2020

Applied professionalism

Indiana Continuing Legal Education Forum (ICLEF)

2020 Applied Professionalism
October 16, 2020
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APPLIED PROFESSIONALISM 2020

October 16, 2020

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DISCLAIMER

The information and procedures set forth in this practice manual are subject to constant change and therefore should serve only as a foundation for further investigation and study of the current law and procedures related to the subject matter covered herein. Further, the forms contained within this manual are samples only and were designed for use in a particular situation involving parties which had certain needs which these documents met. All information, procedures and forms contained herein should be very carefully reviewed and should serve only as a guide for use in specific situations.

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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

12:45 P.M. Trust Accounts and IOLTA
Seth T. Pruden

1:45 P.M. A Call for Help: The Judges and Lawyers Assistance Program (JLAP)
Patricia L. McKinnon

2:15 P.M. Refreshment Break

2:30 P.M. Hidden, But Obvious, Tips for Succeeding in Your Legal Career
Gregory J. Utken

4:00 P.M. Adjourn

October 16, 2020

APPLIED PROFESSIONALISM

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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

Melissa S. 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 districts 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, 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, Carmel

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

Patricia L. McKinnon
Attorney at Law, Indianapolis

EDUCATION

University of Notre Dame Law School - J.D., 1994
Augustana College, B.A., English/History majors

CERTIFICATIONS

Certified Family Law Specialist - Indiana - 2002

EMPLOYMENT

Office of Patricia L. McKinnon, Esq., 1994 - present; family law attorney
Public Defender Agency, Marion County - 1995 - 2000; part-time public defender - civil cases including termination of parental rights and CHINS (Child in Need of Services) cases

PROFESSIONAL AWARDS

2010 – The Edmund S. Muskie Pro Bono Award – ABA Tort Trial & Insurance Practice Section
2008 - President's Award - Indiana Bar Foundation
2006 and 2002 - Pro Bono Publico Award - Indiana Bar Foundation
2000 - Board of Manager's Award - Indianapolis Bar Association
1996 - President's Award - Indianapolis Bar Association

PROFESSIONAL ACTIVITIES

Indiana State Bar Association: Chair- Talk To A Lawyer Today program - since 2001; Current Vice-Chair – Indiana State Bar Association's Small-Solo Conference; Past Chair and Past Vice-Chair – Indiana State Bar Association's Pro Bono Committee; Past Chair – Indiana State Bar Association's Articles and Bylaws Committee; Past Vice-Chair – Indiana State Bar Associaton's Women in the Law Committee; Past Sub-Committee Chair – Indiana State Bar Association's Ethics 2000 Project- Ethics Committee; Current Indiana State Bar Association representative – Board of Indiana Legal Services, Inc. Board; Member –Indiana State Bar Association's Family & Juvenile Law Section and General Practice Section; Past Member – Indianapolis Bar Foundation (two terms). Founding Board Member - "Seeds of Hope"; halfway house for chemically dependent women, Indianapolis, Past Board Member - Neighborhood Christian Legal Clinic, Indianapolis.

PROFESSIONAL MEMBERSHIPS

Indiana State Bar Association; Indiana Bar Foundation (Fellow); Indianapolis Bar Association, Indianapolis Bar Foundation (Fellow); American Bar Association;

VOLUNTEER WORK

Guardian ad Litem (advocate for children) on family law cases for both Kids' Voice and Child Advocates, Inc. Pro Bono Attorney: Indianapolis Legal Aid, Inc., the Heartland Pro Bono Council, the Neighborhood Christian Legal Clinic, and Indiana Legal Services, Inc. Past volunteer tutor- church low income tutoring program. Church Deacon Co-Chair; Past Session Member and Sunday School Teacher.

PERSONAL LIFE

Married - three children. Hobbies: karate (black belt); collecting interesting stories about court cases.

SETH T. PRUDEN
Staff Attorney
Indiana Supreme Court Disciplinary Commission

Seth T. Pruden was admitted to practice law in Indiana in 1984. Pruden received his J.D. from the Indiana University School of Law in Bloomington (now Maurer). He is admitted to practice in the State of Indiana, the northern and southern federal districts of Indiana, and the United States Supreme Court.

Pruden has worked as a staff attorney for the Indiana Supreme Court Disciplinary Commission since 1996. He served as Interim Executive Secretary of the Disciplinary Commission in 2010. As a staff attorney for the Disciplinary Commission, Pruden investigates and prosecutes cases involving attorney misconduct. Also, he has lectured extensively on legal ethics, the Rules of Professional Conduct, law office management and similar topics.

From 2010 to 2019, Pruden was an adjunct professor at Maurer School of Law, teaching a professional responsibility course entitled: “The Legal Profession for LLM’s.” From 2004 to 2018, Prudent taught a course on legal ethics each semester at IUPUI beginning in the Department of Philosophy and, later, the Department of Political Science.

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.

Pruden is a member of the National Organization of Bar Counsel (NOBC), American Bar Association, and Indiana State Bar Association.

Wandini D.F. Riggins
Judicial Law Clerk, Indiana Court of Appeals, Indianapolis

Wandini is a Judicial Law Clerk for the Indiana Court of Appeals. Her duties include:

- Analyzing trial court judgments and evidentiary records.
- Conducting legal research into legal issues.
- Assisting in drafting judicial opinions, motions and memoranda spanning vast civil and criminal doctrinal areas.
- Aid judicial officers in clarifying legislation, informing public policy and establishing binding precedent.

Fred Schultz

Fred is a graduate of Butler University and the Indiana University School of Law - Bloomington. 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 President of ITLA. He is also a member of the American Association for Justice (AAJ), 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 (ABOTA), and currently serves as President of the Indiana Chapter of ABOTA. He is board certified as a Civil Trial Advocate by the National Board of Trial Advocacy. Fred also serves on the board of directors for Indiana Legal Services (ILS), a non-profit organization that provides legal assistance to low income Hoosiers.

Greg Utken

J.D., Indiana University McKinney School of Law, *magna cum laude,* 1974

- Greg is a retired partner from *Faegre Baker Daniels LLP (*now *Faegre Drinker Biddle)*. During his 40-year career he worked at three firms of various sizes – a 15 lawyer firm, a 45-lawyer firm, and the firm from which he retired of several hundred.

- For over 20 years, he served as a supervisor, mentor, and coach for numerous new partners, associates, and law students. He regularly made presentations on career development and leadership.

- Over the years, Greg also held a variety of firm management positions and has spoken nationally on law firm management and legal practice trends.

- He was recognized many years in multiple publications as a leading management labor and employment lawyer by peers and clients. The *Indiana Lawyer* also named him a *Distinguished Barrister*. He has made hundreds of presentations and written numerous articles nationally, regionally, and locally.

- Since retiring, Greg has coached lawyers, law students, and MBA students on career development and leadership.

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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

PowerPoint Presentation

Fostering Civility in an Uncivil World: What's It Really All About
Hon. Melissa S. May - Hon. Gary L. Miller

APPLIED PROFESSIONALISM

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

DEFINITION

- 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

DUTIES OF A LAWYER

- 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

WORLDCOM NETWORK SERVS. V. THOMPSON 698 N.E.2D 1233 (IND. CT. APP. 1998)

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

4 AREAS OF CONCERN

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

- **YOUR CLIENT - THERE ARE RULES**

- 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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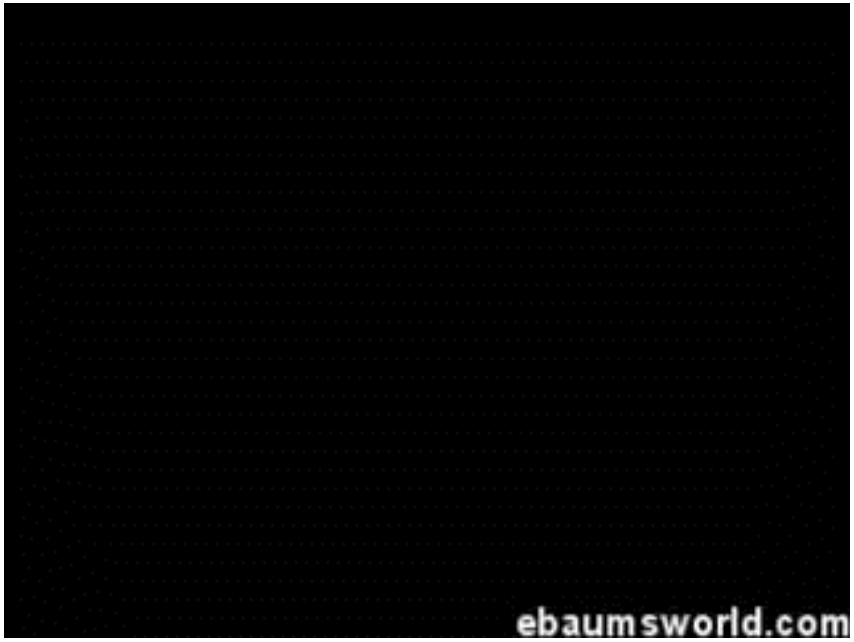
THIRD PARTIES & FELLOW LAWYERS

- "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

THE GOLDEN RULE

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

- 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
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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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INDIANA COURT OF APPEALS
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Section Two

Conflicts of Interest……Wandini Riggins

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

[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.

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' 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. 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.

***2. 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

3. 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.

4. 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:

> **Rule 3.7. Lawyer as Witness**
>
> (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.

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

5. 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).
    - 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).

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

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

2. *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.

3. *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.

4. *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.

5. *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

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

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).

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 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

[6] RPC 1.10.

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 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)

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

- 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

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

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 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***

IX. 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

[9] RPC 1.12.

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)

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

Wandini Riggins, Law Clerk
Indiana Court of Appeals

Black’s Law Dictionary (11th ed. 2019)

Conflict of Interest:

- 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.

- 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

Rules of Professional Conduct (RPC)

- Generally
  - Conflicts of Interest are governed by RPC Rules 1.7 through 1.13
  - Also RPC 3.7, 8.3, and 8.4

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.

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.

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 written informed consent, confirmed in writing.

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 reasonably 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 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 think and ask questions. RPC 1.7, cmt. 20.

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.

PRACTICE POINTERS

- Where a conflict exists before the representation commences?
  - Decline the representation, *unless* client gives informed consent.

- Where 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.

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.

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

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)

***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

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

- After the City of Indianapolis got an order of demolition regarding a condemned building, D., the elderly client who owned the building, retained Stern. Stern violated various RPCs during the representation. The most relevant violation is Stern's transfer of the building, by quitclaim deed, from D., to Respondent's non-lawyer legal assistant and pro bono client, J. "Because 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 I.C. 36-7-9-12(a). The transfer of the building to J. did *not* relieve D. of financial liability, but rather, created a conflict of interest between of J. and D.
- Violated RPC 1.7(a), among other RPCs.
- Penalty: 18-month suspension without automatic reinstatement

***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.

Rule 1.9. Conflict of Interest: Former Clients

- After a representation ends, a lawyer still owes duties to the clients. 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.

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).

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.

LAWYERS' INTERESTS

- 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).

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).

LAWYERS' INTERESTS

- Generally, a lawyer **shall not**:

  - 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).

LAWYERS' INTERESTS

- Generally, a lawyer **shall not**:
  - Acquire a proprietary interest in the action or subject matter of litigation at issue 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).

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.

Rule 1.9. Conflict of Interest: Former Clients

- RPC 1.9 provides that a lawyer, who has represented a former 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.

RELEVANT CASES

- ***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, 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 moved for the appointment of a special prosecutor, which was denied.

  - On appeal, Camm: "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[.]" *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).

RELEVANT CASES

- ***In re Williams,* 971 N.E.2d 92 (Ind. 2012)**
  - An elderly woman hired Williams to administer her estate and executed POA in favor of Williams, who prepared a living will for the client. The client's niece demanded an accounting. The client's money was gone. The client revoked POA and her niece filed a complaint and demanded an accounting, which William resisted. The trial court found as follows and awarded nearly $70,000:
    - Williams "failed to supply an accounting as required";" failed to keep records of his use of [the client]'s funds and of the legal services rendered on behalf of [the client]"; (3) "billed [the client] for 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) "no conceivable reason [existed] for the fees charged, which consumed nearly 1/3 of [the client]'s estate"; and (5) constructive fraud." *Id.* at 95.
  - Our Supreme Court found Williams violated RPC 1.7 and 1.8(a), among others.

RELEVANT CASES

- ***In re Hollander,* 27 N.E.3d 278 (Ind. 2015)**
  - Respondent used information obtained through his public defender employment to meet a woman 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. Disc. Comm'n alleged various RPC violations including:
    - 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.

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.

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.

<u>Practice Pointer</u>:

- 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 problem of that type even though the subsequent representation involves a position adverse to the prior client. . . . ." *See* RPC 1.9, cmt. 2.

- **<u>KEY INQUIRY</u>**: 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.

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.

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).

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).

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.
- Treatment of conflicts involving law firm lawyers who formerly represented the government are governed by RPC 1.11 (and not RPC 1.10).

RELEVANT CASES

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

  - As a solo attorney, Clark took on Dr. XYZ as a client. Clark closed her firm and joined E&E. By the time Clark left E&E, she had represented Doctor in six medical malpractice suits. Clark later joined the MMMMK firm. After intake, Clark presented Sykes' ("Plaintiff") medical malpractice claim and presented it to her MMMMK colleagues, one of whom took the case. After MMMMK filed suit against the Doctor and a hospital on behalf of Plaintiffs, Doctor moved unsuccessfully to disqualify MMMMK from representing the Plaintiffs based on Clark's prior six representations of Doctor.

  - On appeal, the Doctor argued that Clark's six prior representations created a conflict of interest pursuant to RPC 1.9 that should be imputed to MMMMK, pursuant to RPC 1.10.

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

- 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).

- 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 past representation:

  - 1. Determine whether a substantial relationship exists between the subject matter of the prior and present representations.
  - 2. If so, ascertain whether the presumption of shared confidences with respect to the prior representation has been rebutted.
  - 3. If this presumption has not been rebutted, determine whether the presumption of shared confidences has been rebutted with re the present representation. Failure to rebut this presumption also makes disqualification proper.

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

- Judge Crone concluded: "the prior and the present representations [ ] are substantially related for the purposes of RPC 1.9 because "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 the prior representations]. The issues in the prior and present cases are [ ] 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 interests. 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.

***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.

***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.

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.

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 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, unless the affected client(s) gives written informed consent.

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.

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.

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"; 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.
    - Penalty: 3-year suspension without automatic reinstatement.

PUBLIC ATTORNEYS (cont).

- 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).

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).

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*.**

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)

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).

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
Rebecca W. Geyer
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Running a Small Firm – Opening a Law Office, Marketing and Law Office Management

Social Media and Internet Marketing

***Ethically* Marketing Your Brains Out – Without Losing Your Mind!**sm

What's New in Social Marketing for Lawyers?

The Top 7 Social Media Marketing Trends Going Into 2019

Social Media Marketing (2020)

ICLEF – APPLIED PROFESSIONALISM

RUNNING A SMALL FIRM - OPENING A LAW OFFICE, MARKETING AND LAW OFFICE MANAGEMENT

Deciding to take the plunge and open your own law office can be a little bit nerve-wracking, to say the least. You are walking into the unknown, with no way to fully appreciate how your decision will turn out or how it will affect your life. Most lawyers stress about how they will build their own practice and find new clients. Having done just that, I feel qualified to offer some tips that might be helpful.

LAW OFFICE MARKETING

Whether you are starting your own practice now, or have been in private practice for a while, here are some thoughts about law office management that will hopefully be helpful.

LOADING THE PIPELINE – IT TAKES TIME!!

A. Develop a Marketing Plan

Obviously, whether you are a solo practitioner or in a partnership, it doesn't do much good to have a law practice without clients. In order to "make the phone ring," you will need to develop a marketing plan and decide what financial resources you are able to devote to it.

Also, choose one or two professional or civic organizations and get involved. I know we are all overwhelmed with work and family responsibilities, but giving your time and talent to outside groups is critical. Your church, temple or synagogue do important work in your community and always need more help. Likewise, professional associations like your local, state bar association, or national bar associations like the American Association for Justice (AAJ) or the American Bar Association (ABA) always have work that needs to be done but are short on volunteers. Getting involved in these groups gives you a sense of participation and personal satisfaction while helping to advance causes you believe in. It also gives you an opportunity to get to know other people in your personal and professional community which increases your chance for professional referrals. You really can do well by "doing good."

