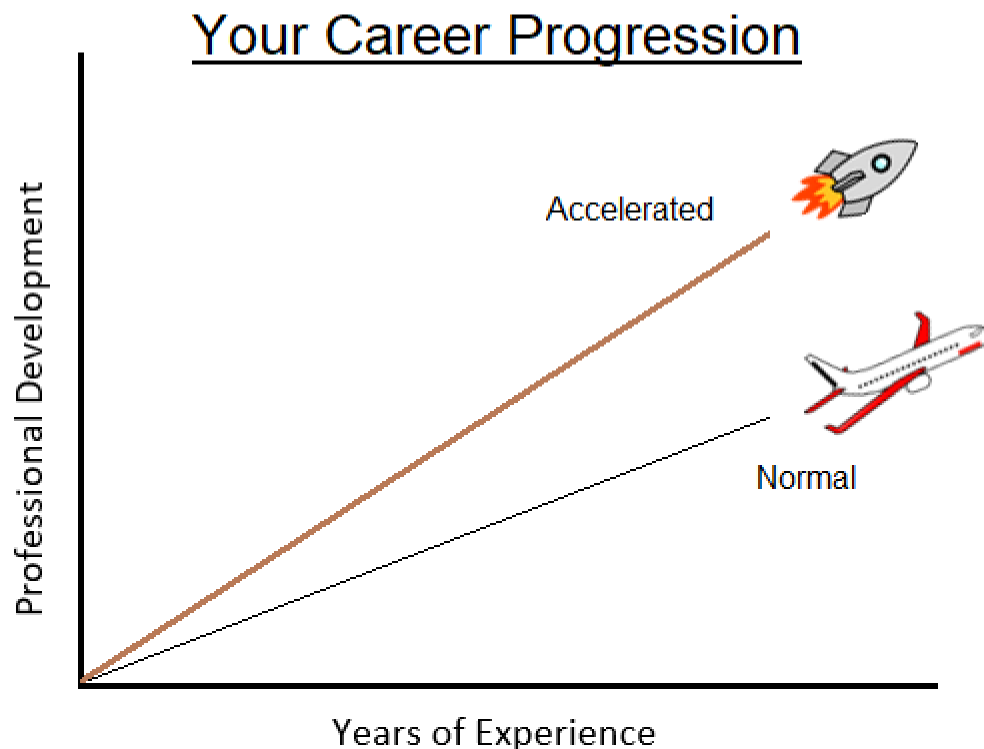
I. "LITTLE" EVERYDAY THINGS CAN ADVANCE YOUR DEVELOPMENT

Employers expect you to have the basic knowledge and skillsets to do what is required. To be a success, however, you typically must do more. No matter what type of law you practice, and no matter what type of organization you practice with, success depends on your ability to deal with people plus your communication and relational skills. Those are skills that anyone can (and nearly everyone should) develop.

Your success will be determined by the overall experience people have working with you, and that is where these materials come into play. The principles and tips presented here are worth reading not only "today" but periodically throughout your years of practice. Why?

- They are within your control.
- Most are things that you can do every day.
- You can put many of them into practice *now* (or, at least, tomorrow).
- Each is something that can accelerate your development.
- The more you can adopt as a habit, the more you will stand out amongst your peers.
- Some also can help insulate you from malpractice claims or other complaints.



II. **BASIC PRINCIPLES**

First

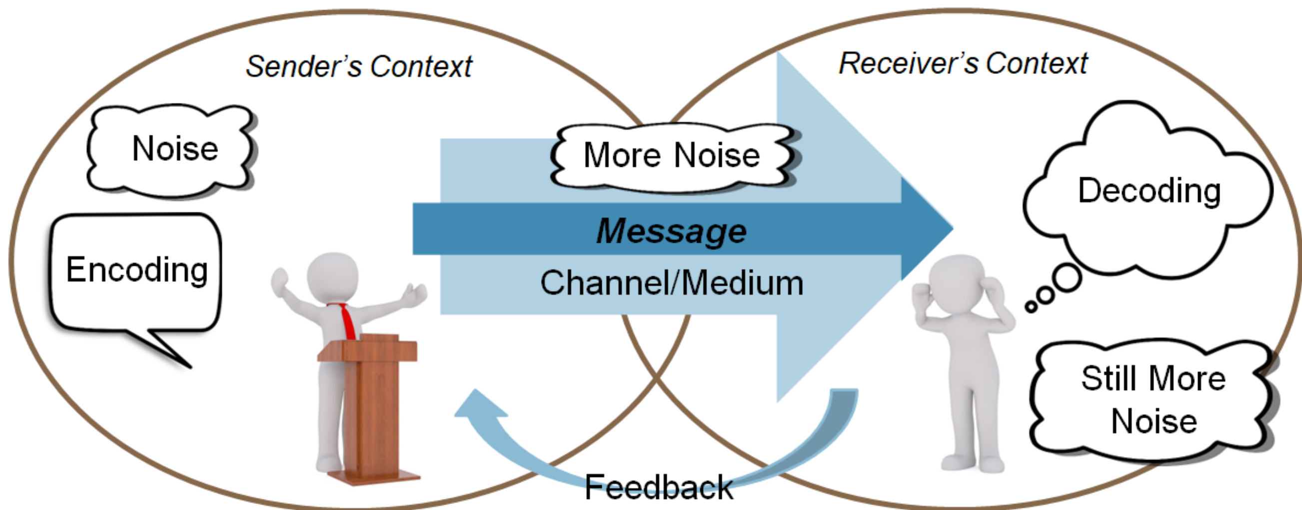
Everything You Do Leaves an Impression

Every interaction you have with others sends them
a message about you. What messages are you sending?

Whether we like it or not, first impressions matter (and there's a large degree of truth to the old saying "you never get a second chance to make a first impression"). You make your impressions through your appearance, what you say, and your body language. People typically will judge you within the first several seconds that they meet you and will judge you further during the first 30 seconds you speak. You want to make a good first impression but, at a minimum, you certainly don't want to make a bad one. Equally important: these concepts apply well beyond first impressions.

How often do you think about the messages you are sending through your interactions?

You will interact with a variety of people in person, on the telephone, through paper, and through screens, so you need this principle on your radar screen constantly. Whether you realize it or not, every one of those interactions will say something about you to others. And you control how you interact.



Second

Implement the Concept of Internal Clients

Having good client service skills is important to developing a successful practice. But how are you going to get experience developing those skills when you are just out of law school? Good question!

But most of you already have clients! Those clients are other lawyers at work who assign projects to you. They are your *"internal clients,"* and you need to treat them as you would external clients. That means your interactions should cause them to not only want to give you more work but also to recommend you to others.

Thus, you also will want to use the tips in these materials with your internal clients. What better place to build and practice client service skills than with the people who hired you, who want you to succeed, and who will be forgiving because they know you are learning.

Third

Execute. It Will Distinguish You from Many Others.

Ideas are easy. Execution is everything

Being smart is important but drive and determination are more likely to influence someone's success. The following quote from U.S. President Calvin Coolidge is spot on.

> *Nothing in the world can take the place of persistence. Talent will not; nothing is more common than unsuccessful men with talent. Genius will not; unrewarded genius is almost a proverb. Education will not; the world is full of educated derelicts. Persistence and determination alone are omnipotent.*

Intentions and the best of plans are but a starting point and are relatively easy to establish. Knowing that you should do something, however, doesn't mean it is easy to do. The key is committing to things that can advance your development and then accomplishing them. But for a variety of reasons, people who follow through and execute on intentions or plans are more often the exception rather than the rule.

Thus, one thing that can distinguish those whose careers accelerate from those whose don't, is having the determination to do what it takes to succeed and then executing it. This is in your hands, so be the exception to the rule and execute.

III. THREE TIPS FOR SETTING THE STAGE

Tip No. 1 It's Your Career, So Take Charge of It

The people who get on in the world are those who get up and look for the circumstances they want, and if they cannot find them, make them. - George Bernard Shaw

You likely will have resources to help develop your career, and that's great. But remember, the person with the greatest responsibility for your development and career success is you.

As noted earlier, what you do, the responsibilities you are given, and how quickly you grow will be, in large part, due to your personal commitment, initiative, planning, and enthusiasm. That means if you want to be successful you need to invest time and effort in your professional development. Be thoughtful and strategic in determining how you will spend that investment time.