FREE VS. PAID ADVERTISING:

The following is a breakdown of different potential sources of clients:

a. Referral Sources (FREE)

1. Other attorneys
2. Physicians
3. Family/Friends

4. Current/former clients

b. Community Involvement (FREE)

1. Church/Temple/Synagogue
2. Boys & Girls Club
3. Civic Organizations

c. Professional Associations (FREE – SORT OF…)

1. AAJ or ABA
2. State TLA
3. Local Bar Associations
4. State Bar Association
5. Political parties

d.. Paid Advertising

i. Newspaper
ii. Television
iii. Phone Books
iv. Radio
v. Internet
vi. Direct Mail
vii. Social Media
viii. Other

MARKET TO FRIENDS AND PRIOR CLIENTS

If you handle your client's case well, communicate with them on a regular basis, and your clients will be your best sources of new clients. Add your prior clients to your marketing file as a resource. Send a letter to the client asking them to make a recommendation on your Google Plus Page. Better yet, have your happy client make a comment on your office Yelp or Google Plus page right there in the office when they pick up their settlement check.

Some of your best referrals sources are, of course, happy clients. Make sure you stay in contact with them. We encourage our clients to sign up and "like" our firm Facebook page or to follow us on Twitter. We post regularly and keep clients and other referral sources up to date with legal news and events. We also make sure that we post about awards we receive, significant cases we're involved in, and anything else that seems newsworthy.

Our office also writes new blogs several times a month. I have an assistant who is a good writer start a draft the blog topic that I pick. I then finish the blog and then post it to the firm website. We then also post it to our firm Facebook, LinkedIn, and Twitter pages. Facebook lets you target your audience with paid "boosts." It's a very affordable way to get your firm in front of a thousand people and increase the number of people who follow your firm.

We also make legal posts on our personal Facebook pages. It's important to remember that your friends look to you as an expert in the law. It's good to remind them occasionally about what you do for a living. Your friends and family who are also Facebook friends will become your advocates and refer people to you.

We also send Happy Birthday cards to every current and former client. Our receptionist is tasked with sending the cards out each week. We regularly hear back from current and former clients saying that they appreciate the card and the fact that we took the time to remember them. It is a great way to reach out and remind them that you exist. Even though you're the one who resolved their case for them and eventually gave them a check for thousands of dollars, you cannot take for granted that five years down the road they'll remember your name. Sending a Birthday card keeps your name fresh in their head. And of course, your firm name, address, phone number, and website are all listed on the card, too.

Another thing we do is have receptions and invite former clients to our events. For example, we host a firm Holiday party at the end of each year and make sure to invite clients via our firm Facebook page. Some former clients show up, but not many. However, the ones that do always talk about what a great event it is. It also reminds us of our success and keeps things in perspective.

We also are active in our community. Our biggest new event is a Half Marathon called the Greene & Schultz Hoosier Half. We are the primary sponsors and post regularly to Facebook and Twitter. We have former clients who have signed up and who will be cheering along the route. Showing you care for your clients and your community and getting your clients involved really takes your branding message to the next level. You elevate yourself above your competition.

B. Remember To Say, "THANK YOU"

Finally, always say, "Thank you." One of the best purchases you can make is nice cards with your firm logo and contact information. Send a hand written "Thank You" to every new client who signs up with you, as well as to who ever the referring source was. You will be surprised at the response you will get. Clients will call and thank you for the kind thought. Likewise, you will continue receiving referrals from people when you take the time to thank them.

We also use our social media pages encourage our friends and former clients to refer people to us. And, when we receive referrals we post something generic (not mentioning specific names) thanking people. For example, on a busy intake week we will often post something like, "Wow! Thank you to all our friends for the great week of new clients! We appreciate your trust in us."

Remember, people refer to you instead of other lawyers because they know you. They anticipate that the person they are referring to you will receive personal attention. Saying "thank you" to the referral source sends the message that they were right in their assessment of you.

One of my favorite ways of saying "Thank You" is a party. Our firm has an annual Holiday Party at a local restaurant. We reserve roughly half the space of the restaurant and have a big party. We invite all of our friends, the local bar association and judges, and all of our other referral sources. We don't necessarily invite all our clients, but we do invite ones that we have become friends with outside their case. We don't give any speeches. It is purely designed to be a good time. People appreciate a chance to get out and socialize. Many of our friends tell us it is the best party they go to every year.

C. Conclusion

Essentially, marketing your firm is just an extension of yourself. Your friends, family and colleagues will want to help you. So will your current and former clients. Find what works for you. It does not have to cost a lot of money to get your message out. To the extent that you need to spend money, make sure you have a plan and can articulate what you want that part of your marketing plan to accomplish and who you are trying to reach. Be willing to try new things and make mistakes. Learn from those mistakes and continually work on your plan. Most of all, enjoy what you are doing and make sure your message is true to who you are.

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SOCIAL MEDIA MARKETING

ICLEF 6th Annual "Reality" CLE
May 10-11, 2018
Rebecca W. Geyer

Social media is a buzz phrase we hear often these days. The term social media is really nothing more than a catch-all term for a marketing process which gains traffic or attention through social media sites. In this day and age, there are numerous ways to have a presence in social media – Facebook, Twitter, LinkedIn, Google+, blogs, company websites – but all have the goal of allowing individuals or companies to reach an intended audience online. While attorneys may know that a social media presence is a necessity in the 21st century, few of us know how to personally engage in a social media strategy or make the time to do so. Getting started in social media without any previous experience or insight can be challenging. Here are some tips to get you started in developing your social media strategy to boost your bottom line.

1) Know and Listen to Your Audience

Success with social media requires you to understand your target audience and what information they hope to gain from following you. It's not enough to just post on a specific topic; successful social media involves joining discussions to learn what's important to your clients. When you

understand your audience, you can you create content which adds value rather than clutter to your audience's lives.

2) **Put the work in to see the rewards**

To have a successful social media campaign, you must be consistent. Consistency does not mean you must post every hour of each day, but it does mean you should have a regular presence on the social media sites you choose to utilize. Crafting social media messages daily, however, is time consuming and often something which gets shoved to the back burner. The trick to social media management is that when you don't have time, follow people that are extremely selective with their tweets, put these folks on a list and share their content. If you do this generously, they will in return be happy to promote your work.

3) **Don't post for the sake of posting**

Utilize social media when you have something to say; don't just post or tweet for the sake of posting. Sometimes it's nice to give your audience a break from the influx of social media if you don't have important content to convey.

4) Schedule Your Social Media Presence

We're all short on time so it's unlikely you have the ability to give over a set amount of minutes each day to further your social media presence. You don't have to hire a marketing professional to make up for your busy schedule; instead, consider scheduling your social media messages at a set time each week. Hootsuite (hootsuite.com) is a wonderful tool which allows you to schedule your social media posts on Twitter, Facebook, Google+ and LinkedIn. Simply compose your message and select the date and time you want it to be sent. Hootsuite will automatically post your message to your social media site at the scheduled time, making it appear you are engaging in social media at that moment even if you're not. While Hootsuite is a terrific tool, don't become too reliant on its use. Live posts should not be forgotten as the greatest impact of social media is felt by engaging our followers and responding to their posts.

5) Double Your Presence

You can double your social media outreach by including links to social media content on your firm webpage. Most webpages allow for the inclusion of social media widgets which post your Twitter or Facebook feeds on your website. This adds new content to your site every time you

post on those platforms, optimizing your visibility on search engines without requiring you to do more work.

6) **Social Media Takes Patience**

Social media success doesn't happen overnight. Regular, sustained practice is necessary to build a following in the social media world.

7) **If You Publish, They Will Come**

If you publish good, quality content and work to build your online audience of followers, those followers will share your posts with their own audiences on Twitter, Facebook, LinkedIn, blogs and more. This type of sharing boosts your entry points on search engines like Google, and can move your company towards the front in a keyword search.

8) **Add Value**

You can't spend all your time on social media promoting your own products and services or people will stop listening. Rather than focusing only on you or your own firm's initiatives, add value to you audience by focusing on topics of interest to your followers.

9) **Acknowledge Your Followers**

You wouldn't ignore a client who calls or e-mails you so don't ignore someone who reaches out to you via social media. Building relationships

is one of the most important parts of social media marketing success, so always acknowledge every person who reaches out to you.

10) Reciprocity Required

You can't expect others to share your content and talk about you if you don't do the same for them. A portion of the time you spend on social media should be focused on sharing and talking about content published by others. Your audience will appreciate knowing about other businesses or issues which may affect them or assist them with a need.

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

Reid F. Trautz

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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.

Finally, lawyers must always be mindful of our professional conduct rules and maintain our professionalism throughout these activities. It's not hard to do, but does take a dose of diligence to stay within our rules.

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—everyone in the firm needs to have a marketing role to one degree or another. Understand and accept that you are running a business, and that you must balance the roles of lawyer, entrepreneur and manager. As the entrepreneur/business owner, marketing will be a major activity for you over the life of your practice.

2. **Have a Marketing Plan.** Use it to avoid a shotgun approach to marketing activities, which is the biggest waste of time and money. This is not simply a list of your intended activities, but the results you will gain from them. Set concrete marketing goals that can measured for success. (How many new clients, annual total increase in revenue, etc.) 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?

3. **Read and Understand the Indiana 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."

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? Ask existing clients how they found you and why they chose you.

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 to attract client often are not effective. Be as specific as you can for your intended audience. For example, if your clients like "high-touch" personal service, tout your service, not your low prices.

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 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. Use a business card scanner on your phone to capture more information 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 a 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, more lawyers or law clerks, and new file cabinets, just to name a few common operational changes.

The Top Ten Marketing Activities to Build Your Practice

1. Create a contact list using Outlook or other contact manager, then use it to inform and remind your network of your business presence:
    - Organize information about family members, friends, school classmates, business colleagues, former clients, 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, chapter 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. This way you get 3 bites at the same apple!

3. Create a web site, then build traffic to it and referrals from it:
    - Make it education-based, client focused, and easy to find
    - Develop a companion blog and link to other informative sites
    - Consider Google AdWords, Facebook ads, and other web advertising (within ethical boundaries)
    - Have multiple domain names that point to your site

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 Twitter
    - Don't just do a personal profile, add a "fan" page for your business
    - Use connections to leverage introductions to potential clients
    - Use your posts and tweets to deepen relationships

8. Test on-line directories and referral services for your target market:
    - Choose wisely
    - 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*
    - Search business journals and newspapers for business opportunities to forward to others in your network

Two Bonus Ideas:

11. Create specific goals for each networking event you attend.
    - Decide in advance to meet X new people and obtain their business cards
    - Follow up with new acquaintances or your time was wasted

12. Entertain business clients, but be wary about results.
    - Focus any conversation on learning the client's industry or business
    - Follow-up after the event is the key to success
    - Tickets to sporting events are tricky; don't always go with the client

What's New in Social Media Marketing for Lawyers?

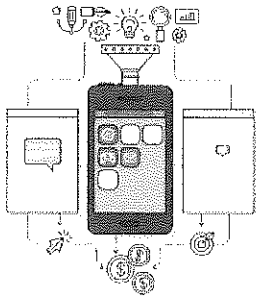
BY MICAH BUCHDAHL ON MARCH 14, 2018 ·

A recent MIT study concludes that fake news spreads "farther, faster, deeper" on social media—at a rate of five times faster than the truth.

At ABA TECHSHOW, Herb Dixon and Megan Zavieh highlighted a vast assortment of issues in a program titled "Think Before You Tweet: Ethical Issues in Social Media," including preservation of evidence litigation, divulging client confidences, and following advertising ethics rules. Not to mention simply embarrassing yourself professionally—such as posting something that may not be unethical or a rules violation, but still makes you look stupid and goes viral like crazy.

In "The Law and Social Media: Tips for Every Lawyer," an ABA CLE webinar on March 15, I moderated a program with colleagues Cynthia Dahl, Kathryn Deal and Molly DiBianca, covering social media issues that range from employment law matters to tweeting jurors, messaging witnesses, friending judges, cybercrime and prosecution, DMCA and trademark issues, virtual law practices, professionalism, and marketing. In other words, everything that is ever involved in practicing law or being an attorney.

In the just-released ABA Formal Opinion 480, the Standing Committee on Ethics and Professional Responsibility reminds lawyers of the confidentiality obligations for lawyer blogging and other public commentary and felt the need to remind us—again—of the duty of confidentiality under model rule 1.6, along with 3.5 (trial publicity) and 3.6.



Ad Age's article, "Over Sharing," discusses a growing number of people using Facebook less or leaving altogether—citing poisoned politics as just part of the problem.

Facebook's recent algorithm change prioritizing posts in the News Feed that spark conversation among friends and family over passive consumption of public content and posts from publishers is a huge shift that has a significant impact on marketers and advertisers.

These are just a few examples of "social media for lawyers" that passed in front of me in the last two weeks. But what had the biggest impact on me was attending a recent CLE program in Southern California on how lawyers should use social media for professional development—with two in-house counsel from major corporations and two practicing attorneys. This is not a compliment. I realized that after all of these years, a so-called "expert panel" talking to a few hundred interested attorneys knew very little about the subject matter in addressing Facebook, LinkedIn, and Twitter. If the instructors doing the teaching are clearly clueless on the subject matter, what about everyone else? The conference, program, and speakers shall remain anonymous.

Just to give you a refresher, LinkedIn started in 2002; Facebook in 2004; Twitter in 2006. Last I checked it is 2018—and so social media is not all that new. Yet, the legal profession continues to struggle with fully wrapping its arms around the best way to use these and many other social media-related tools and formats. It is made all the more difficult by how rapidly the primary social media sites shift how they function. A social media presence is not something you can set up and simply let the status quo handle monitoring the profile, network, tools and settings for each.

We all know the impact that social media has had on our lives and society. We'll keep politics out of this, but you know what I mean—it has changed decision-making, shifted important outcomes, and the analytics and tools-for-purchase are often used for evil instead of good. For every grandmother that gets to see daily posts, photos and videos of the grandkids growing up from afar, or the guy that gets a job from his expertly crafted profile, there is some dude in Russia screwing with us. So maybe I did not keep politics completely out of it, but that is really the point.

When you are looking at your and your law firm's social media portfolio, the assumption is (or should be) that people are looking, reading and researching on a smartphone. They are not on a desktop or even a laptop; maybe an iPad, but more likely than not on a handheld device. So your marketing strategies should be based on that assumption.

Not everything technological takes off. Most law firms like to pretend that their apps are a big success. But while your phone probably has an Uber app, it probably did not find the room or space for a Big Law or even a Little Law app. The vast majority of them are flops. I thought QR codes would be more of the rage than they turned out to be—when was the last time you used a QR code reader to do anything? But social media (and particularly the major social media apps), are the most widely used (by time) parts of the Internet. You need to stay on top of this stuff.

The ABA's Law Practice Division—through this online publication, *Law Practice Today*, the *Law Practice* magazine and its book publishing unit—offers a litany of resources and how-to articles and books on this subject matter. Just make sure the shelf date is recent, or it is likely extremely outdated. Let's take a quick look at the Big Three (Facebook, Linkedin, Twitter) and how they relate to your law practice.

LinkedIn

If you are a business lawyer or just a human being in the workforce, LinkedIn continues to be a critical component of marketing—whether it is marketing yourself (which is really the primary part of the LinkedIn Empire) or marketing your practice. Every non-retired adult should have a LinkedIn profile. Every law firm should have a LinkedIn page. You should make sure your profile paints the proper picture of you. Join the right groups (alumni associations, trade groups, areas of interest, etc.). Build a connections library. Double-check your settings for privacy and visibility.

What's new?

Four Reasons Not to Collect Formal Client Feedback
Administrative Personnel Are Marketers, Too
The Power of Intelligence in the Business of Law
How Much Social Media is Enough?
Understanding the Multiverse of Legal Marketing
Lawyers Of Distinction Helps Lawyers Grow Their Practice
How Firm Central Helped Steve Little Manage His Practice
Women in Law Firm Leadership Positions, Part I
Meet the General Counsel: Dan Coll
Meet the Managing Partner: Michael Moradzadeh
How I Saved Myself From Near Financial Ruin

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Law Practice CLEs | May 2019 April 17, 2019
Law Practice CLEs | April 2019 April 17, 2019

LinkedIn is now owned by Microsoft. So just like when Google buys a business (for example, when it purchased YouTube, among a thousand other "little" companies), you can expect some sort of integration into the new owners' primary product line. So if you use any Microsoft products, like Outlook or Explorer, figure that LinkedIn will likely work better in certain environments.

When someone is checking you out online, many end-users prefer the data that a LinkedIn profile provides over the glossy, carefully crafted biography you present on your own website. Because LinkedIn is such a powerfully optimized site, your profile will often be at the top of a search for you or your business. So a poorly crafted LinkedIn page can easily lead to a loss of business—or an increase if you do a good job with it.

If you are in the job market, might be or unfortunately joined it involuntarily, you need to realize that this is by far the primary resource used by recruiters, search firms and human resource departments for finding and hiring employees. The first thing I tell someone looking for work is to put a lot of energy into LinkedIn, and probably invest in the premium services. This is not new, but it continues to have a greater impact on the job market every day.

Most experts will tell you the same thing about LinkedIn—that most professionals continue to underutilize the power its information provides. The site gleans key information on your contacts and shoots it to you in a variety of e-mails (perhaps more than you'd like, but interesting enough to avoid unsubscribing). It is a core competitive intelligence tool. And if you are a lawyer with a business-to-business practice, it is probably far and away the social media outlet of choice for your law firm.

For a consumer-based practice, LinkedIn is not going to bring you your "typical" new client. It may bring you a better-educated consumer, someone in the B-to-B space or a lawyer-to-lawyer referral, but not so much a new client sought through marketing or advertising strategies.

Facebook

A lot has changed on Facebook in recent years. The importance (or not) of Facebook is often heavily debated with many of my law firm marketing clients. Often, the debate rages around whether you are using it strictly for personal purposes, or if there really is a business development advantage to think about. As Facebook has slowly evolved into being more about making money than serving the social good, the way it has functioned has changed accordingly. It is not as easy for a plaintiffs' firm to market for free on Facebook as it once was, but that does not mean it does not still offer a for-pay platform worth pursuing.

What's new?

As noted at the top of this article, the Facebook algorithms continue to make it difficult for businesses to market without paying a premium. It is hard to post in a way that creates the type of visibility you need to get in front of a prospect. However, some of those paid advertising services, based on sophisticated demographic and end-user information, are very powerful (and successful) advertising tools for the modern consumer. The Yellow Pages are dead, radio and TV are tougher platforms to succeed in—this is a way of finding tomorrow's client in much less of a scattershot method than any of those traditional media, and even better than equally uneven Google AdWord and related search engine optimization campaigns.

Visibility of posts has a much shorter timeline. If you are a business trying to break into my news feed, you probably need to pay good money to do so.

The age of the average Facebook user continues to grow older. The old adage of being on Facebook to follow what your kid is doing has long gone out the window. You can tell just from my own (middle) age and the sites not referenced so far in this article that if I was looking to reach a younger audience, LinkedIn and Facebook would be somewhat irrelevant (Twitter is the most likely established social media mechanism to capture a greater age range). If this article was about reaching a younger audience through social media, it would be all about Instagram (owned now by Facebook), Snapchat, Vine, Pinterest, Kik, WhatsApp, Telegram, and Tumblr, along with whatever other apps I may have never heard of that are on my teenager's iPhone. The Facebook page for a young adult is now designed to tell parents what they want to see and hear—the real stuff gets Snapchatted.

The real value I've found for most attorneys on Facebook is in keeping themselves front and center to an array of clients and colleagues. It paints a picture of you as an interesting human being. Yes, you need to still worry about what you say in front of clients (which are why I avoid political posts, offering up those little quizzes and surveys about my favorite TV shows growing up, or ranting about something few people care about). But it also gives you the chance to more subtly market your practice—I'm teaching a CLE, I'm going to a law conference, here is an interesting article on changes in the tax laws—that has a greater impact than straight-shooting marketing. I've seen posts from lawyers that have led me to refer other lawyers—anyone know a family lawyer in Portland, Oregon?—or that simply create personal and professional bonds that may lead to business success. In returning from an ABA meeting, at least two dozen lawyers asked me about the experience of taking my son to the Super Bowl—which they knew occurred from a variety of Facebook posts detailing the experience.

As is the case with LinkedIn, it is still very important that you periodically look at your Facebook privacy settings—they do change unexpectedly from time to time—and make sure they show the world what you want. But the Facebook picture you paint still has a lot of marketing value—even if many CLEs tell you otherwise. You can search my array of articles and CLEs on the related topic of social media marketing ethics. The lessons taught there are related to following the various state bar ethics rules as they apply to social media platforms, but I never that suggest you should not be participating in them.

Twitter

For me—after spending lots of time focused on Facebook and LinkedIn—I'd say Twitter finally became a daily tool in the last year. From the original thought and concept—keeping it short, with a 140-character limitation—to the increased use of links to more information and streaming video. Twitter is where you go for the most recent news and information. It's faster than a website or blog, in some cases an almost instantaneous feed of things that happened two seconds ago, if not live.

What's new?

For starters, last years' doubling of the character limit to 280 allows for greater "detail." More embedding of images, articles, and videos (including live streams) is allowed than ever before. Gone is the thought that the messaging was too limited. You can do a lot with an effective post, with a solid following and the right hashtags.

For marketing purposes, Twitter offers paid advertising and promotional options (like the aforementioned big social media networks, it wants to make money, not just offer a free public resource to the planet). The Twitter end-user demographic is wider than the others, and those that live on Twitter consider it a seemingly routine part of every hour of the day. For the entrepreneurial lawyer marketer, a news opportunity that equates to a related practice area provides that first-strike, quick-strike capability. The use of hashtags and developing an influential following combine to offer a network that can unquestionably bring in business—and often will get you exposure to media (to get yourself quoted as an expert), potential clients that like what you have to say and stand for, and put you on the map as a thought leader in a particular field.

If you are a Twitter user, you may just use it to follow others for information, or you might be more focused on being followed. Obviously, just following can provide lots of information and insight. But saying something to your followers (or getting noticed and retweeted by someone with a greater following) is the real power of Twitter.

Nothing about Twitter should discourage you from participating in some way, shape or form. Twitter users can employ many strategies, and like everything else, it feels like they are changing daily.

What else is new?

As I hope you've surmised in this article, a lot is new in social media—despite my reminder that social media itself is far from new and novel. It continues to engrain itself every day on our personal and professional lives. Knowing how it works is a model rule of its own (it is malpractice not to understand technology today). Every day brings a reminder of its power and impact. Clearly, something this entrenched in society offers

audiences and visibility that every law firm business development staff needs to know and use. Unfortunately, many of the great automated tools for republishing on multiple web platforms are limited by the social media sites themselves—you need to post directly, not automate. But you still have ways to use such tools to do something once and get it published multiple times. The bottom line is to stay vigilant and cognizant of changes in social media use for marketing purposes—because they do deliver dividends for every lawyer in some manner.

About the Author

Micah Buchdahl *is an attorney who works with law firms on marketing and business development and is a past chair of the ABA Law Practice Division. Micah is a past editor-in-chief of Law Practice Today and a current member of the Board of Editors. He can be reached at micah@htmlawyers.com or by phone at 856-234-4334, and on Twitter at @mbuchdahl.*

The Top 7 Social Media Marketing Trends Going Into 2019

Reuben Yonatan — September 14, 2018

We all know by now how important of a role social media has on your business strategy. If you're not on social media, you're making things significantly harder on your business than they need to be.

However, social media is constantly changing and it's hard if you're a social media marketing manager to understand how social media is changing the game. We're going to break down the top eight social media marketing trends of 2018 that are completely changing how we look at social media.

1. Augmented Reality

Augmented reality is already being implemented in small ways, but it's leaving a significant impact that will last well into the future. In fact, it's estimated that the augmented reality and virtual reality markets will surpass $298 billion by 2023. The most obvious example are Snapchat's facial filters.

A handful of them have sponsors in the corner of the screen, and people can create their own geofilters as well. Social media marketing managers can and should, if they're not already, take advantage of these features that will continue to become more prevalent on other platforms to further their reach while personalizing interactions.

2. Focus on Generation Z

Generation Z is starting to enter the workforce, meaning they have money to spend. Marketers are starting to target the new generation early, which is a smart move. Retail businesses, for example, are offering clothes that are higher end while offering a wider range of styles.

Retailers are also opening pop-up stores and hosting events that offer more intimate, personalized customer experiences, which will continue to be a major business trend for years to come. The reason pop-up stores and events are so popular is that they're unique and are designed with the intention of being shared on social media. Generation Z was born surrounded by technology, which makes them and social media marketing a natural fit for each other.

3. Video

Video continues to be the dominant medium in social media. Instagram copied Snapchat by creating Instagram Stories, which work in exactly the same way. According to Entrepreneur, 200 million Instagram users use Instagram Stories each month. This

makes Instagram a vital focus in your marketing efforts, and one you should give your best effort at. YouTube continues to grow in popularity due to the rise in YouTubers (we'll get into that more a little later). Generation Z also uses social video platforms like Houseparty, where users can join group video chats and talk to each other online and on the go.

By making their presence known on all these video platforms, social media marketers will have a unique advantage in 2018 because video platforms, again, make it easier to offer personalized customer experiences, which is what customers — regardless of generation — want from businesses. People are visual learners by nature, and video goes beyond what pictures offer. Businesses are realizing this, realizing the popularity of video channels, and realizing the versatility of video.

4. Messenger Apps and Chatbots

Like video, messenger apps offer customers another channel to reach out to businesses and vice versa. We all know how popular Facebook Messenger is and how easy it is for people to reach out to each other without leaving Facebook. This is important because customers who are on Facebook aren't always on it with the intention of buying a product.

If a customer does, however, land on a business page and see something they're interested in, marketers can reach out to them via chatbot and initiate a conversation that could ultimately lead to a sale the customer never saw coming. This is a great way to increase engagement throughout the customer journey. Businesses can reach out on Messenger, WhatsApp, and Kik, which are all popular messaging apps Millennials and gen Z'ers are using regularly.

5. Live Streaming

Live streaming takes video channels to another level. Instead of creating a video and worrying about developing it or needing to start over because it didn't come out exactly

as you planned, social media marketing managers can live stream what they're doing to give potential customers an intimate, behind-the-scenes look at what's going on around the office and how products are being made.

We'll repeat this over and over again: personalized customer experiences matter. Live streaming helps marketers to not just give potential customers an intimate look at what's going on, but to offer a natural call-to-action. For example, marketers who want to offer a one-time promotion can start a live stream and announce on social media that the promotion is starting right now while interacting directly with customers who may or may not have questions and comments.

6. Influencer Marketing (YouTubers)

Remember when we mentioned YouTube? YouTubers are the best example of people who market products and businesses to viewers. Any time you see a sponsored video by anyone with hundreds of thousands of subscribers, you're watching someone who's considered an influencer. By reaching out to Influencers on YouTube and even other social media like Instagram, you're getting other people who come off as normal, everyday people to promote your products.

Again, this comes down to offering personalized customer experiences. YouTubers gain fame by putting out content that relates to tons of people. When they talk about a product or service, they're taking advantage of social engineering to give off the impression that the product or service they're marketing plays a significant role in their life and that it can play a significant role in ours. They're people we feel we can trust and that goes a long way in a market where customers are hesitant to trust big companies.

7. User-generated Content

User-generated content is content created by unpaid fans of businesses that businesses can use to promote their products. It can come in the form of photos, videos, or memes. Doing this is an extremely useful way of getting the customers

involved with the business strategy, which — as you can probably guess — leads to a better, overall customer experience.

Word-of-mouth referrals still play a significant role in this technology-driven market. People no longer respond to simple marketing tactics anymore. It's not enough to tell someone they need a product. They want a story behind the product. Like what we just mentioned about YouTubers playing a big role in social media marketing, people also want to see products being used in real life situations. User-generated content personalizes products in ways businesses simply can't.

The Final Word

Social media marketing trends in 2018 are all catered to personalizing the customer experience by putting the customer in charge. Businesses understand that they're now playing the role of navigator, guiding people to their products and letting them decide whether or not it's right for them. Through social media, businesses can connect with their customers quickly and personally to help generate more revenue while rebuilding trust by becoming more transparent, public figures.

Source of Article: https://www.business2community.com/social-media/the-top-7-social-media-marketing-trends-going-into-2019-02119776

SOCIAL MEDIA MARKETING

Social media is no longer a new phenomenon. LinkedIn started in 2002; Facebook in 2004; Twitter in 2006. While social media may be a familiar concept, attorneys still grapple with how to use it as a marketing and communication tool. It is made all the more difficult by how rapidly the primary social media sites shift how they function. A social media presence is not something you can set up and simply let the status quo handle monitoring the profile, network, tools and settings for each account. When you are looking at your and your law firm's social media portfolio, the assumption is (or should be) that people are looking, reading and researching on a smartphone. They are not on a desktop or even a laptop; maybe an iPad, but more likely than not on a handheld device; your marketing strategies should be based on that assumption. But which social media platforms allow you to best reach your intended audience, and how do you engage with the people you are trying to reach? This paper will give an overview of current social media platforms, and make suggestions on how you can best engage in a social media marketing strategy.

LinkedIn

LinkedIn continues to be a critical component of marketing for business lawyers and most employees in the workforce—whether it is marketing yourself (which is really the primary part of the LinkedIn Empire) or marketing your practice. Every non-retired adult should have a LinkedIn profile. Every law firm should have a LinkedIn page. You should make sure your profile paints the proper picture of you. Join the right groups (alumni associations, trade groups, areas of interest, etc.). Build a connections library. Double-check your settings for privacy and visibility. LinkedIn is now owned by Microsoft, and

you can expect some sort of integration into Microsoft's primary product line (Windows, Internet Explorer and Office products). When someone is checking you out online, many end-users prefer the data that a LinkedIn profile provides over the glossy, carefully crafted biography you present on your own website. Because LinkedIn is such a powerfully optimized site, your profile will often be at the top of a search for you or your business. A poorly crafted LinkedIn page can easily lead to a loss of business—or an increase if you do a good job with it.

Most experts will tell you the same thing about LinkedIn—that most professionals continue to underutilize the power its information provides. The site gleans key information on your contacts and shoots it to you in a variety of e-mails (perhaps more than you'd like, but interesting enough to avoid unsubscribing). It is a core competitive intelligence tool. And if you are a lawyer with a business-to-business practice, it is probably far and away the social media outlet of choice for your law firm. For a consumer-based practice, LinkedIn is not going to bring you your "typical" new client. It may bring you a better-educated consumer, someone in the B-to-B space or a lawyer-to-lawyer referral, but not so much a new client sought through marketing or advertising strategies.

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A lot has changed on Facebook in recent years. As Facebook has slowly evolved into being more about making money than serving the social good, the way it has functioned has changed accordingly. It is not as easy for a plaintiffs' firm to market for free on Facebook as it once was, but that does not mean it does not still offer a for-pay platform worth pursuing. Facebook algorithms continue to make it difficult for businesses to market without paying a premium. It is hard to post in a way that creates the type of visibility you

need to get in front of a prospect. However, some of those paid advertising services, based on sophisticated demographic and end-user information, are very powerful (and successful) advertising tools for the modern consumer. The Yellow Pages are dead, radio and TV are tougher platforms to succeed in—this is a way of finding tomorrow's client in much less of a scattershot method than any of those traditional media, and even better than equally uneven Google AdWord and related search engine optimization campaigns. Visibility of posts has a much shorter timeline. If you are a business trying to break into my news feed, you probably need to pay good money to do so.

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As is the case with LinkedIn, it is still very important that you periodically look at your Facebook privacy settings—they do change unexpectedly from time to time—and make sure they show the world what you want. But the Facebook picture you paint still has a lot of marketing value—even if many CLEs tell you otherwise. You can search my array of articles and CLEs on the related topic of social media marketing ethics. The lessons taught there are related to following the various state bar ethics rules as they apply to social media platforms, but I never that suggest you should not be participating in them.