**** Those who take charge of their career usually are more successful.***

Tip No. 2 Establish a Support System Early

The best way to leapfrog in your career is to get advice from someone who's done what you're trying to accomplish. It helps clear all the doubt. – Heather Anne Carson

Get a Mentor

It is beneficial to become involved in a mentoring relationship with a more experienced person. That relationship can have many benefits. It can:

- Help develop your career at a **more accelerated pace**
- Show you **"the ropes"** on how things operate in the real world
- Help you **think through issues** with which you may struggle
- Serve as a **"sounding board"** for ideas or actions you would like to try
- **Provide a haven** where you can discuss mistakes or shortcomings
- Help you begin to develop a **network**

**** Those mentored typically develop more quickly than those who are not.***

Make the Most of Your Mentoring Relationship

Like most things in life, you will get out of a mentoring relationship what you and your mentor put into it. You both will be busy, have outside interests, and personal or family obligations. It can be a real challenge to find time for mentoring. The following tips will help you get the most out of a mentoring relationship.

- **Identify goals** that you want to accomplish in the mentoring.
- **Commit** to meet regularly (not less than every other month).

- **Schedule** the sessions at a time least likely to be interrupted.
- At the close of each session, **decide** what you want to cover next.
- Give yourself small ***"homework"*** projects between sessions. Things where you can apply what you have learned.
- Show **appreciation** to your mentor for taking time to work with you.

Mentoring success depends upon both you and the mentor committing to the process, giving it some structure, and following through.

Staff Relationships are Important

The client service team consists not only of lawyers, but also paralegals, secretaries, and other support staff members. They can be valuable teammates.

Many legal assistants and secretaries are experienced with the format and style of documents, administrative practices and policies, preferences in styles of other lawyers, and often agency and court procedures (and even those who are inexperienced typically are eager to learn and develop). They can be a wealth of information and help you develop the best service for clients.

So, getting to know and interacting with staff members will be to your benefit. This was true before the COVID-19 pandemic, and it's even more critical now with remote work being more commonplace. Seize opportunities to **talk** with support staff. Show interest in them. Treat them with the same dignity and respect you would any colleague.

**** Successful lawyers partner effectively with support staff.***

Tip No. 3 Set Goals and Begin to Use Career Planning

There are so many people working so hard and achieving so little. – Andy Grove

What Do You Want to Achieve?

Consciously steering your career is preferable to allowing events take to you wherever they might. Get in the habit of setting concrete goals and deadlines. Ask yourself - what do I want? And - to get what I want, what do I need to do? Those who succeed consciously try to position themselves for opportunities to do what they would like - more on this point later.

**** Those that set goals usually are more successful than those who don't.***

Prepare a Series of Career Development Plans

If it's a priority you'll find a way. If it isn't, you'll find an excuse. – Jim Rohn

Preparing a series of career development plans need not be overly difficult, but it requires setting aside time to be thoughtful about your career and what you want to do. Then, come up with a meaningful and doable plan.

Pick the plan time frame you wish – a month, or a quarter is typical - and then try these four steps, which come from *The Four Disciplines of Execution* by Sean Covey & Chris McChesney.

Step 1 - *Identify your priority goal(s) or objectives.*

Objectives are significant, concrete, and action oriented. Successful people focus on a handful of initiatives that can make a real difference. Limit the number of your goals. The more you try to do, the less you are likely to accomplish. Pick just one, two, but no more than three "wildly important" goals that can make a difference in your development. Begin with the question- What's most important for the next 3, 6, or 12 months?

Step 2 - *Decide each goal's end game.*

Define how you will measure whether you reached each of your goals. Key results benchmark and monitor how we reach the objective. Effective key results are specific and time-bound, aggressive but realistic. You either meet key results or you don't; there is no gray area. The designated period is typically a quarter.

Step 3 - *Identify specific and meaningful actions*.

Identify concrete actions within your control that will contribute to your ability to meet the goals if you take those actions. Strive to complete 70%.

Step 4 – *Establish a cadence of accountability*

Regularly track your progress toward reaching each goal (monthly is best, but no less frequent than quarterly).

**** Having a doable plan can accelerate your career development***.

A sample one-page career development plan template is in **Appendix A.**

Hold Yourself Accountable

Accountability is a significant differentiator. Others can hold you accountable, but it's preferable to demonstrate that you can hold yourself accountable. That is sometimes a difficult thing to do, but those who succeed find a way to make it happen.

Develop an internal rigor and follow through on those things you know are necessary. Because this can be hard, many people choose to use an "*accountability buddy.*" That is someone else who wants to succeed, and the two of you check in monthly to make sure the other is following through.

**** Those that hold themselves accountable are more successful.***

IV. Five Tips For Accelerating Your Development

Tip No. 4 Expand Your Comfort Zone

The comfort zone is a nice place, but nothing grows there.
- Caroline Cummings

Most people do those things that come naturally to them and with which they are most comfortable. And there is nothing wrong with that, but it is not a formula for growth as a person or in your career.

If you are not intentional about progressively stepping outside of your comfort zone, then your networks, what you do, and the level of responsibility you receive will be "boxed in" by the comfort zone to which you passively limit yourself.

And each time you step out of your zone you will become more comfortable with that new experience. And ultimately, you will expand your comfort zone and grow.

**** Expanding your comfort zone will accelerate your career.***

Tip No. 5 Be Engaged and Demonstrate Enthusiasm

If I am told, I may forget. If I am taught, I will remember. If I am engaged, I will learn." – paraphrasing Ben Franklin

Those who are engaged in what they are doing usually are creative, productive, and happier and have greater commitment. And our level of engagement is discretionary. Each day, consciously or unconsciously, we each make a choice about our level of commitment to what we are doing.

Hopefully, you're excited about your new career. And how enthused you are about your work usually is apparent to others from your interactions with them. Most clients (and other lawyers) prefer to work with people that are enthused about what they do or about the project on which they are working. **Think about this:** If you put two lawyers side-by-side and one demonstrates enthusiasm for what she/he is doing, and the other does not - who is more likely to get the nod for more work in the future?

**** Those engaged and enthused will be more successful.***

Tip No. 6 Opportunities - Take Them and Make Them

Things may come to those who wait, but only the things that are left by those who hustled. – Abraham Lincoln

Those who sit in their office and wait for work to be given to them place themselves at a disadvantage. Developing a career is about opportunities and there are two types of opportunities – those that you are given and those that you create.

You will have formal and informal training and development opportunities at work. Try to take advantage of them. But you also need to think about what you want to do and what experiences you want to have and then take steps to create those opportunities for yourself.

To succeed, you want to be positioning yourself for opportunities to grow and develop. **Most of the best opportunities are where <u>you</u> find them** – few opportunities will seek you out.

**** Those that create opportunities for themselves accelerate their career.***

Tip No. 7 Distinguish Yourself Through Preparation

Luck is what happens when preparation meets opportunity" – Seneca

Having a reputation for being prepared is a good thing. The difference between success and failure often is found in the person's degree of preparedness. And usually, you control how prepared you are. Being thoroughly prepared can be a real confidence booster. Invariably, when you are well prepared it will impress the client, the other side, and the decision maker.

The reverse is also true. When you are unprepared or poorly prepared you know it and will lack confidence. And your lack of preparation will also be evident to others.

Remember - your level of preparation usually will translate into your level of confidence.

**** Those that are well prepared will be more successful***

Tip No. 8 Demonstrate Responsibility

Having a reputation for being responsible and being someone who can be counted on also is a good thing. There are many ways to develop this reputation. Below are three examples of how to demonstrate that you are a responsible person.

<u>"Oops - Fess Up" and Do It Sooner Rather Than Later</u>

Unlike wine, bad news does not get better with time.

Because we are human, we all have made mistakes, and we will continue to make mistakes periodically. There is a reason it's called the "practice" of law. But remember the adage – *Honesty is the best policy*. That goes double in our profession. Take responsibility for mistakes, and grow through lessons learned from your mistakes. When you know (or believe) you have erred, it is best to *fess up* promptly because:

- The sooner you acknowledge an issue, the sooner someone can help.
- The sooner you acknowledge an issue, the better the chance to fix or mitigate it.
- Doing so demonstrates that you have integrity and are a responsible person

<u>Don't Blame Others</u>

Another part of being responsible is never trying to blame others for things that appropriately fall at your doorstep. The classic cases involve young professionals being *"caught"* in an embarrassing or uncomfortable position. They then lay some or all the responsibility on their secretary, a staff member, or another professional. Don't do that! It is refreshing when someone steps up to take responsibility, and they will be respected for doing so.