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For me—after spending lots of time focused on Facebook and LinkedIn—I'd say Twitter finally became a daily tool in the last year. From the original thought and concept—keeping it short, with a 140-character limitation—to the increased use of links to more information and streaming video. Twitter is where you go for the most recent news and information. It's faster than a website or blog, in some cases an almost instantaneous feed of things that happened two seconds ago, if not live. The doubling of the character limit to 280 allows for greater "detail." More embedding of images, articles, and videos (including live

streams) is allowed than ever before. Gone is the thought that the messaging was too limited. You can do a lot with an effective post, with a solid following and the right hashtags.

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technology today). Every day brings a reminder of its power and impact. Clearly, something this entrenched in society offers audiences and visibility that every law firm business development staff needs to know and use. Unfortunately, many of the great automated tools for republishing on multiple web platforms are limited by the social media sites themselves—you need to post directly, not automate. But you still have ways to use such tools to do something once and get it published multiple times. The bottom line is to stay vigilant and cognizant of changes in social media use for marketing purposes—because they do deliver dividends for every lawyer in some manner. Here are some tips for engaging in social media for your practice:

1) **Know and Listen to Your Audience**

   Success with social media requires you to understand your target audience and what information they hope to gain from following you. It's not enough to just post on a specific topic; successful social media involves joining discussions to learn what's important to your clients. When you understand your audience, you can you create content which adds value rather than clutter to your audience's lives.

2) **Put the work in to see the rewards**

   To have a successful social media campaign, you must be consistent. Consistency does not mean you must post every hour of each day, but it does mean you should have a regular presence on the social media sites you choose to utilize. Crafting social media messages daily, however, is time consuming and often something which gets shoved to the back burner. The trick to social media management is that when you don't have

time, follow people that are extremely selective with their tweets, put these folks on a list and share their content. If you do this generously, they will in return be happy to promote your work.

3) Don't post for the sake of posting

Utilize social media when you have something to say; don't just post or tweet for the sake of posting. Sometimes it's nice to give your audience a break from the influx of social media if you don't have important content to convey.

4) Schedule Your Social Media Presence

We're all short on time so it's unlikely you have the ability to give over a set amount of minutes each day to further your social media presence. You don't have to hire a marketing professional to make up for your busy schedule; instead, consider scheduling your social media messages at a set time each week. Hootsuite (hootsuite.com) is a wonderful tool which allows you to schedule your social media posts on Twitter, Facebook, Google+ and LinkedIn. Simply compose your message and select the date and time you want it to be sent. Hootsuite will automatically post your message to your social media site at the scheduled time, making it appear you are engaging in social media at that moment even if you're not. While Hootsuite is a terrific tool, don't become too reliant on its use. Live posts should not be forgotten as the greatest impact of social media is felt by engaging our followers and responding to their posts.

5) Double Your Presence

You can double your social media outreach by including links to social media content on your firm webpage. Most webpages allow for the inclusion of social media widgets which post your Twitter or Facebook feeds on your website. This adds new content to your site every time you post on those platforms, optimizing your visibility on search engines without requiring you to do more work.

6) Social Media Takes Patience

Social media success doesn't happen overnight. Regular, sustained practice is necessary to build a following in the social media world.

7) If You Publish, They Will Come

If you publish good, quality content and work to build your online audience of followers, those followers will share your posts with their own audiences on Twitter, Facebook, LinkedIn, blogs and more. This type of sharing boosts your entry points on search engines like Google, and can move your company towards the front in a keyword search.

8) Add Value

You can't spend all your time on social media promoting your own products and services or people will stop listening. Rather than focusing only on you or your own firm's initiatives, add value to you audience by focusing on topics of interest to your followers.

9) Acknowledge Your Followers

You wouldn't ignore a client who calls or e-mails you so don't ignore someone who reaches out to you via social media. Building relationships is one of the most important parts of social media marketing success, so always acknowledge every person who reaches out to you.

10) Reciprocity Required

You can't expect others to share your content and talk about you if you don't do the same for them. A portion of the time you spend on social media should be focused on sharing and talking about content published by others. Your audience will appreciate knowing about other businesses or issues which may affect them or assist them with a need.

Section Four

Vignettes of Legal Ethics

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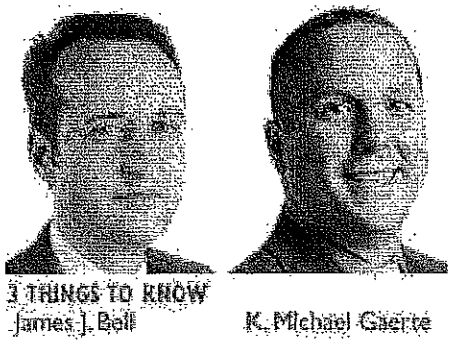
Section Four

THE INDIANA LAWYER .com

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

James Bell , K. Michael Gaerte February 12, 2014



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.•

James J. Bell *and* **K. Michael Gaerte** *are attorneys with Bingham Greenebaum Doll LLP. They assist lawyers and judges with professional liability and legal ethics issues. They also practice in criminal defense and are regular speakers on criminal defense and ethics topics. They can be reached at jbell@bgdlegal.com or mgaerte@bgdlegal.com. The opinions expressed are those of the authors.*

THE INDIANA LAWYER .com

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

James Bell , Jessica Whelan November 4, 2015

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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THE INDIANA LAWYER .com

3 things to know about the ethics of files

James Bell , Jessica Whelan September 9, 2015

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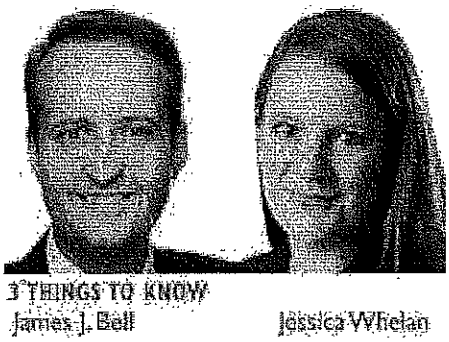
Bell/Whelan: 3 things to know about requests for client information

James Bell , Jessica Whelan September 7, 2016



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

2019 UPDATE

Chuck Kidd,
Kevin McGoff, &
Margaret Christensen

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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 Hudson*, 105 N.E.3d 1089 (Ind. 2018)**, "Defendant" was charged and tried with four counts of child molesting based on accusation of Defendant's stepchildren. Respondent was the deputy prosecuting attorney trying this case. Nearly a week before trial, Respondent interviewed one of the Defendant's stepchildren, who 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) requires Respondent to have disclosed 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 Fontanez*, 53 N.E3d 410 (Ind. 2016)**, Respondent received a public reprimand. Respondent represented Client in a tort action against the City of Hammond. After the case was removed from state to federal court, Respondent failed: (1) to serve initial disclosures as required under federal rules of procedure; (2) to respond to discovery requests; (3) to respond to an order compelling discovery; (4) to pay attorney fees awarded to the defendants; (5) to respond to the defendant's motion for sanctions; (6) and to appear at the hearing on the motion for sanctions. The federal court granted the defendant's motion for sanctions and dismissed the tort action with prejudice. Respondent also failed to keep the client apprised of the status of the case.

The Court imposed a public reprimand, citing mitigating circumstances: (1) Respondent has no prior discipline; (2) Respondent has been cooperative with the Commission and has been remorseful; (3) during the period of misconduct, Respondent was in the midst of a prolonged custody dispute; (4) Respondent has reached out to Client and encouraged him to consult with an attorney regarding a malpractice action against Respondent, and is willing to pay any malpractice judgment that might be entered; and (5) Respondent attended CLE programs and consulted with other practitioners in an effort to improve his practice management and skills.

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 an unemployed drug addict, 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 then signed it. Respondent, however, 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 grandson; the child's mother had just died and the child's father was in arrears on support. Respondent filed a motion seeking leave for the grandparents to intervene and for the court to award custody to the grandparents.

A hearing was held, but Respondent did not provide the father notice of the hearing. Further, Respondent did not allege an emergency as Trial Rule 65(B) requires. After the court awarded custody to the grandparents, the father filed a motion to correct error. At the following 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 Brewer*, 110 N.E.3d 1141 (Ind. 2018)**, Respondent neglected clients by failing to attend hearings and timely file briefs, failed to return a client's file and admitted to abusing cocaine during this period. Law enforcement found cocaine, marijuana, and drug paraphernalia when serving Respondent with a bench warrant. In addition to violations of Rules1.3, 1.4(a)(3), 1.16(d), 8.1(b), and 8.4(b), the Court found that she violated Rule 1.16(a)(2) when she failed to withdraw from representation when the lawyer's ability to represent the client is 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)**, the Respondent threated to kill his estranged wife with an axe and drove to her home with the weapon. Respondent was convicted of intimidation (a level 6 Felony), which the Court of Appeals affirmed. The Court suspended the Respondent immediately following his conviction and the Court held that disbarring Respondent from the practice of law was warranted for Respondent's conviction.

In ***Matter of Johnson IIII*, 74 N.E.3d 550 (Ind. 2017)**, Respondent, who was the chief public defender in Adams County, had an affair with a woman ("Jane Doe") 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 did not report his convictions of operating a vehicle while intoxicated ("OWI") or possession of marijuana to the Commission in violation of Admission and Discipline Rule 23(11.1)(a)(2). He was later arrested and convicted for multiple OWI offenses, which is a violation of Indiana Professional Conduct Rule 8.4(b). The court sanctioned respondent with a 180 day suspension from the practice of law, "with 30 days actively served" and the rest contingent on completing "twenty-four months of probation with JLAP monitoring."

In ***Matter of Chamberlain*, 87 ne3d 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 while intoxicated (BAC .15) to the Shelby County Courthouse for a scheduled small claims hearing where Respondent 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 the Respondent's misconduct.

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 Prof. Cond. R. 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 Prof. Cond. R. 8.4(b), by committing criminal acts that reflect adversely on his honesty, trustworthiness or fitness as a lawyer. The Court suspended Respondent from practicing law for four years for his misconduct.

In ***Matter of Knight*, 2015 Ind. LEXIS 474 (Ind. 2015)**, Respondent was found guilty of domestic battery, a Class A misdemeanor. He received a suspended sentence with probation that included drug and alcohol monitoring. Respondent had no prior discipline and promptly reported his conviction to the Commission. Along with voluntarily going to counseling, Respondent was successfully discharged from JLAP and showed great remorse for his actions. The parties agreed that Respondent violated Prof. Cond. R. 8.4(b) by committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer. After considering the submission of the parties, the Court imposed a public reprimand for Respondent's misconduct.

In ***Matter of Hollander*, 27 N.E.3d 278 (Ind. 2015)**, Respondent was employed as a public defender. In November 2012, Respondent came across a police report of a female who was arrested for engaging in prostitution. The report contained the female'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 indicating that he could help with the female's situation and stated 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 undercover IMPD police officer responded to the text messages and set up a meeting with Respondent in a hotel room. Respondent attempted to hug and kiss the 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, for his misconduct.

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.

In ***Matter of Daley*, 116 N.E.3d 457 (Ind. 2019)**, Respondent was appointed as a public defender to represent one co-defendant ("Client 1") in a burglary case. Client 1 expressed his desire to serve as a witness for the prosecution and to therefore testify against the other co-defendant. The probable cause affidavit in Client 1's file identified the other co-defendant by name, but the Respondent did not learn of the identity of the other co-defendant. Two months later, Respondent agreed to privately represent the other co-defendant ("Client 2") without knowledge that his initial client was the co-defendant in the same case.

The Respondent instructed his paralegal to file an appearance on behalf of Client 2, but the paralegal failed to do so and the Respondent did not ensure that the appearance had been filed. Following a pretrial conference in Client 2's case, the Respondent became aware that he was representing both Client 1 and Client 2 in the same matter. Upon learning this, Respondent withdrew from representation of both Client 1 and Client 2. The Court found Respondent in violation of Rules 1.1, 1.7(a), and 5.3(b) and gave the Respondent a public reprimand for his misconduct.

In ***Matter of Henderson*, 78 N.E.3d 1092 (Ind. 2017)**, Respondent was the elected prosecutor for Floyd County. David Camm was a former police officer charged with murdering his wife and their two minor children. Respondent entered into an agreement with a literary agent, with the intent to write and publish a book about the Camm case. Respondent continued to represent the State in post-trial proceedings in the trial court and assisted the Attorney General during appellate proceedings. Respondent entered a publication agreement with a publisher. 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." The Court found there was conflict between Respondent's duties to the State and his own personal interests and the impact that conflict had upon the criminal proceedings against Camm and imposed a sanction of a public reprimand.

In ***Matter of Steven M. Kirsh*, 83 N.E 3d 699 (Ind. 2017)**, respondent was retained to represent clients who were seeking to adopt. 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 Hatcher*, 42 N.E.3d 80 (Ind. 2015)**, the personal representative of an estate ("F.G.") hired an attorney to supervise matters related to the deceased's estate. Believing the deceased might still be owed wages, the attorney filed suit on the estate's behalf against the former employer. Respondent appeared in the wage suit on behalf of

the former employer. Soon thereafter, F.G. began demanding the wage suit be dismissed.

F.G.'s attorney gave ten days' notice that she intended to withdraw her appearance on behalf of the estate. Before his attorney withdrew, F.G. approached Respondent and engaged in discussions about the supervised estate and the aforementioned wage suit. F.G. also told Respondent that his attorney was no longer representing him, but Respondent failed to independently confirm this. After F.G.'s original ttorney withdrew, Respondent appeared on the estate's behalf in the supervised estate. At this point, Respondent was representing both the estate and the deceased's former employer, who were direct adversaries in the same related litigation. The parties agreed that Respondent violated Prof. Cond. R. 1.7 and 4.2, for representing a client when the representation is directly adverse to another client, and improperly communicating with a person the lawyer knows to be represented by another lawyer in the matter. The Court publicly reprimanded Respondent for his misconduct.

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 Prof. Cond. R. 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.

In ***Matter of Stern*, 11 N.E.3d 917 (Ind. 2014)**, the Indianapolis Department of Metropolitan Development ("DMD") obtained an order to demolish an unsafe building owned by DR. DR retained Respondent to represent her in defending the order. However, Respondent's complaint for judicial review did not comply with the statutory requirement that the complaint be verified and filed within 10 days of the date the order to demolish was issued. In an apparent attempt to prevent the city from imposing liability on DR, Respondent executed a quitclaim deed on behalf of DR, which transferred the subject building to JH, a convicted murderer who began working in

Respondent's law office as a "contract paralegal" after his release from prison. Respondent thereafter began representing both DR and JH in the matter. Unfortunately for Respondent, under the Indiana Code, because the quitclaim deed was executed *after* the demolishment order was issued, the only effect of the transfer was to establish joint and several liabilities between DR and JH for demolition and administrative costs. Thus, the building transfer created a conflict of interest between DR and JH. The demolishment order was ultimately affirmed, and no appeal was taken. But the shenanigans didn't stop there. JH filed a subsequent lawsuit against the city, *pro se*, alleging violations of his federal and state constitutional rights. After the lawsuit was removed to federal court, Respondent appeared on behalf of JH. The thrust of JH's claim was that he did not receive proper notice from the city that the building was scheduled to be demolished.

However, DR was required by statute to provide the DMD with notice of her transfer to JH within five days of the transfer. As the Court pointed out, "If JH obtained a judgment against the DMD based on lack of notice, and that lack of notice was caused by DR's failure to inform the DMD of the transfer, DR would be liable to the DMD for the amount of the judgment... Thus, Respondent pursued a case on behalf of one client (JH) which, if successful, would make his other client (DR) liable for the judgment." In total, the Court concluded that Respondent had violated Rules 1.1, 1.6, 1.7(a), 3.1, 3.3(a)(1), 5.3, 8.1(b), and Guideline 9.1. Respondent was suspended for eighteen months without automatic reinstatement.

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 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 free 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 Respondent keeping a 46% of the settlement amount. Rule 1.5(a) prohibits the collection of an unreasonable fee, but the Respondent has 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 agree 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.

***Matter of Weldy*, 991 N.E.2d (Ind. 2013)**, includes six grievances from six different clients for various reasons, including lack of communication, issues involving attorney's fees, and making false assertions to the court. One client retained Respondent to represent her in an employment discrimination action. Upon settlement, Respondent failed to explain the advantages and disadvantages of the fee designation. Respondent explained to another client that his fee would be a percentage of the amount recovered, including statutory attorney fees, but failed to send a written fee agreement. Respondent claimed forty percent of the total awarded, and later refunded $911.68 to the client.

Respondent represented another client with no written fee agreement. When this second matter settled, $2,500 was designated as statutory attorney fees. Respondent asked the client to sign an agreement that would have entitled him to $2,938.50 in fees. When the client declined, Respondent refused to communicate with him for three months. When settlor sent Respondent the check for the agreed upon settlement, Respondent kept the check in a drawer and filed a small claims action against the client. The court eventually awarded Respondent $1,012.50. For Respondent's

professional misconduct, the Court suspended Respondent from the practice of law for a period of 180 days, beginning August 9, 2013, with 90 days actively served and the remainder stayed subject to completion of at least one year probation with a practice monitor.

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 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 Prof. Cond. R.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.

The medical malpractice statutes of Indiana 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 Prof. Cond. R. 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 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 Doug 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 Marcus E. Ellison*, 87 N.E.3d 460 (Ind. 2017)**, respondent formed an agreement with a client to represent client in an 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 ninety-day suspension, 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.

Number 5 SOLICITATION AND ADVERTISING

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 with Rules 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 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.

In ***Matter of Wray*, 91 N.E.3d 578 (Ind. 2018)**, Respondent used a referral system with a 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 thirty-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:

- Rule 1.4(a)(1) & (5) by failing to inform and consult with her clients of her limited scope of employment;
- Rule 5.3 and Guideline 9.3 by failing to reasonably supervise nonlawyers;
- 5.5(a) by assisting in the unauthorized practice of law; and
- 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 for 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 quite title actions for homeowners. Thereafter, Respondent accepted flat fees for representation, but did not complete any quite 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 CONFIDENCE AND PRIVILEGE

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.

***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, size of his practice, and specialties within the law. The Court found the Respondent's willful dishonestly 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 to 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 on Respondent.

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 trial court, 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 Brizzi*, 71 N.E.3d 831 (Ind. 2017)**, Respondent was the elected Marion County Prosecutor. The Commission found that Page brought a matter directly to Respondent, who then intervened and instructed his deputies to allow Page's client to plead guilty to a lower felony charge and to return a portion of the seized cash to Page's client. The chief deputy indicated Respondent had never given him such an instruction in a narcotics case, and both deputies knew of no reason to reduce the lead charge to a class D felony or to return any of the seized funds. The Court held that attorney's conduct, as prosecutor, in negotiating plea agreement for client of business partner warranted 30-day suspension of license.

In ***Matter of Carl L. Epstein*, 87 N.E.3d 470 (Ind. 2017)**, the Respondent represented a defendant that recorded their phone conversations. The phone conversations demonstrate 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 ninety 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 petitioner 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*, 2017 WL 818574 (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 Cohen*, 18 N.E.3d 996 (Ind. 2014)**, Respondent received a ninety-day suspension with automatic reinstatement for violating Prof. Cond. Rules 1.16(d) and 8.4(c). Respondent served as in-house counsel for Eli Lilly ("Lilly") from 1999-2009. When Respondent was preparing to leave his position at Lilly, he copied various forms and documents belonging to Lilly onto a disk. The Court found that the information on the disk was Lilly's property and was confidential. The Court held that Respondent violated Rule 8.4(c) by taking and retaining the disk knowing that he was not authorized to possess or control the information after leaving Lilly. Additionally, the Court held that

Respondent violated Rule 1.16(d) by failing to protect Lilly's interests upon termination of representation.

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 Greene*, 6 N.E.3d 947 (Ind. 2014)**, Respondent, who was licensed to practice law in Illinois but not in Indiana, was hired by an Indiana hospital to assist in obtaining payment for medical care provided to patients who had been injured in

accidents. When a patient involved in an accident was released from the hospital, the hospital would provide them with a form on Respondent's letterhead seemingly offering his legal services on behalf of the patient in recovering funds from insurance companies. The letters created the impression that Respondent was operating on behalf of the patients and not the hospital, which was not true. Respondent was barred from the practice of law in the state of Indiana.

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 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 entitled "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 the 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.

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 plead guilty, leaving him to spend 8 years incarcerated and to pay restitution. The Court disbarred Respondent.

In ***Matter of Mercho*, 2017 WL 1162401 (Ind. March 29, 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, 347 (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 held that a disbarring Respondent from the practice of law was warranted for Respondent's misconduct.

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 for his misconduct.

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. The Court suspended Respondent from practicing law for eight months for his misconduct.

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.

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 Prof. Cond. 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 Thomas*, 111 N.E.3d 1013 (Ind. 2018)**, Respondent was hired by two "Siblings," for representation against a mortgage for their failure to pay for home repairs. Respondent met with Siblings toward the beginning of their representation, but failed to communicate adequately the following three years. This resulted in minimal work being done on the Siblings' case. The Court imposed a public reprimand for the Respondent's

failure to act with diligence and promptness in the handling of this case.

In ***Matter of Coleman*, 67 N.E.3d 629 (Ind. 2017)**, Respondent falsely represented 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. 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, and 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.

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Meg concentrates her practice in business litigation, attorney ethics, appeals, construction law and media law. Meg has assisted clients and taken leadership roles in litigation in both federal and state courts in claims involving multi-million dollar contract disputes, shareholder liability, construction defects, real estate transactions, of employee non-compete provisions, defamation, inter-governmental disputes, and administrative enforcement and licensing. Meg also works with clients to develop business-wise strategies for compliance obligations and managing risk.

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Ethics 2020: Mid-Year Case Law Update

Margaret Christensen
Max Hsu

Current through August 2020

***In the Matter of Fraley*, No. 18S-DI-304 (January 21, 2020)**

- Fraley, committed attorney misconduct by severely mismanaging her trust account and by engaging in a pattern of dishonest and fraudulent behavior during the Commission's investigation.

- Respondent committed the following violations:

- **Count 1.** From 2014 through 2018, Respondent engaged in pervasive financial misconduct, including multiple overdrafts of her trust account, commingling of personal and client funds, use of trust account funds to pay personal or business expenses, failing to deposit client funds into a trust account, and conversion of client funds.

- **Count 2.** During the Commission's investigation into Respondent's trust account mismanagement, Respondent knowingly made false statements of material fact to the Commission and submitted to the Commission a false and forged affidavit purportedly executed by Respondent's former paralegal.

- **Count 3.** The Commission initiated a noncooperation case against Respondent due to her failure to respond to requests for information, which was dismissed with costs after Respondent belatedly complied. Respondent did not timely pay those costs, prompting the Commission to send Respondent a notice letter in advance of petitioning for a costs nonpayment suspension. Respondent replied with a letter to the Commission falsely stating that she had paid her costs. Respondent attached to that letter a copy of a check purportedly drawn on Respondent's personal checking account, which Respondent falsely represented she had previously mailed to the Commission. The Commission then requested from Respondent a copy of the cancelled check and bank records showing that the check was presented for payment. Respondent did not provide those items, but rather provided a money order to "serve[ ] as a replacement for the original check," which Respondent claimed had not been returned to her office or cashed.

- "Respondent's criminal conversion of client funds, and her elaborate pattern of fraudulent and dishonest behavior during the investigation and litigation of this matter, elevate this case into an entirely different realm."

- “Respondent lied at innumerable junctures to the Commission and during sworn testimony, forged an affidavit containing false statements of material fact, falsified a personal check, and even invented a fictitious bank manager – all in an effort to extricate herself from various investigations and proceedings that began as simple overdraft inquiries.”

- Respondent violated Professional Conduct Rules 1.15(a), 1.15(c), 8.1(a), 8.4(b), 8.4(c), and 8.4(d), and Admission and Discipline Rules 23(29)(a)(4) (2016), 23(29)(a)(5)(2016), 23(29)(a)(4) (2017), 23(29)(c)(2) (2017), 23(29)(c)(4) (2017), and 23(29)(c)(5) (2017).

  Penalty: Disbarred.

***In the Matter of Bruce N. Elliott*, 19S-DI-251 (January 23,2020)**

Facts:

- 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).

Violation: Respondent violated Indiana Professional Conduct Rule 3.2 by failing to make reasonable efforts to expedite litigation consistent with the interests of his client.

Discipline: Public Reprimand.

***In the Matter of James R. Lisher*, No.19S-DI-535 (January 23, 2020)**

Facts: Respondent employed nonlawyer Heather Brant from 2001 until 2018. Respondent delegated broad authority to Brant to handle most office tasks, including client communication, banking, and electronic court filing.

- Respondent also failed to maintain appropriate trust account records. Over the course of several months in 2018, Brant stole several thousand dollars from the firm's operating account, overdrafted the firm's trust account, and fraudulently created several purported court orders and other legal documents.

- Brant's improper actions were enabled in significant part by Respondent's **failure to appropriately supervise her.**

Ind. Professional Conduct Rules

- 1.15(a): Failing to maintain and preserve complete records of client trust accountfunds.

- 5.3(b): Failing to make reasonable efforts to ensure that the conduct of a nonlawyer employee over whom the lawyer has direct supervisory authority is compatible with the professional obligations of the lawyer.

Ind. Admission and Discipline Rules

- 23(29)(a)(3): Failing to keep records or ledgers detailing the nominal amount of attorney funds held in a trust account, showing the amount and dates of attorney funds disbursed or deposited, and a running balance of the amount of attorney funds held in the trust account.

- 23(29)(a)(7): Failing to keep reconciliation reports for a trust account.

- 23(29)(c)(7): Failing to reconcile internal trust account records with periodic bank account statements.

Aggravators/Mitigators

- The parties cite Respondent's substantial *experience in the practice of law* as a fact in aggravation.

- In mitigation the parties cite among other things Respondent's:

- lack of prior discipline,
- his lack of dishonest or selfish motive,
- his restitution to affected clients, and
- his cooperation with the disciplinary process.

Discipline: 60-day suspension with automatic reinstatement

In the Matter of Burton, No. 19S-DI-309 (January 29, 2020)

Facts

- Respondent/Chief Deputy Prosecutor, committed attorney misconduct by abusing his prosecutorial authority as part of a campaign of retaliation against a detective.
- Respondent and Inmate had a sexual relationship for 20-years.
- Detective asked Inmate whether she and Respondent had a sexual relationship to which she responded, yes.
- After discovering the Detectives' line of question, Respondent was outraged and instructed the Inmate to:
  - Supply him and the elected prosecutor with a statement about the interview
  - Respondent provided Inmate with some specific guidance on what that statement should say.
  - After receiving the letter from Inmate, Elected Prosecutor filed with the VPD an Employee Misconduct Complaint against Detective.
  - A month after, VPD investigators met with Inmate. A day after, Respondent instructed Inmate not to speak with the investigators again.
  - Respondent also instructed Inmate to write another letter to Elected Prosecutor regarding the second interview and provided guidance on what to include in the letter.

Respondent violated these Indiana Professional Conduct Rules prohibiting the following misconduct:

- 1.7(a)(2): Representing a client when there is a concurrent conflict of interest.
- 8.4(d): Engaging in conduct prejudicial to the administration of justice.
- 8.4(e): Stating or implying an ability to improperly influence a government agency or official or to achieve results by means that violate the Rules of Professional Conduct.

Aggravators/Mitigators

- The parties cite Respondent's substantial experience in the practice of law as a fact in aggravation.

- In mitigation the parties cite among other things Respondent's lack of prior discipline, his remorse and cooperation with disciplinary proceedings, and his many years of public service.

  Penalty: 90-days with automatic reinstatement.

***In the Matter of Adams,* No. 19S-DI-144 (Feb. 14,2020)**

Count 1. Respondent was hired by "Client 1" to obtain a guardianship over Client 1's three grandchildren. Respondent prepared petitions for appointment of a guardian but never filed them. Respondent erroneously told Client 1 that the petitions had been filed, and thereafter did not respond to Client 1's numerous requests for information. Respondent eventually refunded all attorney fees paid by Client 1.

Count 2. Respondent owns a business account and an IOLTA trust account. From 2011 until 2019, Respondent annually certified his business account as an IOLTA account. In February 2019, Respondent certified his IOLTA account with the Clerk and closed the certification for the business account.

Count 3. Respondent was hired by "Client 3" to represent her in a probation violation matter, accepted a $1,000 retainer, and thereafter did no work on the case and did not respond to Client 3's attempts to reach him. Respondent did not refund the $1,000 fee to Client 3 until after she filed a grievance with the Commission.

Count 4. "Client 4" hired an Illinois law firm to represent him in a post-dissolution matter in Marion County and hired Respondent to serve as local counsel. Respondent was given a $3,500 payment to serve as local counsel. Shortly thereafter Client 4 terminated the services of the Illinois firm, and Respondent was advised his services were no longer needed. Illinois counsel unsuccessfully tried for several months to obtain a refund of the $3,500 for Client 4, which Respondent did not provide until after Client 4 filed a grievance with the Commission.

Count 5. "Client 5" hired Respondent to represent him in various expungement matters and paid Respondent a $2,000 retainer.

- Respondent filed expungement petitions in Hamilton and Marion Counties inApril 2019.
- The Prosecutor filed an objection arguing the petition was statutorily noncompliant, and the court scheduled a hearing.
- Respondent did not advise Client 5 of the hearing, neither Respondent nor Client 5 appeared at the hearing, and the expungement petition was denied as a result.
- Client 5 was unable to contact Respondent for several months and

eventually hired successor counsel, who amended the Hamilton and Marion County petitions and succeeded in obtaining expungements for Client 5 in those counties.

- Respondent was successful in obtaining an expungement for Client 5 in a third county, and he reimbursed Client 5 for the successor counsel fees in the Hamilton and MarionCounty cases.

Violations: The parties agree that Respondent violated these Indiana Professional Conduct Rules prohibiting the following misconduct:

- 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).

Aggravators: Respondent's pattern of misconduct and substantial experience.

Mitigators: Respondent's lack of prior discipline, his cooperation with the disciplinary process, and his engagement with JLAP to address factors contributing to his misconduct.

Discipline: Suspended 180-days, with 60 days actively served and the remainder stayed subject to completion of at least two years of probation with JLAP monitoring.

***In the Matter of Bryan*, No. 19S-DI-306 (Feb. 27 2020)**

Facts:

- Respondent possessed cocaine in his home on a date in September 2017, which police learned through information provided by a confidential informant.
- During the Commission's investigation of this matter, Respondent did not timely comply with a subpoena duces tecum, which led to the initiation of show cause proceedings. Respondent eventually produced documents that were not in compliance with the Commission's demand.

Violations:

- Respondent violated Indiana Professional Conduct Rule 8.1(b) by failing to respond to the Commission's demand for information and Professional Conduct Rule 8.4(b) by committing a criminal act that reflects adversely on Respondent's trustworthiness or fitness as a lawyer.

Discipline: Suspended 150-days, with 120-days actively served and the remainder stayed subject to JLAP probation

***In the Matter of Rios*, No. 19S-DI-511 (Feb. 27 2020)**

Facts: "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 would not 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.

Violation: 1.16(d) by failing to timely refund advance payment of fees and expenses thathave not been earned or incurred.

Discipline: Public Reprimand

***In the Matter of Gupta*, No. 19S-DI-71 (March 10, 2020)**

Facts: Gupta, committed attorney misconduct by, among other things, mismanaging his attorney trust accounts, charging and collecting unreasonable amounts for fees and expenses, neglecting numerous client matters, making false statements to the Commission, and evading the payment of income taxes.

- Failed file tax returns on his law firm profits since 2010;
- Failed to keep adequate records, commingled funds, used trust account funds to pay personal or business expenses, and failed to timely disburse settlement funds owed to clients or third parties;
- Routinely billed clients unreasonable amounts for travel and other expenses;
- Referred clients to consultants and allowed those consultants to submit requests for payment without providing invoices for work performed;
- Frequently absent from his law office, allowing nonlawyers to do accounting and legal work;
- Neglected to advance his client's cases, causing detriment to client such as a dismissal; and
- Claimed physical and mental health issues, but failed to withdraw from any active cases.

Respondent violated the following Rules of Professional Conduct:

1.3: Failing to act with reasonable diligence and promptness.

1.4(a)(2): Failing to reasonably consult with a client about the means by which the client's objectives are to be accomplished.

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.

1.4(b): Failing to explain a matter to the extent reasonably necessary to permit a client to make informed decisions. 1.5(a): Charging or collecting an unreasonable amount for fees and expenses.