Give Credit to Others

Another aspect of being responsible is giving credit where credit is due. If someone compliments you for doing something but it was a colleague who really was more responsible than you, don't allow a misimpression. Promptly acknowledge that while you were involved, the real credit should go to so and so. This will demonstrate that you recognize others' contributions, don't want to leave a mistaken impression, and are not a glory hog.

V. SIX TIPS FOR GETTING THE MOST OUT OF WORK

Tip No. 9 Effectively Plan Your Work

Most people don't plan to fail; they fail to plan – John L. Beckley

Being Organized Is Key to Success

Organizing your thoughts, documents, files, whatever it may be, will pay dividends in your development and representation of clients. Being organized demonstrates you are "on top" of things and can be entrusted with responsibility. Clients notice when you are able to navigate to a document quickly and confidently (and they notice because they are usually much more accustomed to seeing their lawyers rifle through papers or scrolling/clicking through electronic documents until they come across whatever it is they are searching for).

Calendar Meetings, Calls, And Deadlines. Confirm Them Later

Missing a deadline or a meeting can be a serious matter. At best, it is embarrassing; at worst, it can be malpractice. Once you learn of a date for a meeting, a filing deadline, an assignment deadline, a conference call, etc., get it on your calendar promptly. Make it a practice to review your work calendar daily to ensure you are on top of approaching due dates and deadlines.

Even though it has become increasingly commonplace in certain circles, *missing deadlines is a bad thing*. It is remembered, especially when your tardiness burdens your internal or external client. If you cannot meet the deadline, notify the assigning lawyer in advance.

To avoid misunderstandings or time crunches, confirm - on the front end - a project's deadline. **This often is a multi-step deadline.** For example, there can be a deadline to get a document filed, a deadline to get that document to the client for review before it is filed, and the deadline for you to get it to the assigning attorney (internal client) so he or she has adequate time to review it. Except in very rare cases, the morning of a filing deadline or the day before is *not* sufficient time for meaningful client review. Your goal is to meet your deadlines consistently or, better yet, beat them.

It also never hurts to reconfirm a meeting or call the day before it is scheduled to occur. This simple courtesy has become more of a distinguishing feature in the service business.

Maintain a Project Status List

As your career develops, you will juggle more and more projects. Keeping track of what is on your plate and related deadlines in an organized format will be important. And as you become busier, you will find that having at your fingertips what's on your plate and the status of projects will help you manage your workload. It also will help ensure you do not miss deadlines. And it can come in handy at evaluation time when you are trying to reconstruct the projects or work you have done for internal clients. A sample Project List is in **Appendix B**.

**** Those that plan and are organized usually will be ahead of those who are not.***

Tip No. 10 Position Yourself for Work You Want

Early in your career, often, you will do work that is assigned to you or that comes in the door. But to develop in areas in which you are interested or get experiences that you desire, you need to think about

how you will position yourself to get work and experiences that you want and not just ones you are given. This takes initiative on your part.

What could you do to position yourself for work or projects you want?

**** Those that position themselves for work they want will accelerate their career.***

Tip No. 11 Send the Right Message if Asked to Help When Busy

Let me see if I can figure out a way to help. - You

Periodically, someone in your office will ask you to do a project and your "plate" already will be full or you will be on a tight deadline. But it is not a good idea to tell the internal client how busy you are and run down a list of all your projects. Usually, everybody is busy.

Instead, express your willingness to help and ask what the project is and when it is due. Maybe you can adjust your schedule to take on the project because your other projects have later deadlines. Or the project might not be too time intensive, or you may be able to take it on and work a couple of extra hours that evening or over the weekend.[1]

If your workload, current deadlines, and the new project deadline are incompatible, tell the assigning attorney you would be glad to help, but your current commitments to other lawyers won't allow you to meet his or her deadline. You may also tell them that they may be able to talk to the other attorneys for whom you are doing a project and get your deadline on that project adjusted, so you can take on the new project.

Honestly assess your workload and decline work gracefully if you cannot do it. But honest assessment requires thought and discussion. If you find you are routinely declining work (from specific assigners or generally), conduct further focused assessment – with input from mentors or others – to identify the cause(s) and potential solutions.

Tip No. 12 Always Understand Expectations

Miscommunication or misunderstanding is often the reason for disappointment in or failure of a project. You could always blame the assigning lawyer or the external client or a staff member for the misunderstanding, but this really goes to taking responsibility.

When you are given an assignment, <u>don't rely</u> on assumptions before beginning it. The worst feeling is learning <u>after</u> you've spent hours working on something that your work product missed the mark, was not helpful to the assigning lawyer or the external client, and now must be redone by you (or someone else).

Project assignment conversations with an internal or external client should end with closure. This is true not only for the assignment but the client's preferences and expectations.

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[1] We realize opinions differ widely on expected work hours amongst individuals and across organizations, and we aren't suggesting here that everyone (or anyone) needs to make late night or weekend hours their "norm." We *are* suggesting here that judicious offers to go the extra mile in appropriate cases pay tremendous dividends in terms of reputation and relationship development.

What should you want to know about a project before starting it?

After receiving an assignment, take a few minutes to confirm these things with the assigning attorney or external client. If there's something you are not sure you understand, that is the best time to ask for clarification.

**** Those that confirm expectations will be more successful.***

Tip No. 13 Seek Feedback and Then React Appropriately

Seeking Feedback

You will learn more and develop sooner if you get feedback on your work. You should expect feedback from those for whom you do projects, but people are notorious (particularly lawyers) for not providing either much feedback or good feedback. Many are uncomfortable giving negative feedback and they rarely seem to give praise. So, it often will fall on you to seek feedback.

Of course, you want valuable feedback – and that means you need candid feedback. One way to help ensure valuable feedback is to give the internal or external client **permission on the front end to "tell it like it is."** For example, tell the client as a professional you are committed to constant improvement, and you believe one way for that to happen is by having those who review your work be as candid as they possibly can be, so it becomes a real opportunity for you to learn and improve.

Reacting to Feedback

And when you get critical or constructive feedback, do not become defensive or make excuses. Yes, criticism can hurt your feelings, but focus on the fact that it was a learning opportunity and a chance for you to improve. Remember, without candid feedback you will not grow. And there are several reasons why you should take constructive criticism in stride and thank the person for the input.

- The person evaluating your work is your internal client.
- That person typically has more experience and deeper knowledge than you.
- Whether you agree or not, the feedback is your internal client's honest opinion of your work.
- Studies consistently show most people inaccurately assess their own performance. So, accept that your internal client's opinion is more accurate than yours.
- In the final analysis, it is the internal client's opinion that counts

**** Those that seek feedback and take it well will accelerate their careers.***

Tip No. 14 Think Through Meetings Before Attending Them

Before Meetings

You will be invited to many meetings, both client and civic related. Will you simply show up or are there things to have on your radar screen?

Before attending most substantive meetings, go through a mental checklist asking yourself if you know:

- Why the meeting is being held?
- Who will be at the meeting?
- Is there anything I need to do to be prepared?
- What do I want to get out of the meeting?

Also, confirm the meeting and your attendance the day before.

During Meetings

Remember, *every interaction you have with someone sends them a message.* This is true when participating in a meeting of any kind. Be punctual. Remember, being on time really means being a little early. Smile, and show some energy.

Bring paper, pen, a laptop, iPad, or anything else needed. Turn off your cell phone and keep it out of sight. Checking the time or texting is disrespectful. If you will need to answer your phone or step out to make a call, explain that before the meeting begins.

Be engaged. Sit up at the table, be a good listener, and don't interrupt others. No matter how comfortable it may be, folding your arms usually is a bad visual message.

Take notes during the meeting. It shows that you are engaged in the meeting, and they can be helpful later. It will avoid embarrassment when someone asks you – *"what do your notes show?"* As you take notes, if there is something you particularly want to remember, or it is a follow up item, then place a check mark or asterisk to the left of it.