1.5(c): Failing to disclose to a client the method by which a

contingent legal fee will be determined.

1.7(a)(2): Representing a client when the representation may be materially limited by the attorney's responsibilities to another client, a former client, or a third person.

1.15(a): Commingling client and attorney funds, and failing to maintain a trust account in a state (Illinois) in which the attorney maintains a separate office.

Respondent violated the following Rules of Professional Conduct:

1.15(b): Maintaining more than a nominal amount of attorney funds in a trust account.

1.15(c): Failing to disburse earned fees and reimbursed expenses from a trust account.

1.15(d): Failing to deliver promptly to a client funds the client is entitled to receive, and to third parties funds they are entitled to receive.

1.16(a)(2): Failing to withdraw from representation of a client when the lawyer's physical or mental ability to represent the client is impaired.

1.16(a)(3): Failing to withdraw from representation after being discharged.

3(b): Failing to make reasonable efforts to ensure that the conduct of a nonlawyer employee over whom the lawyer has direct supervisory authority is compatible with the professional obligations of the lawyer.

7.3(d): Accepting improper referrals from a service.

8.1(a): Knowingly making a false statement of material fact to the Disciplinary Commission in connection with a disciplinary matter.

8.4(b): Committing criminal acts (willful failure to file income tax returns) that reflect adversely on the lawyer's honesty, trustworthiness, or fitness.

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

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

Ultimately, Respondent's **pattern** of misconduct was **wide-ranging, severe, andlong-lasting.**

- "The parties acknowledge in their conditional agreement that "Respondent's actions may warrant a different sanction" (Agreement at 68), and *indeed we have disbarred attorneys who have engaged in similarly egregious patterns of misconduct.*"
- **Discipline**: Suspended for a period of not less than three years, without automatic reinstatement.

In the Matter of Wilson, Case No. 18S-DI-365 (March 23,2020)

Facts: Respondent operates a small, family-run law firm. From 2013 through 2017, Respondent mismanaged his trust account.

- Respondent's mismanagement included among other things multiple overdrafts, commingling of client and attorney funds, and inadequate recordkeeping.
- Much of this misconduct stemmed from Respondent's failure to adequately supervise his daughter, a nonlawyer who was employed in various roles at Respondent's firm and who was a signatory on Respondent's trust account.
- Respondent did not timely comply with a subpoena duces tecum issued by the Commission during its investigation, prompting the initiation of a show cause proceeding that was dismissed when Respondent belatedly complied.

Violations:

- Ind. Professional Conduct Rules: 1.15(a): Commingling client and attorney funds. 5.3(a): Failing to make reasonable efforts to ensure that the lawyer's firm has taken measures to assure that a nonlawyer employee's conduct is compatible with the professional obligations of the lawyer.
- 5.3(b): Failing to make reasonable efforts to ensure that the conduct of a nonlawyer employee over whom the lawyer has direct supervisory authority is compatible with the professional obligations of the lawyer.
- 5.3(c)(2): Failing to take reasonable remedial action with respect to the misconduct of nonlawyer assistants under the lawyer's supervision.
- 8.1(b): Failure to respond timely to the Commission's demands for information.

Discipline: Suspended 180-days, with 30 actively served and the remaining stayed subject to 18- months of probation, including independent oversight of trust account.

***In the Matter of Cuciuc*, No.19S-DI-267 (April 7, 2020)**

Facts: After twice failing the Indiana bar exam, Respondent applied again in December 2014, took and passed the July 2015 bar exam, and was admitted to practice in April 2016.

- In his bar exam application, Respondent answered "**no**" to:
- Questions 14 ("Have you ever been a party in a civil court case or proceeding?") and
- 15 ("Have you ever had a complaint or other action (including but not limited to, allegations of fraud, deceit, misrepresentation, forgery or malpractice) initiated against you in any administrative forum?").
- Respondent also acknowledged in his application his affirmative obligation to notify the Board of Law Examiners of any events between his application and bar admission that would cause any of the answers on his application to change.
- After he submitted his application and took the bar exam, but before he was admitted to the Indiana bar, Respondent was the subject of a civil protective order proceeding filed in Marion Superior Court as well as a Title IX complaint filed with the McKinney School of Law. Respondent failed to supplement his bar application to include information about the protective order and Title IX proceedings.

Violation: Respondent violated Professional Conduct Rule 8.1(b) by failing to disclose a fact necessary to correct a misapprehension known by the person to have arisen in a bar admissionmatter.

Discipline: Suspended for a period of not less than 180 days, without automatic reinstatement.

***In the Matter of Cogswell,* Case No. 19S-DI-135 (April 7,2020)**

Facts:

- Count 1. Respondent represented the wife ("Client 1") in a divorce.
- Parties' mediated property settlement agreement Respondent to prepare the required papers, with the husband ordered in the interim (for a period not to exceed six months) to make monthly payments directly to Client 1.
- After more than six months passed, Respondent had not prepared the documents needed to effectuate Client 1's share of the husband's retirement benefit, and the husband ceased making the monthly payments to Client 1.
- Soon thereafter, the husband also failed to timely make a $15,000 installment payment. Client 1 attempted repeatedly and unsuccessfully to contact Respondent about the status of her case.
- Respondent eventually met with Client 1 and promised to complete the retirement paperwork and take action to have the husband held in contempt for failing to make the installment payment, but failed to do so.
- When Client 1 tried to advance her case with various pro se filings, the court referred those filings to Respondent and directed him to file an appropriate pleading before the court would take any action.
- Respondent did not confer with Client 1 about these developments or otherwise take any action, which left Client 1 unclear why her requests for relief had not been successful.
- Count 2. Respondent represented "Client 2" in connection with a workplace sexual harassment matter, but Respondent turned over primary handling of the matter to his paralegal ("JB").
- In November 2017, the Equal Employment Opportunity Commission issued Client 2 a Notice of Right to Sue.
- Client 2's federal law claims were required to be filed within 90 days of receipt of this notice, and the statute of limitation for any state law claims arising from the workplace sexual harassment was two years from the date of occurrences.

- Client 2 contacted JB to confirm whether a lawsuit had been filed, and JB falsely told Client 2 that it had. Respondent did not communicate with Client 2 and did not adequately supervise JB's communications with Client 2.

- Respondent failed to file a lawsuit until after the relevant deadlines for state and federal law claims had passed, resulting in the eventual dismissal of all of Client 2's claims as untimely.

- Respondent has no prior discipline, and after the events in Count 2 Respondent fired JB and paid $15,000 in damages to Client 2 through Respondent's malpractice insurance carrier.

Violations - Respondent violated the following Indiana Professional Conduct Rules:

- 1.3: Failure to act with reasonable diligence and promptness.

- 1.4(a)(3): Failure to keep a client reasonably informed about the status of a matter.

- 1.4(a)(4): Failure to comply promptly with a client's reasonable requests for information.

- 1.4(b): Failure to explain a matter to the extent reasonably necessary to permit a client to make informed decisions. 3.4(c): Knowingly disobeying an obligation under the rules of a tribunal.

- 5.3(b): Failure to make reasonable efforts to ensure that the conduct of a nonlawyer employee over whom the lawyer has direct supervisory authority is compatible with the professional obligations of the lawyer.

Discipline: Suspended 60-days, all stayed subject to 12-months of probation

***In the Matter of Curtis T. Hill, Jr.*, No. 19S-DI-156 (May 11, 2020)**

Facts:

- After the 2018 Indiana legislative session, the Respondent, several legislators, lobbyists, and legislative staff attended an event at a local bar.
- While at the event, Respondent inappropriately touched four women (a state representative and three legislative assistants).
- Eventually, the events at the bar were reported to legislative leaders who commissioned a report to examine potential employment law issues.
- Shortly after, the report was leaked and became a matter of public discussion.
- In March 2019, the Commission filed a disciplinary complaint against Respondent.

Hearing: A four-day evidentiary hearing was held in October 2019, followed by the parties' submission of post-hearing briefing.

- The hearing officer found that Respondent violated Rules 8.4(b) and 8.4(d), found in favor of Respondent on the Oath of Attorneys charge, and recommended that Respondent besuspended for at least 60 days without automatic reinstatement.

Discipline: Suspended for 30 days with automatic reinstatement

***In the Matter of Adam Lenkowsky*, No. 19S-DI-541 (June 12, 2020)**

- In early 2019, pursuant to a guilty plea, Respondent was convicted in Hamilton County of operating a vehicle while intoxicated ("OWI") with endangerment, a level 6 felony entered as a class A misdemeanor.
- Respondent had a prior OWI conviction in Marion County.
- Respondent had no prior discipline, has been fully cooperative with the Commission, and has voluntarily taken several measures since his arrest in Hamilton County to respond to his misconduct, including entering into a long-term monitoring agreement with the Judges and Lawyers Assistance Program.
- **Violation**: The Court finds that Respondent violated Professional Conduct Rule 8.4(b), which prohibits committing a criminal act that reflects adversely on Respondent's trustworthiness or fitness as a lawyer
- **Discipline**: Respondent was suspended from the practice of law for a period of 30 days, all stayed subject to completion of at least two years of probation.

***In the Matter of Patrick E. Chavis, IV*, No. 18S-DI-491 (June 12, 2020)**

Count 1. Respondent's written fee agreement called for a $750 "non-refundable" initial fee, described both as a "retainer" and a "flat fee," with an hourly rate thereafter. The fee agreement also included hourly rates for "beginning associates," "senior associates," and "partners," even though Respondent was a solo practitioner.

Respondent took no meaningful action on Client 1's case, and Client 1 was unable to contact Respondent. During the Commissions' investigation, the Respondent was unresponsive, and could not provide any account of fees earned.

Count 2. Client told Respondent she needed the paperwork completed by Thanksgiving 2017. The written fee agreement called for a "flat fee" of $2,500 that was "non-refundable," with an hourly rate for any services not specifically covered. Respondent did not complete the paperwork by Thanksgiving or at any point thereafter, and Client 2 was largely unable to contact Respondent, including her demand for a refund. Respondent did not timely respond to the Commission's investigation and when Respondent eventually did respond, he claimed without support that he had been unable to reach Client 2 and was unaware Client 2 had been trying to reach him.

Violations: Respondent violated these Indiana Professional Conduct Rules prohibiting the following misconduct:

- 1.3: Failure to act with reasonable diligence and promptness.
- 1.4(a)(3): Failure to keep a client reasonably informed about the status of a matter.
- 1.4(a)(4): Failure to comply promptly with a client's reasonable requests for information.
- 1.5(a): Making an agreement for, charging, or collecting an unreasonable fee.
- 1.16(d): Failure to refund an unearned fee upon termination of representation.

- Indiana Admission & Discipline Rule 23(23.1) by failing to claim notices sent by certified mail.

  Discipline: Suspended from the practice of law for a period of **90 days**, all stayed subject to completion of at least one year of probation with JLAP monitoring.

***In the Matter of Steven T. Fulk*, No. 19S-DI-277 (June 15, 2020)**

- Respondent, committed attorney misconduct by neglecting a client's case, converting an employee's tax withholdings for his own personal use, and failing to cooperate with the disciplinary process.

Violations: Respondent violated these Indiana Professional Conduct Rules prohibiting the following misconduct:

- 1.4(a)(3): Failing to keep a client reasonably informed about the status of a matter.
- 3.4(c): Knowingly disobeying an obligation under the rules or an order of a court.
- 8.1(b): Knowingly failing to respond to a lawful demand for information from a disciplinary authority.
- 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.

Aggravating Factors: Respondent has shown absolutely no remorse for, or insight into, his misconduct. Respondent refused to cooperate with the Commission's investigations, has refused to meaningfully participate in these disciplinary proceedings, and has filed no petition for review, brief on sanction, or responsive brief in this Court.

Discipline: For this misconduct, Respondent was disbarred.

***In the Matter of Cody R. Williams*, No. 19S-DI-465 (July 9, 2020).**

Count 1. Respondent overdrafted his trust account on multiple occasions, has mismanaged his trust account in several other respects, and has failed to maintain adequate financial records and did not fully comply with a subpoena duces tecum issued by the Commission, leading to the initiation of show cause proceedings and a suspension for noncooperation that eventually terminated when Respondent belatedly complied.

Count 2. Respondent failed to perform any meaningful work on a client matter; did not sufficiently address Client 2's concerns during communications over the next several months; failed to advise the Client she was ineligible to file a bankruptcy petition until November 2018; and also falsely told Client 2 in November 2017 that he had contacted another attorney to assist at no extra cost with filing a bankruptcy petition. After the client changed counsel, he failed to turn over the documents and refund the flat-fee to the client.

Count 3. In a criminal matter, Respondent did not respond to numerous attempts by the prosecutor's office to schedule depositions of witnesses and failed to appear at two pretrial hearings. Respondent appeared before the court, apologized for his failures, and 2 indicated he would withdraw his appearance and refund the money paid by Client 3, which he failed to do.

Count 4. A Client hired Respondent to file a petition that the Client agreed to pay for. After getting Client's credit card information, Respondent never filed the petitions, but he repeatedly told Client that the petitions had been filed. Respondent eventually ceased communicating with Client 4. After Client filed a grievance, Respondent promised to refund unearned fees, but failed to do so.

Count 5. Respondent never visited his Client in jail despite several requests by the family and despite repeated promises by Respondent that he would do so. Thereafter, the family asked Respondent for a refund and asked the court to appoint the Client a public defender due to Respondent's failures to communicate. Respondent has not refunded unearned fees despite his admission that a refund is owed.

Violations: The parties agree that Respondent violated these Ind. Professional Conduct Rules prohibiting the following misconduct:

- 1.1: Failing to provide competent representation.
- 1.3: Failing to act with reasonable diligence and promptness.
- 1.4(a): Failing to keep a client reasonably informed about the status of a matter and respond promptly to reasonable requests for information.
- 1.15(a): Failing to hold property of a client separate from lawyer's own property.
- 1.16(d): After the termination of representation, failing to protect a client's interests, failing to refund an unearned fee, and failing promptly to return to a client case file materials to which the client is entitled.
- 8.1(a): Knowingly making a false statement of material fact to the Disciplinary Commission in connection with a disciplinary matter.
- 8.1(b): Knowingly failing to respond to a lawful demand for information from a disciplinary authority.
- 8.4(c): Engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.
- 8.4(d): Engaging in conduct prejudicial to the administration of justice.
- Ind. Admission and Discipline Rules: 23(29)(a)(1): Failing to keep a deposit and disbursement journal containing a record of deposits to and withdrawals from an attorney trust account.
- 23(29)(a)(2): Failing to keep sufficiently detailed client ledgers.
- 23(29)(a)(3): Failing to keep records or ledgers detailing the nominal amount of attorney funds held in a trust account.
- 3 23(29)(a)(6): Failing to keep records of electronic disbursements or transfers from a trust account.
- 23(29)(a)(7): Failing to keep reconciliation reports for a trust

account.

- 23(29)(b): Inability to produce financial records by electronic, photographic, computer, or other media capable of being reduced to printed format.

- 23(29)(c)(2): Paying personal or business expenses directly from a trust account.

- 23(29)(c)(5): Making cash disbursements from a trust account.

- 23(29)(c)(6): Failing to keep records of electronic disbursements or transfers from a trust account.

- 23(29)(c)(7): Failing to reconcile internal trust account records with periodic bank account statements.

Discipline: 180-day suspension without automatic reinstatement.

***In the Matter of Katherine E. Flood*, No. 19S-DI-675 (July 9, 2020)**

- Respondent pled guilty to disorderly conduct, a class B misdemeanor, arising from a domestic altercation at her home. Respondent has two prior convictions for OWI, one of which predates her bar admission.

  Violation: The parties agree that Respondent violated Indiana Professional Conduct Rule 8.4(b), which prohibits committing a criminal act that reflects adversely on Respondent's trustworthiness or fitness as a lawyer.

  Discipline: Respondent from the practice of law for a period of 90 days, stayed subject to completion of at least two years of probation.

***In the Matter of Anthony F. Tavitas*, No. 20S-DI-335 (July 9, 2020)**

- Respondent mismanaged his trust account from 2016 - 2018. Among other things, Respondent maintained inadequate records, commingled client funds with personal and business funds, neglected to timely disburse settlement proceeds to a client, and regularly paid personal and business expenses from his IOLTA.