Close of Meetings

Before leaving a meeting, always ask any follow up questions and confirm your *"to do's,"* if any (You can do this quickly if you placed check marks next to key points). This avoids misunderstandings and shows you are on top of things. Close by saying something that shows you will be responsible. For example:

I'll take care of it and keep you posted OR *Will do* OR *Consider it done*

**** Those that prepare for meetings accelerate their development.***

VI. THREE TIPS ON CULTIVATING CLIENTS

People respond in direct proportion to the extent you reach out to them.
- Nelson Rockefeller

Tip No. 15 Learn Something about EQ

What Is EQ?

EQ stands for Emotional Intelligence. It is described as the ability to recognize and understand our emotions and those of others and then use that awareness to manage our behavior and relationships with others. In short, it is having the skills to manage relationships.

EQ can be more important than IQ and it has become recognized as significantly important in explaining why one person with the same skills and aptitude as another becomes more successful. Those who have studied EQ report that 90% of high performers have a high EQ.

Elements of Emotional Intelligence

There are three primary elements of emotional intelligence.

Perceiving Emotions: You need to perceive emotions accurately. This includes understanding nonverbal body language and facial expressions.

Understanding Emotions: Emotions can carry a mix of meanings. If anger is expressed, what could be the cause and what might it mean. For example, it could mean the person is dissatisfied with your work; or it could be he got a speeding ticket when coming to work, or he's had a fight with his spouse.

Managing Emotions: The ability to manage emotions effectively.

Know Thyself **- Be Self-Aware**

The starting point is self-awareness. We typically experience situations emotionally. Therefore, you often have heard it said that when getting emotional we should take a deep breath and count to 10– that slows the reaction until our brain kicks in. So, we need to understand what the triggers or hot buttons are that cause us to react emotionally.

You will be more successful if you are capable of being honest with and about yourself. Take some time to think about how you are wired. Recognize your values and strong points as well as those points that are not so strong. Acknowledging your shortcomings can help you be well grounded and more receptive to constructive criticism.

List your strengths and shortcomings. Do a self-assessment and honestly answer questions. Know your strong points and determine how you can continue to improve them. Adopt an attitude of constant learning and improvement.

Tip No. 16 - Develop Relationships and Networks

Most people prefer to work with those that they like and trust. But they can't like or trust you if they do not know you.

<u>It's a Relationship Business</u>

One thing that most successful lawyers have in common is relationship building skills. Effective attorneys can carry on a conversation with most anyone. Arm yourself with information that helps you engage in conversation when networking. Read a news feed or paper every morning, watch the news, and read publications. Know what is going on in the world, the State, and in the city where you practice. This is a good habit to get into early.

**** Those that know how to develop relationships will accelerate their career.***

<u>Begin Building Effective Relationships</u>

Where do you start on building an effective relationship either internally or externally? When meeting someone, show interest, demonstrate an open mind, and have a positive demeanor. Relationship building is not a science but an art. You need to be inquisitive but not nosy. You need to be a good listener. You need to reciprocate by sharing information about yourself. You also should demonstrate a sense of humor.

Most people appreciate it when you show interest in them. They are flattered and will share information. Start by looking for things that you have in common. The range of commonality points is wide and might include schools attended; hometowns; places lived; children; parents' jobs or backgrounds; favorite music, books, art, or music; vacation spots; favorite sports or sport team; and outside activities.

Enter their contact info into Outlook (or your contact management application of choice) and add some notes about things you learned, so you can refresh your recollection before you meet them again. Also, consider sending a follow up *"it was nice to meet you"* or "*enjoyed our conversation"* text or email and comment on something you have in common or something you learned about them.

<u>Build Internal and External Networks</u>

Both the size and quality of the networks you build matter. If you work in a firm or an organization, never forget the prime source of work is from *"internal clients"* - other lawyers where you are employed who can send work your way (more on this later). This is the easiest place to start. But what distinguishes successful internal networkers from those who aren't? **Face-to-face meetings are extremely important.**

External sources of potential work are everywhere also – law school classmates, people you meet while working on a client project, in external organizations, at church, and at seminars, as well as folks in your neighborhood or introduced to you by others, etc. Making and keeping a contact list is a helpful tool and one to which you should refer often. Here are other tips for mining external networks.

<u>Peers</u> – Start with your peers. Ask them to introduce you to others

<u>Organizations</u> – Choose ones in which you have an interest and then, do more than join – participate.

Client contacts – Another good source is those you meet through a client project. You can build not only a professional relationship but a personal relationship with these folks.

Seminars and meetings – You will attend seminars or other external meetings, but will you maximize the opportunity to network? Probably not. Often, lawyers sign up, show up, and leave. If possible, get the attendee list in advance (or review it when you register). Is there someone you know or with whom you may have a connection? Is there someone you would like to meet? Use the time before the conference starts, during breaks, or the luncheon to network.

Seek speaking and writing opportunities – Do not wait for an invitation to speak or write. Many organizations welcome offers from lawyers to speak or write.

Start an external group – Some young professionals create their own external development group from different businesses, with the common goal of brainstorming how to build their careers and support one another in doing so. They meet monthly or quarterly.

Identify Prominent Coaches from the Community – In every location there are successful businesspeople. Approach one of them. Tell them you are trying to build a career and you see that they have done so. Ask if they would be willing to meet with you to brainstorm ways to build a career. Often, they will be flattered and want to help.

**** Those that develop good networks will accelerate their career.***

Tip No. 17 Provide Clients with More Than They Expect

Lawyers exist to serve clients and clients come in several forms. There are external clients. In private practice they are individuals, organizations, or companies that come to the firm for legal services and in-house at a corporation, the company is the client. In the public sector, the state or federal government agency is the client. And remember, you also have internal clients - the lawyers who assign you work.

And once you perform work for any client (external or internal), that client can do one of three things:

- Say something **positive** about you and your work.
- Say something **negative** about you and your work.
- Say **nothing** about you and your work.

Obviously, you want the person for whom who did the work to say something positive.

Besides a result and fair fees, what do clients expect from their lawyer?

- *Appear and act professionally*
- *Be friendly*
- *Be courteous*
- *Be prepared*
- *Be responsive*
- *Keep them updated*
- *Be sincere*
- *Be organized*
- *Be a straight shooter*
- *Be a good listener*
- *Put them at ease*
- *Have empathy*

The "Wow" Factor

In large part, a client's experience is emotional and relational. Thus, it is the client's overall experience working with a lawyer that determines the lawyer's success. It is good to have a client. It is better to have a satisfied client. But it is best to have a **wildly enthusiastic** client (internal and external) because, if you do, they will give you more work and recommend you to others.

Keep Them in the Loop

Clients, whether internal or external, do not like unwanted surprises – like a looming deadline that you didn't forewarn them about, or a bill for services that is more than anticipated, or an 11th hour notice that you will need more time to complete something. You do not want to earn a reputation as someone who doesn't alert clients as quickly as possible to changed circumstances.

You also need to keep clients *"in the loop"* on the status of a project. A client (internal or external) should never need to call you to find out the status of their project or case. Keep them advised as to its progress.

Three Important Words

In real estate, the three most important words are location, location, location. In our business, those three important words are **responsiveness, responsiveness, responsiveness.** Demonstrated responsiveness can distinguish you from others. Clients change lawyers for this reason.

- Meet or, better yet, beat the deadline.
- Return phone calls promptly.
- Handle an emergency immediately, even if working on another project. You can always work on that project later in the day.
- Don't procrastinate.
- Check texts, emails, and voicemails in the evening and on weekends.

One thing that "wows" clients and keeps them coming back is exceptional responsiveness.

When Possible, Communicate in Person

Communications specialists have long shared the notion that how someone receives the meaning of a communication is determined by the *"93 / 7 Rule"* – People's perceptions of a conversation are formed:

- 55% from body language
- 38% from tone of voice, and
- 7% from choice of words.

This suggests you should talk in person or pick up the phone whenever you can. **Do not rely on email, text, or social media for important communications**. Additionally, more is typically accomplished (and more quickly) in person or on the phone than through a string of back-and-forth emails. Your first instinct, not your last, should be to talk to a person.

Stay Top of Mind

You shouldn't assume that just because a client retained you in the past that when the client has other legal needs later it automatically will call you. Someone else may have filled the vacuum since your last contact. You need to interact and stay "top of mind" with clients through phone calls, emails,

notes etc. and show you are thinking of them even when you are not “on the clock”. For repeat clients, instead of sending a holiday card in December, consider sending a Thanksgiving card. That will distinguish you from others who send holiday cards, plus Thanksgiving is an appropriate time to thank them for being your client.

When the Client is an Organization, Get to Know the Staff

Never underestimate the importance of the client representative’s assistant or receptionist. The impression you make on them will be fed back directly to the client. Treat them with respect, show interest in them, and take a few minutes when you arrive or when you call the client to “chat” with these folks.

VII. Simple Things Matter - Remember These Four

Tip No. 18 Be Punctual and Timely

To be early is to be on time – to be on time is to be late – to be late is unacceptable.

Being punctual sends a positive message; being late does not. Those who are habitually late gain a poor reputation and send a message the other person's time is not valuable.

Always try to arrive early for any meeting. And when unavoidable circumstances cause you to be delayed, show common courtesy - call or text the others to tell them you will be delayed and your expected time of arrival.

The same goes for documents, filings, and delivery of any work to your internal or external clients. Being timely sends a positive message. Being untimely does not. Just as with punctuality, when you realize you will not be able to deliver the work product as expected, promptly let the client know.

Tip No. 19 Always Be Considerate of Others

People will quickly forget what you said, but they will always remember how you made them feel. – Maya Angelou

Part of your reputation will be based on how you treat other people whether they be clients, colleagues, opposing counsel, court staff, or those you meet. You never know when those with whom you interact may be a future client, colleague or someone who will be able to assist you. If you are indifferent, not very nice, or act like a jerk it will ensure you will have an unfavorable reputation. But being respectful and considerate will always serve you well.

And remember, everyone at work is part of machinery that serves clients and deserves your respect - staff, receptionists, mail room folks, and housekeeping staff. They all can contribute to your mission but conversely, they can make your life miserable. Your treatment of them can determine which it is.

Tip No. 20 Attitude Makes a Difference

Attitude is a little thing that can make a big difference. – Winston Churchill

Be Appreciative and Show Gratitude

Newer lawyers often take some things for granted and do not realize the value of showing appreciation and gratitude. Mentors, supervisors, internal clients (and sometimes external clients) will do things that contribute to your development as a lawyer and a person. They don't have to do those things but usually do because they want to see you grow and develop your potential.

Be sure to periodically express your thanks and appreciation for the interest they have shown and their willingness to help. Your expression of gratitude will be remembered and lead to continued mentoring or work assignments. And not expressing gratitude or appreciation also will be remembered.

Burdens vs. Opportunities

Another aspect of a person's attitude is how they view something when they are asked or encouraged to do something. Often the response can say a lot about a person.

One response is *"Great - just what I need - one more thing I have to do"* (it's a burden). Another response is "*Thanks, sounds interesting. I appreciate the chance*" (it's an opportunity). Query - Which attitude do you think is likely to get you further in your career?

Be Willing to Help Peers

True professionals do not: back stab; try to climb over someone else; or intentionally try to make a colleague look bad or fail. Instead, real professionals collaborate, help, and support their peers and colleagues. These also are the sign of a team player.

**** Those with positive attitudes usually are more successful.***

Tip No. 21 Appearances Can Make a Difference

Yours

You are a professional and should look and act like one. Personal grooming and appearance are important. How you dress and appear can send a message to clients, prospective clients, and colleagues. Right, wrong, or indifferent, many will decide not to hire someone in a professional capacity if they have scuffed shoes or dirty fingernails.

Another point to consider was made by automotive industry legend, Bob Lutz. He commented that your appearance can either lower or raise an initial barrier to how an audience takes in information you want to deliver.

Your Office and Desk

Your office can make a big first impression too. An office in disarray might make more of an impression than your personality. Think about it, if you meet with a nice person who operates out of a pig sty, what will you remember more?

Some attorneys think that having stacks of files in their office or on their desk demonstrates how busy they are. That is one interpretation, but it can just as easily (or more likely) suggest you are disorganized, poor at multitasking, and spend more time looking for the right file than working on the file. Remember, how you maintain your office can indicate how you run your practice.

VII. CONCLUSION

Remember - Every interaction that you have with others (in person, by phone, by videoconference, or in writing), sends them a message about you. When you interact with others, what messages will you be sending? You control that.

There are many tools in this presentation from which you can choose. Chances are, not all the ideas will be right for you. So, select the tips that you believe can be worthwhile. Then identify two or three and try to master them. After you have done that, then pick another couple and work on them. The habits you develop now will either help or hinder your career development and success.

The theme of this presentation has been that you can have considerable control over your career, and you can do things that make a real difference in your development. But for that to happen, **you must be intentional** both in thinking about and doing those things.

APPENDICES

A Development Plan Sample

B Example of Project List

C Summary List of Tips

D Tips on Initial Client Meetings

E Guide on Making Documents Reader Friendly

Appendix A

Personal Development Plan

(Period of Plan -   )

Two or Three Important Goals for Developing My Career This Period

The Measure of Whether I Achieve Each Goal is as Follows

Actions I Can Take That Will Contribute to Reaching Each Goal

Progress on My Goals Will be Tracked as Follows

Appendix B

(*Your Name*) Project List

Description	Date Assigned	Internal Client	External Client	Internal Due Date	External Due Date	Project Status
~~Demand letter~~	~~2/01/20~~	~~Gentry~~	~~York~~	~~2/08/20~~	~~2/11/20~~	**DONE**
Limitations Memo	3/10/20	Garrison	HSG	3/25/20	**3/29/20**	Rough draft
Draft SJ Motion	3/28/20	Utken	Billmon Inc.	4/25/20	**4/30/20**	Argument outlined

Appendix C

Foundational Principles

A. Realize the Importance of Interactions and Messages You Send
B. Implement the Concept of Internal Clients
C. Execute and You Distinguish Yourself from Many Others

Tip Tool Kit

1. It's Your Career So Take Charge of It
2. Establish a Support System Early
3. Set Goals and Begin to Use Career Planning
4. Expand Your Comfort Zone
5. Be Engaged and Demonstrate Enthusiasm
6. Opportunities - Take Them and Make Them
7. Distinguish Yourself Through Preparation
8. Demonstrate Responsibility
9. Effectively Plan Your Work
10. Position Yourself for Work You Want
11. Send the Right Message if Asked to Help When Busy
12. Always Understand Expectations
13. Seek Feedback and Then React Appropriately
14. Think Through Meetings Before Attending
15. Learn Something About EQ
16. Develop Relationships and Networks
17. Provide Clients with More Than They Expect
18. Be Punctual and Timely
19. Always Be Considerate of Others
20. Attitude Makes a Difference
21. Appearances Can Make a Difference

Appendix D

Tips on Initial Client Meetings

Before the Meeting

Conflict issues - Make sure you know all potential parties and affected persons or entities so you can determine if you have an ethical, business, or personal conflict?

Confirm the appointment - More and more service providers do this as a courtesy reminder. ***Demonstrates*** you are courteous and organized.

Reception - Will the client have a good first impression? Is the reception area neat, is the receptionist pleasant? ***Demonstrates*** you care about your practice and impressions your office makes.

Fees/Billing - Make sure the fee/billing arrangement is clear and in writing. Either provide before or during the meeting. ***Demonstrates*** you are a straight shooter.

At the Meeting

Outline/Checklist - Have an outline of points to cover. ***Demonstrates*** you are prepared and organized.

Connect - Make a quick personal connection. *"Where are you folks from?" "How did you learn about me?" "How can I help you today?"* ***Demonstrates*** you are friendly and care.

Resist the lawyer urge to do most of the talking - Let clients tell the story their way, then double back to fill in or clarify. Be prepared to deal with the emotional aspect. ***Demonstrates*** you are a good listener.

Be engaged - Sit up at the table, take notes. ***Demonstrates*** you are focused on them.

Clarify - Personal knowledge versus secondhand information? How sure is the client of the "*facts*"? Find out what documents may be relevant and arrange to review them. ***Demonstrates*** you are thorough.

Closing the Meeting

Close the loop – Is there anything else I should know? Are there any questions I can answer for you? ***Demonstrates*** you are thorough.

Expectations - Manage the client's expectations from the beginning. Explain any important caveats, follow up that is needed, or next steps. ***Demonstrates*** you are a straight shooter and organized.