Violations: The parties agree that Respondent violated these rules prohibiting the following misconduct:

- Ind. Professional Conduct Rules: 1.15(a): Commingling client and attorney funds and failing to maintain and preserve complete records of client trust account funds.

- 1.15(b): Maintaining more than a nominal amount of attorney funds in a trust account.

- 1.15(d): Failing to deliver promptly to a client funds the client is entitled to receive.

- Ind. Admission and Discipline Rules 23(29)(a)(5): Making cash withdrawals and electronic disbursements from a trust account.

- Ind. Admission and Discipline Rules 23(29)(a)(1): Failing to keep a deposit and disbursement journal containing a record of deposits to and withdrawals from an attorney trust account.

- 23(29)(a)(4): Failing to keep relevant fee agreements.

- 23(29)(a)(7): Failing to keep reconciliation reports for a trust account.

- 23(29)(c)(2): Paying personal or business expenses directly from a trust account, and failing to promptly withdraw fully earned fees from a trust account.

- 23(29)(c)(7): Failing to reconcile internal trust account records with periodic bank account statement

Discipline: Respondent suspended from the practice of law for a period of 90 days, all stayed subject to completion of at least 12 months of probation.

***In the Matter of: Robin G. Remley*, No. 20S-DI-93 (July 9, 2020)**

- Respondent mismanaged her attorney trust accounts from 2014 - 2018. This mismanagement included among other things failing to keep adequate records, commingling client and attorney funds, making improper disbursements and electronic transfers, and paying personal and business expenses directly from her IOLTA.

  Violations: The parties agree that Respondent violated these ethics and discipline rules:

- 1.15(a): Failing to hold property of a client separate from lawyer's own property, and failing to maintain and preserve complete records of client trust account funds.

- 1.15(b): Maintaining more than a nominal amount of attorney funds in a trust account.

- 23(29)(a)(5): Making cash withdrawals and electronic disbursements from a trust account.

- Ind. Admission and Discipline Rules 23(29)(a)(1): Failing to keep a deposit and disbursement journal containing a record of deposits to and withdrawals from an attorney trust account.

- 23(29)(a)(2): Failing to keep accurate client ledgers.

- 23(29)(a)(3): Failing to keep an accurate ledger detailing the nominal amount of attorney funds held in a trust account.

- 23(29)(a)(6): Failing to keep accurate records of electronic disbursements or transfers from a trust account.

- 23(29)(a)(7): Failing to keep reconciliation reports for a trust account.

- 23(29)(c)(2): Paying personal or business expenses directly from a trust account.

- 23(29)(c)(7): Failing to reconcile internal trust account records with periodic bank account statements.

  Discipline: Respondent suspended for a period of 90 days, all stayed subject to completion of at least 18 months of probation.

***In the Matter of Andrew Homan*, No. 19S-DI-318 (July 24, 2020)**

- Respondent was arrested for, and later pled guilty to, OWI.
- As a result of his refusal to comply with Indiana's implied consent law at the time of his arrest, and later as a result of his conviction, Respondent's license was suspended from May 2017 until July 2018, but Respondent twice drove while his license was suspended.
- Separately, Respondent entered into an "of counsel" relationship with a Texas law firm, Eastman Meyler d/b/a WipeRecord, which marketed various "criminal record removal services" and similar services.
- Under this contractual relationship, Eastman Meyler would generate customer leads, enter into representation agreements, and provide all document preparation and processing, customer service, billing, and client management. Respondent was forbidden from negotiating representation agreements with clients and, in most instances, from communicating with clients at all. Clients sought an expungement of two criminal matters in Indiana and indicated their request for relief was time-sensitive due to an immigration matter. One year after retaining Eastman Meyler, Clients still had not received resolution to their matters and were inadequately communicated with. Respondent never communicated with Clients despite the fact he was their attorney of record.

  Violations: The parties agree that Respondent violated these Indiana Professional Conduct Rules prohibiting the following misconduct:

- 1.3: Failing to act with reasonable diligence and promptness.
- 1.4(a)(2): Failing to reasonably consult with a client about the means by which the client's objectives are to be accomplished.
- 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.

- 5.3(c): Ordering or ratifying the misconduct of nonlawyer assistants, or failing to take reasonable remedial action with respect to the misconduct of nonlawyer assistants under the lawyer's supervision.

- 5.4(c): Permitting a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

- 5.5(a): Assisting in the unauthorized practice of law.

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

Discipline: Suspended for 90 days.

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

2020

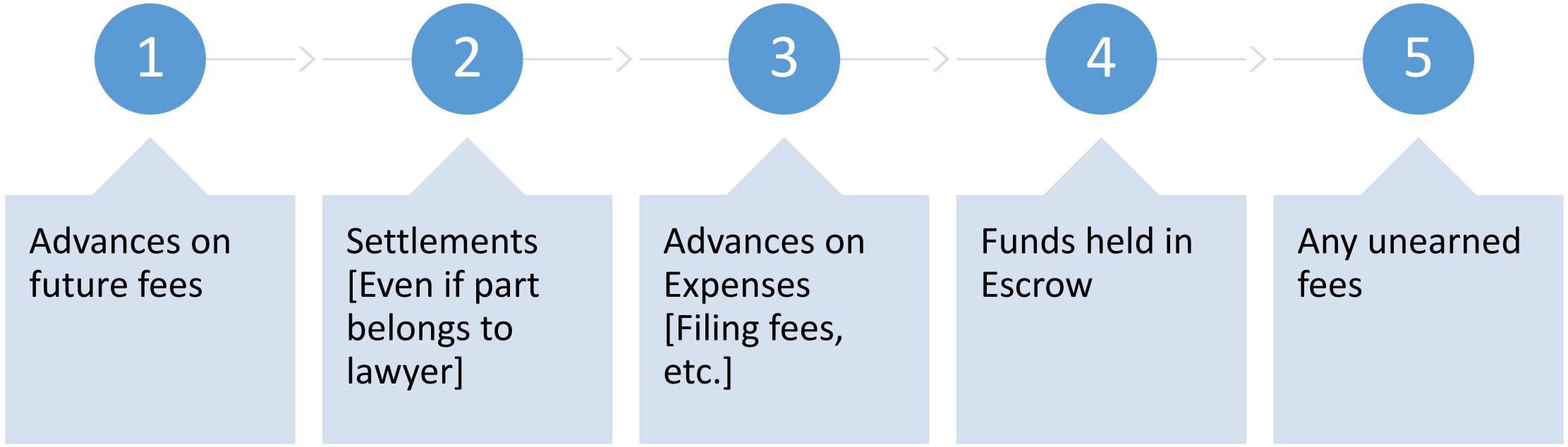
RESOURCES

- 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

1

RECEIPTS
(DEPOSITS IN)

2

DISBURSEMENTS
(PAYMENTS OUT)

3

So, you need a Receipts and Disbursement Journal to keep track of all of the pooled funds in the account

- THE MONTHLY BANK STATEMENT IS NOT A DISBURSEMENTS AND RECEIPT JOURNAL

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)

Patricia L. McKinnon
McKinnon Family Law, P.C.
Indianapolis, Indiana

Section Six

No One Said It Would Be Easy, but No One Said It Would Be This Hard

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

No One Said It Would Be Easy

- We are hard wired for empathy
- Working with those suffering consequences of traumatic events takes a toll
- Feeling your client's pain or sharing your client's emotions is going to happen
- On our best days, we're all just one event away

jlap

But No One Said It Would Be This Hard

Our Goal: 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

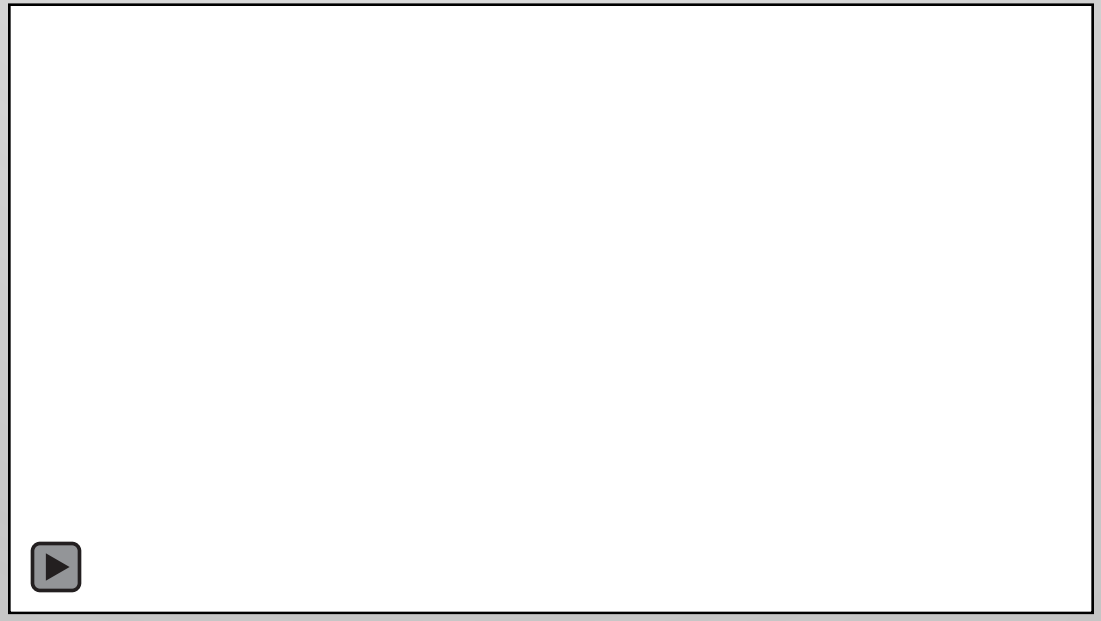
Sometimes Things Go Wrong…

Our Brains on Trauma

- Amygdala is the smoke alarm of your brain
- Amygdala can't tell the difference between real and perceived threat
- When living in state of ongoing perceived threat our brain has trouble engaging the parasympathetic response and returning to a state of calm

jlap

Our Amygdalas Are on Overload



Don't Deny the Feelings

- When we try to deny or suppress the feelings we are having we make the amygdala hijack longer and stronger
- Labeling the emotion helps re-engage the prefrontal cortex
- Acknowledge the thoughts and feelings you are experiencing
- Give yourself the space to face the negative thoughts and feelings without judging

Stay in the Moment

- It takes about 6 seconds for the chemicals in your brain to dissipate – take a few deep belly breaths
- Identify something you can
  - see
  - touch
  - hear
  - smell
  - taste

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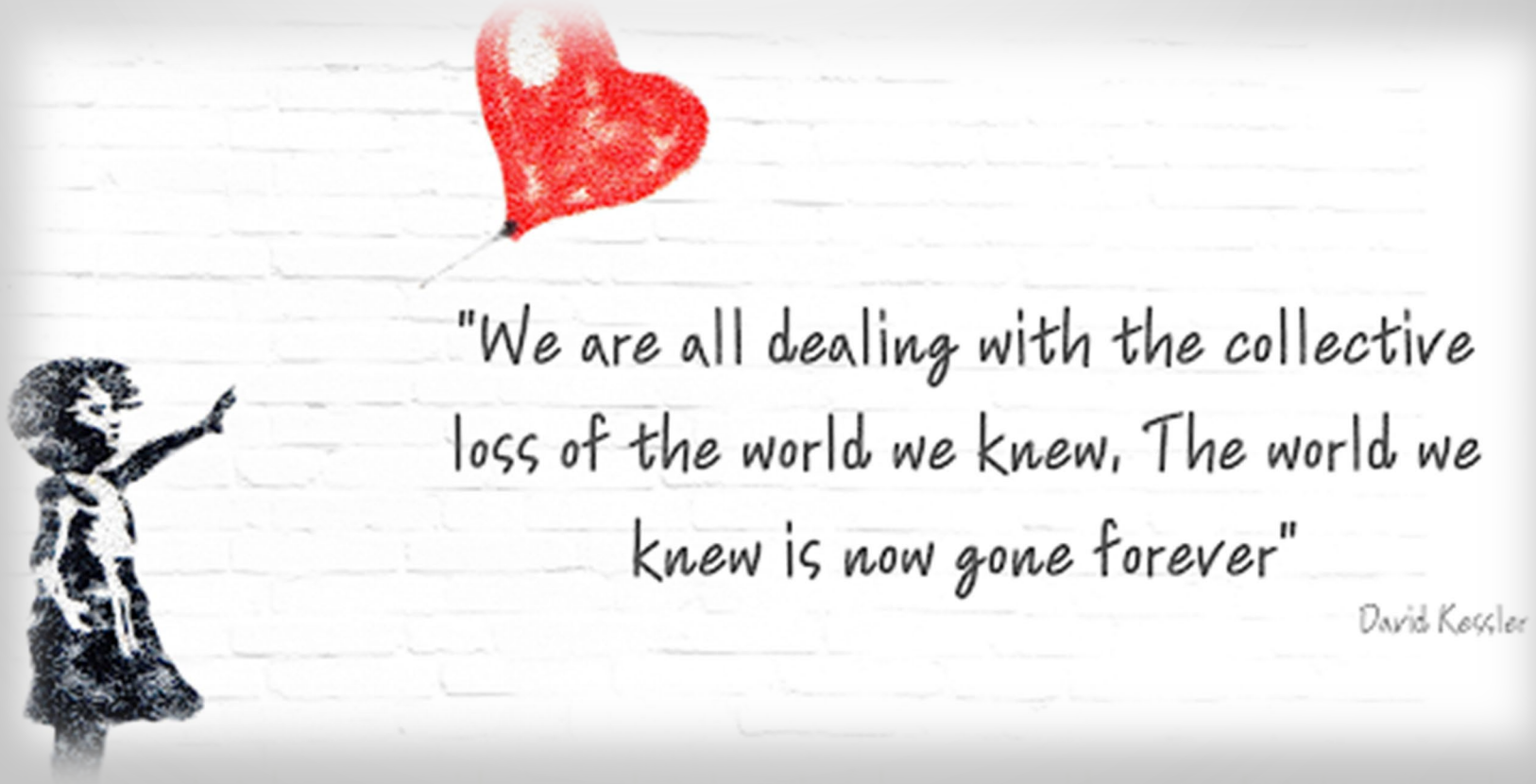


Collective Grief

We're Feeling Multiple Kinds of Grief

- "We are dealing with the collective loss of the world we knew."
  - David Kessler, grief specialist
- Personal losses
  - People, jobs, routine, physical connection
  - Not enough time to count the losses
- Loss of ritual
  - Shared rituals create social solidarity and provide meaning
- Community grief

jlap

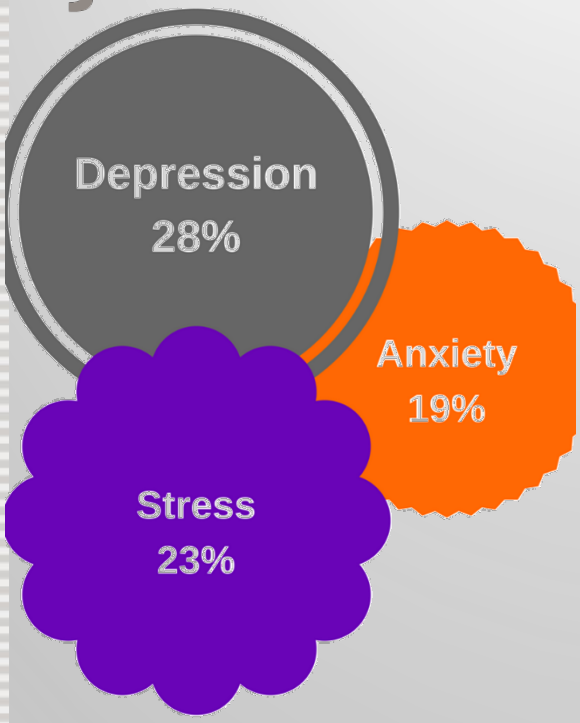
In Compounded Grief,
1+1 no longer equals 2.
Effects multiply til
even the strongest
hearts get overloaded.
Take extra care.
Give extra time.
Never rush or judge.