Privilege - Make sure clients understands how and why to preserve the attorney-client privilege, and its importance. ***Demonstrates*** you are thorough and want to protect the client's interests.

Preferred method of communication - Ask clients if they have a preference for how you communicate with them. ***Demonstrates*** you are courteous.

Appendix D

Close - Close the meeting by saying something that shows gratitude and puts the client at ease. For example:

- ✓ *"It was very nice meeting you. Thanks for choosing me to help."*
- ✓ *"Don't worry about anything, I will take it from here."*
- ✓ *"I'll take care of everything and keep you posted,"*
- ✓ *"I will help you get through this".*
- ✓ *"Please call my office if you have further questions or if you think there is something else that I need to know."*

Demonstrates you are appreciative and taking charge of their problem.

Appendix E

Guide to Making Your Documents More Reader Friendly

Greg Utken

A. Lawyers and Writing

The consensus among writing experts (including those in the legal profession) is that *"few people realize how badly they write."* The late Justice Scalia commented that legal writing is just non-fiction prose. In his view, most law students lack not the skill of legal writing but the skill of writing at all. Many judges agree with him.

Bryan Garner, a well-known commentator on legal writing, says lawyers have a history of *"wretched writing"* and usually they are *"bad writers"* because the profession condemned them to a diet of bad reading material. Garner opines there is "*more bad writing than good*" and about 80% of lawyers write poorly. My personal experience supports that observation. Why is this so?

Lawyers historically wrote in dense prose and only other lawyers or judges could understand what they wrote. It set them apart and caused clients to view lawyers as smart and deserving of respect (and their fees). Generation after generation of lawyers followed the same path. So, who were members of the new generation of attorneys to second guess the writing of prior successful lawyers? Documents, forms, briefs, and templates were, and are, handed down decade after decade.

B. Goals in Written Communications

Writing has been described as the art of creating desired effects. Your use of language and document structure should result in greater clarity and strength of presentation. Professor John Trimble believed that good writing makes readers feel smart, while bad writing doesn't.

Do you draft a document in a way that makes it easier to read or in a way that unintentionally discourages an audience from reading it? Most members of your intended audience usually are busy people with many things to read. They shouldn't have to slog through paragraphs (or pages) of text before getting to what <u>they really want to know</u>. People are more likely to read communications that are short, to the point, and look reader friendly. When drafting a document, you should have a handful of key goals in mind.

- Make the document and text reader friendly
- Capture the readers' attention quickly.
- Keep it simple. Be clear and concise
- Write like one human talking to another

Make your document and text easy to approach, easy to read, and easy to understand.

C. Make the Reader's Job Easier

Most people don't readily digest a long uninterrupted stream of text. So, they typically begin to skim the text or perhaps even skip it. Because people usually best grasp information in smaller doses, you should break

- large text blocks into headings, short paragraphs, and white space,
- small text blocks into bullet points and lists, and
- long sentences into shorter sentences or clauses separated by punctuation.

Headings make your document easier to follow, easier to read, and thus, more desirable to read. Each heading should identify what the reader will learn and draw them into reading text they might otherwise scan or skip.

Because you want to capture the reader's attention quickly, your document's first sentence and introductory paragraph are important. Keep sentences to about 20 words or less. Also, make your paragraphs relatively short. Make your points plainly and directly.

D. Words That You Use

1. Choosing Words

The clarity of your document and a person's interest in reading it begin with the words you use. Consider these guidelines.

- Use **simple** words not technical words
- Use **familiar** words not far-fetched words
- Use **concrete** words not abstract words
- Use **short** words not long words
- Replace **legalese** or fancy words
- Many **adverbs** and a**djective**s are unnecessary.
- Don't **inflate**. Write "*except*" instead of "*with the possible exception*" and "*because*" instead of "*due to the fact that.*"

2. Avoid Consultant Speak Words

Many consultant type words are overused and usually add nothing to what needs to be communicated. Examples of consultant type words include these.

Consultant Speak	Simple English
• *bandwidth*	capacity
• *coherent*	clear, rational
• *comprehensive*	complete, thorough
• *deliverable*	end result
• *granular*	micro, detailed
• *holistic*	well rounded, complete
• *mission-critical*	important, necessary
• *optimize*	improve, increase
• *synergy*	interaction
• *robust*	healthy, vigorous

Appendix E

3. Dump Redundant Word Phrases

Redundancy is part of the lard that has been passed down in legal writing. Consider using one word instead of multi-word phrases like these.

• *Any and all*	any
• *By and between*	between
• *Cease and desist*	cease or stop
• *Covenant and agree*	agree
• *Due and payable*	due
• *Full force and effect*	effect
• *Give, devise, bequeath*	give
• *Indemnify and hold harmless*	indemnify
• *Make, publish, and declare*	declare
• *Null and void*	void

4. Use Conversational Transition Words Not Hefty Legalistic Ones.

Transitional words help the flow of your writing. But, by habit, we often use the 50 cent words. Use shorter normal transitional words.

Not	**But**
• *assuming arguendo*	even if
• *notwithstanding*	despite
• *moreover*	and, also
• *consequently*	so, thus
• *for this reason*	because
• *notwithstanding the fact*	although
• *in order to*	to
• *subsequently*	later
• *additionally*	also
• *hereinafter*	**Adds nothing, drop it.**
• *with respect to*	about
• *furthermore*	and, also
• *following*	after
• *exemplifies*	shows
• *in the instant case*	here

5. Change Out Legalese for Plain English

Part of making your documents reader friendly is writing them in plain English instead of lacing them with "legalese" – words that aren't special legal terms but just fancy ways to say simple English words. Among the classic examples are the following.

- *concerning/regarding* - “about”
- *further* - “also.”
- *herein* - Does it mean - In this agreement? In this section? In this subsection? In this paragraph? Use ordinary English words: "in this agreement."
- *i.e.* / *namely* - If you need these, your sentence probably isn’t clear.
- *Indicate* - Does it mean “show”, “point to”, “reveal”, “suggest”, “said”, “promised”, “stated”, “claimed”, or “declared”? Choose one of those words or often using “say,” “state,” or “show” will do.
- *Numerous*- “many”
- *provided that* - Does it mean "if," or "except," or "also?" Does it modify the preceding 12 or 35 words? Instead, use a period and begin a new sentence "But."
- *pursuant to* - "required under."
- *Said* – It is the past tense of *"say"*. But just a fancy substitute for *"the"*.
- *Same*- Lawyers use this as a pronoun thinking they are being precise. “*I received your notice and acknowledge the same.”* But *same* is no more than “it.”
- *specifically* - Describes something twice - once in general terms and then what is really meant. Just delete it
- *such* - For lawyers, means the one just mentioned, but is a fancy substitute for the clear words "this," “that,” "these," “those,” or "the."
- *The manner in which* - “how”
- *Utilize* - “use”

E. Verbs That You Use

1. Use Active Voice, Unless….

Usually verbs should create action, reveal the actor, and minimize words. When a subject performs the action, the verb is **active**. When a subject receives the action, the verb is **passive**. You should use active voice, unless you intend to focus on either an action’s effect or the person to whom the action is directed, not on who did what. Typically, you might use passive voice if

- you want to be less than clear (for example, in some discovery answers).
- you don’t know the actor or when the actor is not important. *“The game was brought to a halt.”*
- the receiver of the action is more important than the subject of the action. *“My client was lied to and mistreated.”*
- you want to disassociate yourself from a statement. *“Significant cost overruns are projected.”*

Appendix E

2. <u>Watch for *"to be"* Verbs and Trade Them for Stronger Ones</u>

The *"be"* verbs like "*is*",*"are"*, *"was"*, and *"were"* usually don't carry force. So, trade them out for stronger verbs.

- *"Our professionals identify provisions that ~~are violative of~~* ***violate*** *applicable federal and state law."*
- *"The options and final approach we propose ~~are largely dependent~~* ***depend*** *on the conditions the buyer ~~is planning to impose~~* ***imposes****.*
- *"We strive to ensure that before any course of action is taken, clients ~~are in agreement~~* ***agree*** *with the course our professionals propose."*

3. <u>Change *"-ion"* Words into Active Verbs</u>

Words that end in -*ion* are abstract nouns made from verbs and they can clutter your writing.

- *"We also ~~take into consideration~~* ***consider*** *a client's goals when developing a strategy."*
- *The firm ~~makes accommodations for~~* **accommodates** *employees with a disability."*
- *"We counsel clients on ~~taking steps in mitigation of~~* ***mitigating*** *possible claims that may be brought."*

F. <u>Watch for Text Clutter</u>

1. <u>Introductory Phrases Often Aren't Needed</u>

Unless discussing something's existence, the phrases *"There is"* or *"There are"* are clutter.

<u>Not</u> - *"~~There is~~ no reason any business needs to overpay for quality legal services in this environment."*

<u>But</u> – *"No business needs to overpay for quality legal services in this environment."*

<u>Not</u> **-** *"~~There are~~ three reasons most clients cite as to why they use our services."*

<u>But</u> **-** *"Most clients say they use us for three reasons."*

Often, other introductory phrases also serve little purpose - including phrases like *"It is important to note…" We respectfully submit that…" One also must bear in mind…"*

<u>Not</u> **-** *"~~It is important to note~~ the firm has offices in multiple jurisdictions*."

<u>But</u> - "*We have offices in multiple jurisdictions*."

<u>Not</u> - *"~~The firm respectfully submits that~~ the hourly rate charged is not the most important factor in your legal budget – it is the overall cost of the service."*

<u>But</u> **-** *"The hourly rate charged is not the most important factor in an organization's legal budget – it is the overall cost of the service provided."*

2. <u>*"Of"* and *"In"* Signal Excess Words</u>

The words *"of"* and *'in"* indicate you have used too many words in the sentence.

"of" This word typically leads to unnecessary words on either side of the *"of."*

- *In its discussion ~~of this issue~~, the firm recognized . . .*
- *In their first two years, Associates typically worked a four-month rotation, and stayed in one practice group during ~~the pendency of~~ the rotation.*

"in" This preposition often introduces to a bit of unnecessary information.

- *We outline the steps a client must follow ~~in order~~ to effect*
- *When our clients are ~~in the process of~~ liquidating their assets*
- *We provide legal budgets ~~to~~ assist clients when they do a risk benefit analysis. . ..*

3. <u>Drop Excess Word Baggage at the End of Sentences</u>

Unnecessary words sometimes appear at the end of sentences. Check your last few words before the period and ask if they really are necessary. If sentence ending words form a prepositional phrase, odds are you can delete them.

- *The firm never tolerates that type of behavior and promptly investigates ~~pursuant to the terms of its internal harassment policy.~~*
- *Our professionals always identify next steps and additional costs on a project when there are changes ~~to the project.~~*

4. <u>Limit Use of Citations and Quotations</u>

It is not unusual for attorneys to cite and quote cases too much and too often. Avoid string citations. Cite authorities sparingly – you only need one or maybe two cites for a proposition. And when citing a case, it often helps to add a brief parenthetical explanation how the case supports you. A good parenthetical starts with an *"ing"* word relating to something a court did like *"holding;",* consists of a single sentence quote; or alternates between the two and then adds *"because."*

Example

> *Quazite Div. of Morrison Molded Fiberglass Co. v. NLRB*, 87 F.3d 493, 496 (D.C. Cir. 1996) (denying enforcement of Board's decision that withdrawal was unlawful because it "[l]ack[ed] both substantial evidence and a reasoned explanation of any causal link between [ULPs] and the Union's loss of support")

Keep quotations as short as possible. Also, avoid bloc quotations. Judges are said to frown upon and even skip them.

G. <u>Read it Out Loud</u>

Finally, don't write sentences that are difficult to speak. Write with your ear not your eye. What you write should sound natural, not awkward, when you say it. Read your document aloud and if a sentence doesn't sound natural then re-write it.

Hidden But Obvious Tips for Succeeding

Key Principles & Tips to Accelerate Your Legal Career

October 21, 2022

Presented By

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Value of These Tips

- Everyday things
- Within your control
- Can be put into practice right away
- Each can accelerate ***your*** development

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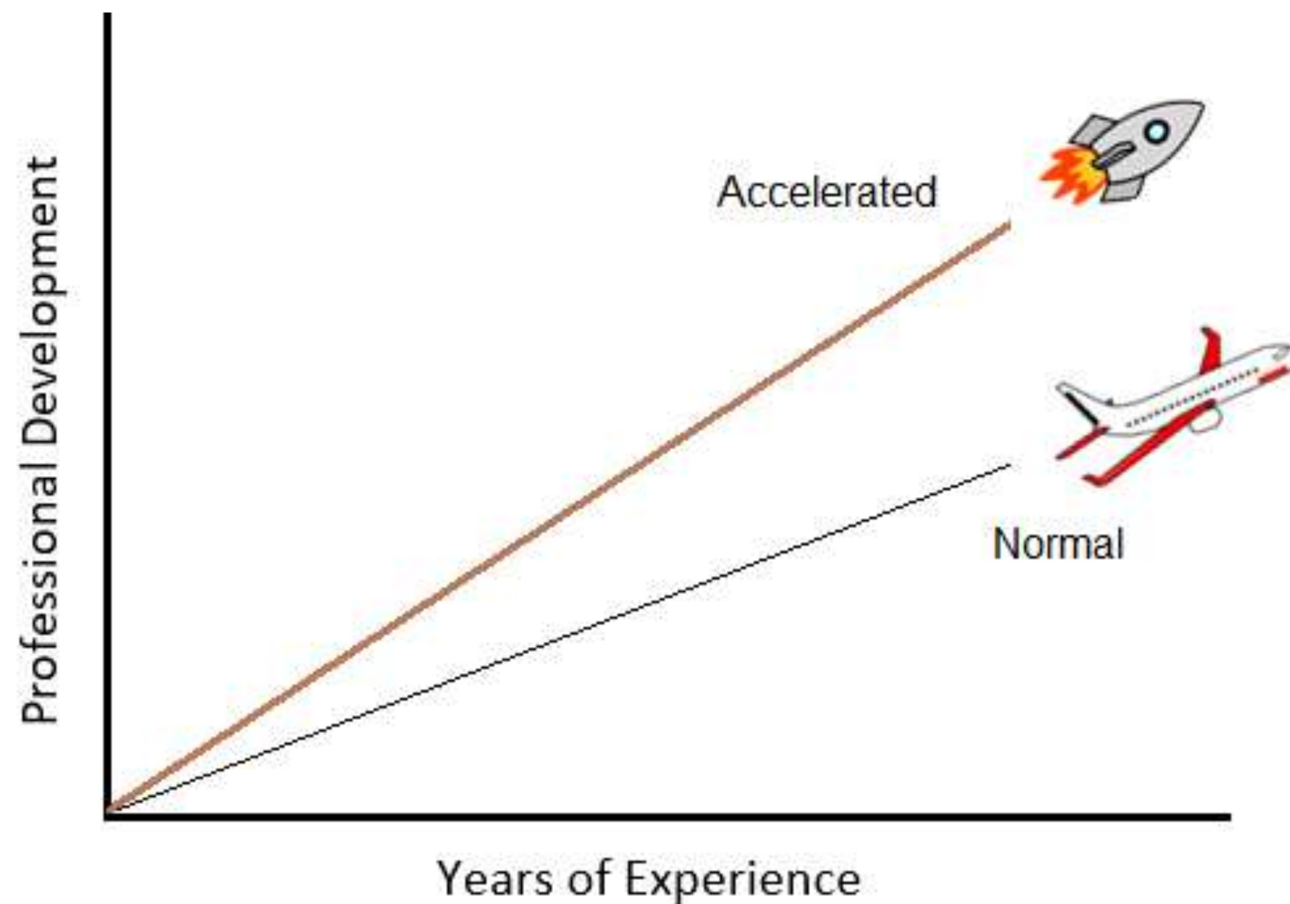
Career Progression Options



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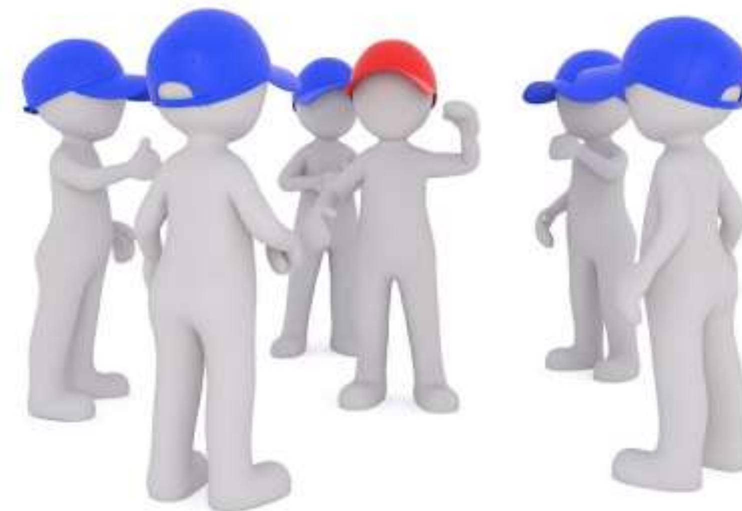
Consciously Steer Your Career

Three Fundamental Principles

1. Everything you do leaves an impression
2. Apply the Internal Client Concept
3. Distinguish yourself through execution



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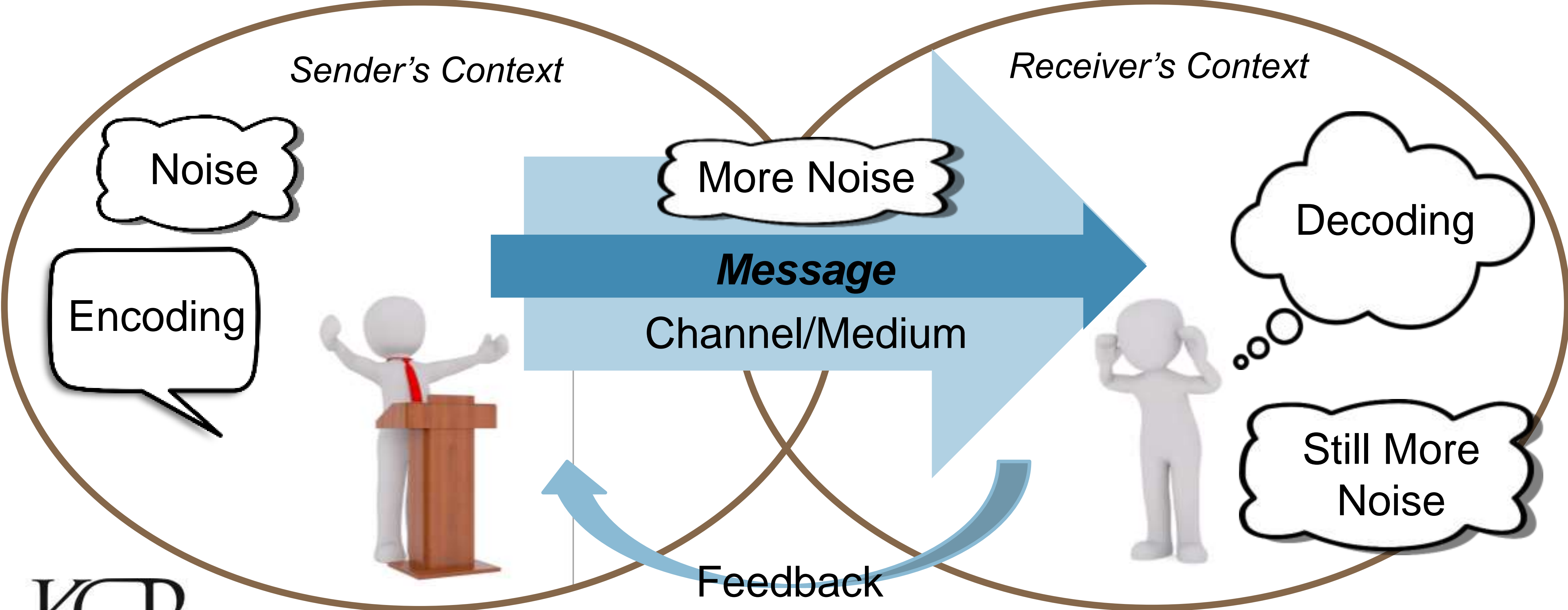
“Everything You Do Leaves An Impression”



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3 Tips to Set the Stage

Tip 1 – **Take charge** of your career

Tip 2 – Establish a **support system**

Tip 3 – **Goals** and a do-able **plan**

Tip 3 – Unpacked Further

- *Four Disciplines of Execution* (see materials)
- **SMART** Goals: **Specific**

  Measurable

  Achievable

  Relevant

  Time-based

5 Tips to Accelerate Development

Tip 4 – Expand your **comfort zone**

Tip 5 – Be **engaged** and **enthused**

Tip 6 – Take and create **opportunities**

5 Tips to Accelerate Development

Tip 7 – Distinguish through **preparation**

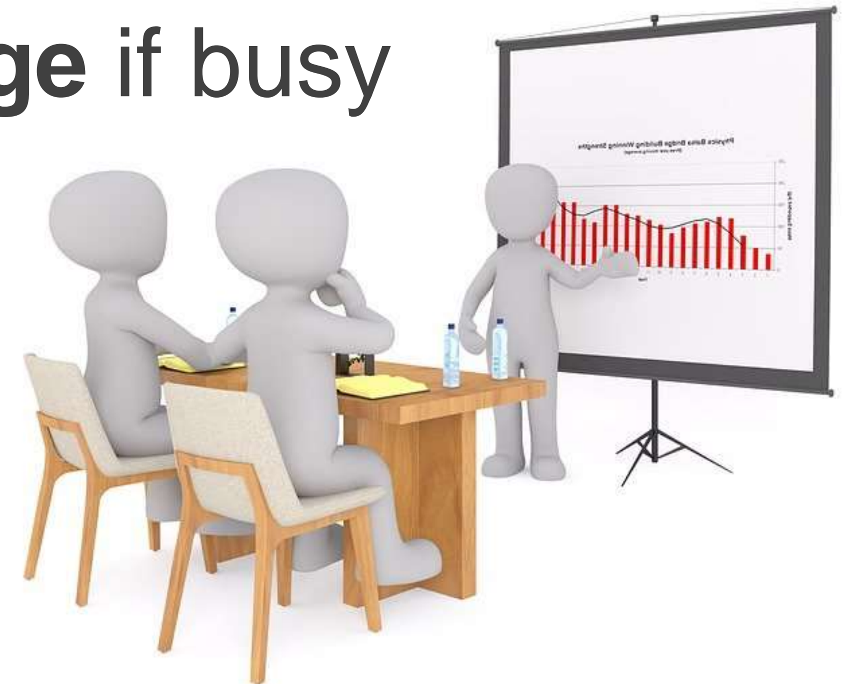
Tip 8 – Demonstrate **responsibility**

6 Tips to Get the Most Out of Work

Tip 9 – Effectively **plan** your work

Tip 10 – **Position** yourself for work

Tip 11 – Send the **right message** if busy



6 Tips to Get the Most Out of Work

Tip 12 – Understand **expectations**

Tip 13 – Seek **feedback** (and react)

Tip 14 – Be prepared for **meetings**

Tip 14 – Unpacked Further

- **Preparation**
  - What should you know *before*?
- **Participation**
  - Everything you do leaves an impression!
- **Conclusion**
  - Confirm take-aways (*then execute/follow-up!*)

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3 Tips to Cultivate Relationships and Clients

Tip 15 – Learn about (and grow your) **EQ**

Tip 16 – Develop **relationships/networks**

Tip 17 – Give **more than expected**

Tip 17 – Unpacked Further

Clients Can Say *One* of These About Your Work…

- Something **positive**
- Something **negative**
- **Nothing**

…which will it be?

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Tip 17 – Unpacked Further Still

"Wow Factors" That Create "Wildly Enthusiastic" Clients

- Responsiveness
- Keep them in the loop – no surprises
- Communicate "live" where possible
- Stay top of mind
- Know organizational client's key staff

4 Small Things That Matter

Tip 18 – Be **punctual** and **timely**

Tip 19 – Always be **considerate**

Tip 20 – **Attitude** matters

Tip 21 – **Appearances** matter

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Tip 21 – Unpacked Further

What's Your Virtual Meeting Background?

Tip 21 – Unpacked Further Still

More Formal to Less Formal is Easier Than Vice Versa

In Conclusion

Keep The Principles and Tips on Your Radar

- **Be Intentional** about **your** development
- Pick and **try 2-3 tips**
- Later, **try 2-3 more**
- Hold yourself **accountable**
- Know client's key staff

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Thank You!

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