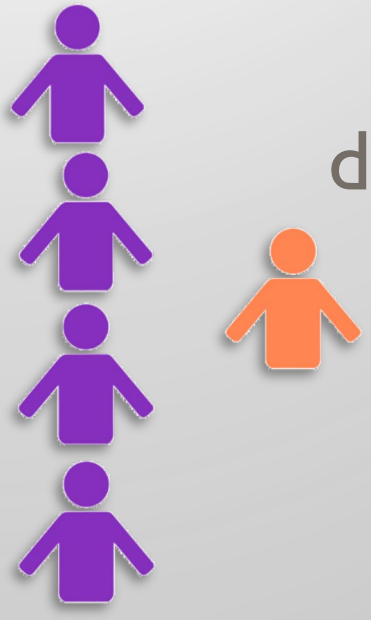
HospiceWhispers.com
#31DaysWithGrief

jlap

Mental Health and Substance Use in the Legal Profession

Mental Health in the Legal Profession



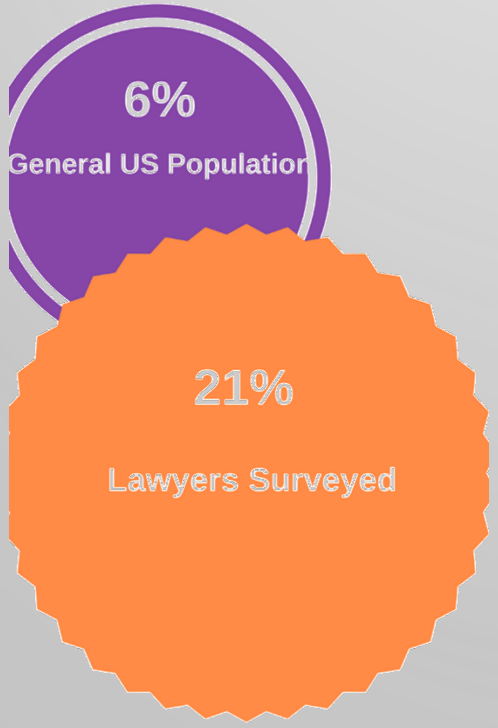


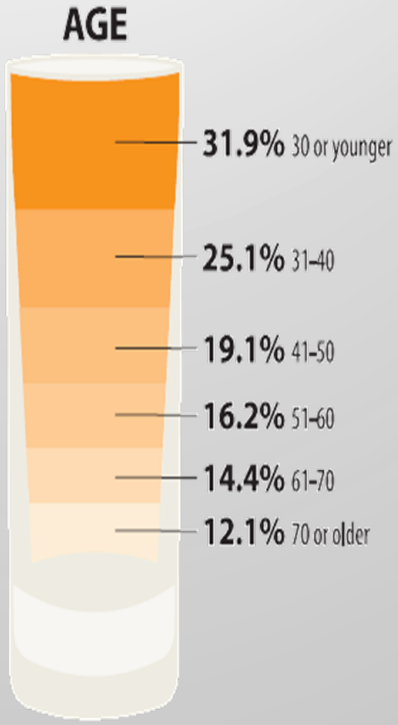
Lawyers report depression 4x the rate of the general population

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
- Analysis vs. emotions
- Perfectionism
- Pessimism
- Vicarious trauma
- Adversarial system

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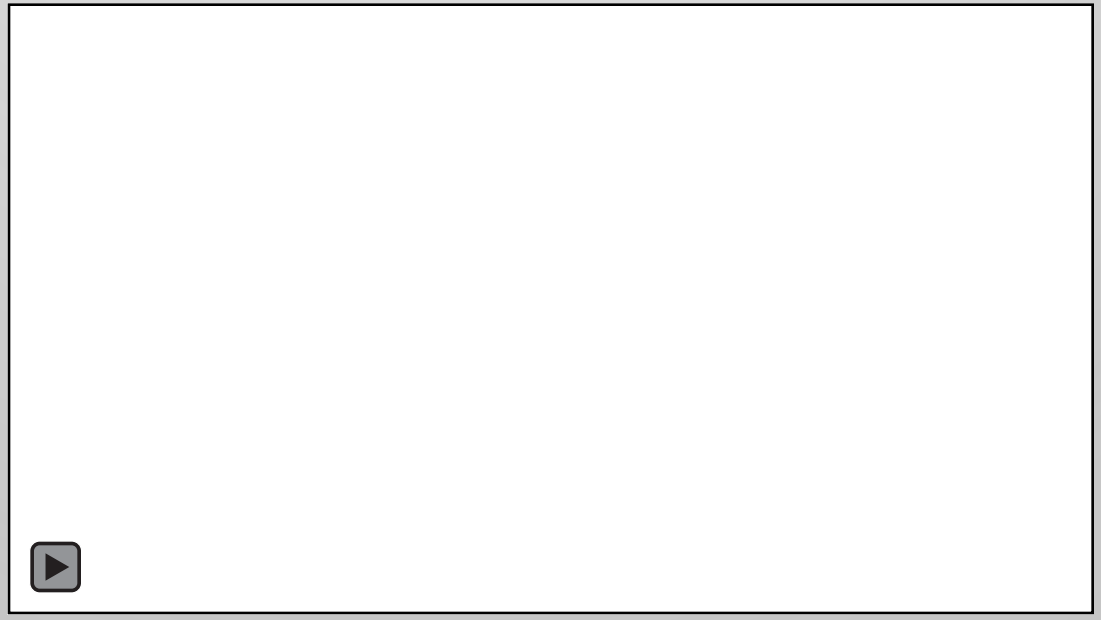
First, How Are You Doing?



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 the warning signs
- Share your concerns
- Suggest they contact JLAP – their call is completely confidential
- You can call JLAP for help in locating resources or reaching out to someone

JLAP Is Here for You


WAY
grief
stress
aging
burnout
suicide
anxiety
depression
Caregiver issues
Career transition
relationship issues
problem drinking
trauma
JOB
JAP
?

JLAP Provides

JLAP Provides a Safe Place to Seek Help

The majority of the people working with JLAP come to us voluntarily. On average, less than 5% of our cases are formal referrals, and the remainder are either self-referred or are referred by a concerned friend, family member, or colleague.

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 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.

jlap

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 remains open for business remotely, so you can still call us during business hours and talk with one of our staff or schedule an appointment via secure video.

as always, our services are free and confidential

we are providing the following peer support groups via Zoom

law students/recent grads & admittees: every monday at noon

connection: every wednesday at noon

addiction issues: 1st wednesday at 6pm
3rd tuesday at 6pm

caregiver support: 2nd thursday at noon

mental health/wellness: 3rd wednesday at 6pm

join us for jlap gentle yoga every thursday at 5pm

for more information
call 317-833-0370 or
visit courts.in.gov/ijlap

Connect with JLAP

Additional Supports for Legal Professionals

join jlap deputy director loretta oleksy
for 45 minutes of gentle movement,
mindful breathing, and postures
to restore your body and soul.
no yoga experience necessary;
the focus is more meditative than physical.
in addition to a yoga mat you may find your experience enhanced by 2 yoga blocks (or books or rolled up towels), a bolster (or firm pillow), a yoga strap (or necktie or scarf) and a blanket.
see available dates and register at
https://jlapyoga.as.me/gentleyoga

all classes are currently hosted virtually via zoom

MINDFULNESS IN LAW SOCIETY

- Indiana chapter is newly formed
- Meets via Zoom on Tuesday afternoons
- Guided meditation & gentle yoga

www.mindfulnessinlawsociety.org

Section Seven

ICLEF
Applied Professionalism

HIDDEN - BUT OBVIOUS TIPS for SUCCEEDING

Key Principles and 21 Practical Tips to Accelerate Your Career Development

October 16, 2020

Greg Utken
gjutken@gmail.com

Section Seven

Hidden - But Obvious Tips for Succeeding

Key Principles and 21 Practical Tips to Accelerate Your Career Development

Table of Contents

Appendices

PREFACE

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."

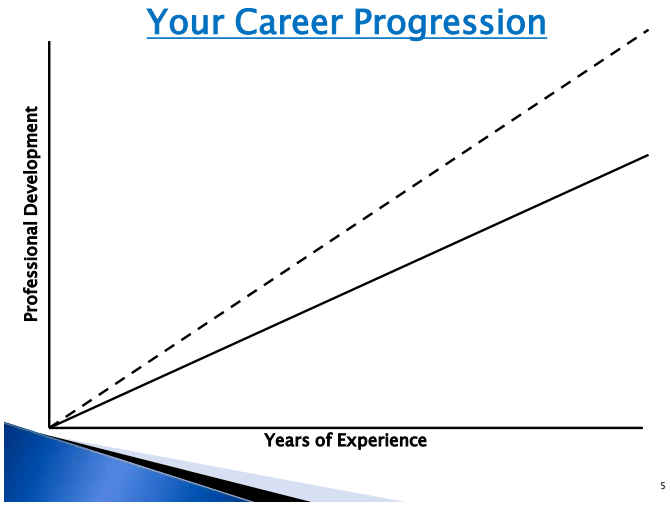
A summary listing of the Tips is in **Appendix C**.

I. EVERYDAY THINGS CAN ADVANCE YOUR DEVELOPMENT

Employers expect you to have the basic knowledge and skill sets to do what is required. To be a success, however, you typically must do more. It's about dealing with people and your communication and relational skills. Those are skills that you can 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 tips have the following attributes that recommend them to your attention.

- They all are within your control.
- Most are everyday things that you can do.
- You can put many of them into practice tomorrow.
- Each is something that can accelerate your development.
- They comprise a tool kit from which you can draw.
- Some can help insulate you from complaints or malpractice claims.



_____ Normal progression

- - - - - Accelerated progression

II. THREE BASIC PRINCIPLES

Before getting to the Tips, here are three principles fundamental to laying the foundation on which to build a successful career.

Principle A

Realize the Importance of Interactions and the Messages You Send

Every interaction you have with others sends them
a message about you. What messages are you sending?

It is often said that you never get a second chance to make a good first impression. First impressions are important. You make them through your appearance, what you say, and your body language. One commentator has observed that people typically will judge you within the first several seconds that they meet you and will judge you further in the first 30 seconds you speak. You want to make a good first impression but, at a minimum, you certainly do not want to make a bad one. But this rule applies beyond first impressions.

Several years ago, I participated in training focused on inclusion and engagement for all professionals at our firm that was provided by a Boston-based group. The trainer made a statement like the one quoted above. That statement has stuck with me ever since. It is a BFO (blinding flash of the obvious), but few people even think about.

How often do <u>think</u> about messages you send through your interactions?

Because you will interact with a variety of people in person, in writing, on the telephone, and via email, 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.

Principle B

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.

Principle C

Execute and You Distinguish Yourself 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. While Calvin Coolidge is not known as one of the better U.S. presidents, this quote from him 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 accomplish them. But in my experience, people who follow through and execute on intentions or plans are more often the exception 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 on 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 is 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 begin to develop a **network**
- 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

**** Those mentored typically develop more quickly than those who are not.***

How to Get the Most Out of a 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 that 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 team for providing client service 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. 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. Talk with them. 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?

Get in the habit of setting concrete goals and deadlines. Consciously steering your career is preferable to allowing events take you wherever they might. 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 you don't know what your top three priorities are, then you don't have priorities. - Donald Rumsfeld

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.

- *In God we trust all others must bring data*

Pick the plan time frame you wish – a month, or a quarter is typical - and then try these four steps, which come from one of the books I recommend at the end of these materials – *The Four Disciplines of Execution* by Sean Covey & Chris McChesney.

Step 1 - *Identify your priority goal(s) or objectives.*

A goal or objective is what is to be achieved. 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? I would consider achieving 70% as success.

Step 4 – *Establish a cadence of accountability*

Regularly track your progress toward reaching each goal (monthly is best, but no less frequent than quarterly).

Another good book to check out on this topic is John Doerr's *Measure What Matters.*

**** 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 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, I recommend that people get 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, 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. **Query**- 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 opportunity is where <u>you</u> find it** – 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 will be impressed.

The reverse also is true. When you are unprepared or poorly prepared you know it and will lack confidence. And your lack of preparation also will 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.

We all have made mistakes because we are human. That means we will continue to make mistakes periodically. Remember the adage – *Honesty is the best policy* – well that goes double in our profession. Take responsibility for mistakes. You 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. Do not do that! It is refreshing when someone steps up to takes 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

In my third year of practice, a partner at the small firm I was with assigned me primary responsibility for defending a piece of federal litigation. It was the first time I had been given that responsibility. He told me there were two keys to succeeding on a case. One was being well organized, and the other was being better prepared than the other side. I never forgot that.

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.

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.

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. Your goal is to meet your deadline or, better yet, beat it.

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 the **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 and you can take it on and work a couple of extra hours that evening or over the weekend.

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 or that if he or she talks to one of the other attorneys for whom you are doing a project and gets your deadline on that project adjusted, 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.

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.

What should you want to know about a project <u>before starting it</u>?

After receiving the 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 time to ask for clarification.

**** Those that confirm expectations will be more successful.***

Tip No. 13 Seek Feedback and Then React Appropriately

<u>Seeking Feedback</u>

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.

<u>Reacting to Feedback</u>

And when you get critical or constructive feedback, <u>do not</u> 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 <u>will not</u> 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.

It's a Relationship Business

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.***

Begin Building Effective Relationships

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 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.

Build Internal and External Networks

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.

Peers - Start with your peers. Ask them to introduce you to others

Organizations – 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 upon, 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 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

A communication specialist made a presentation to our firm a few years ago. He reported 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 <u>not</u> rely on email 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.

<u>Stay Top of Mind</u>

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.

<u>When the Client is an Organization, Get to Know the Staff</u>

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. <u>SIMPLE THINGS MATTER - REMEMBER THESE FOUR</u>

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. Someone once told me that a professional with scuffed shoes and dirty fingernails will not be hired.

Another point to consider was made by automotive industry legend, Bob Lutz. He commented that your appearance can be 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. A study was done a few years ago on whether the neatness of one's desk or office affects the perception of that person's level of professionalism. Over 80 percent of respondents said neatness did affect their perceptions. 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, 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 Template

B Example of Project List

C Summary List of Tips

D Tips on Initial Client Meetings

E Guide on Making Documents Reader Friendly

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 A

(*Your Name*) Project List

Description	Date Assigned	Internal Client	External Client	Internal Due Date	External Due Date	Project Status
~~Demand letter~~	~~2/01/19~~	~~Gentry~~	~~York~~	~~2/08/19~~	~~2/11/19~~	**DONE**
Limitations Memo	2/10/19	Garrison	HSG	2/25/19	**3/04/19**	Rough draft
Draft SJ Motion	2/28/19	Utken	Billmon Inc.	3/15/19	**3/31/19**	Argument outlined

Appendix B

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 C

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 the client tell the story his or her 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.

Appendix D

Preferred method of communication - Ask clients if they have a preference for how you communicate with them. ***Demonstrates*** you are courteous.

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.

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?

Common explanations include that 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 they really want to know. 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.

Appendix E

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

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."*

2. Watch for *"to be"* Verbs and Trade Them for Stronger Ones

The *"be"* verbs like *"is" "are", "was",* and *"were"* typically carry little 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. Change *"-ion"* Words into Active Verbs

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. Watch for Text Clutter

1. Introductory Phrases Often Aren't Needed

Unless you are discussing something's existence, the phrases *"There is"* or *"There are"* are clutter.

Not - *"~~There is~~ no reason any business needs to overpay for high quality legal services in this environment."*

But – *"No business needs to overpay for high quality legal services in this environment."*

Not - *"~~There are~~ three reasons most clients cite as to why they use our services."*

But - *"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…"*

Not - *"~~It is important to note~~ the firm has offices in multiple jurisdictions.*"

But - "*We have offices in multiple jurisdictions.*"

Not - "~~*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."*

But - "*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. *"Of"* and *"In"* Signal Excess Words

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. Drop Excess Word Baggage at the End of Sentences

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. Limit Use of Citations and Quotations

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. Read it Out Loud

Finally, don't write sentences that are difficult to speak. 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 and 21 Practical Tips to Accelerate Development of Your Career

Greg Utken

Do Everyday Things

- Basic knowledge & skills expected
- Must do more to build success
- Tips - Not "rocket science"
- Will you advance or "tread water"

Your Career Progression

Value of The Tips

- Everyday things
- Within your control
- Can put in practice tomorrow
- Each can accelerate development

Consciously Steer Your Career

Three Fundamental Principles

- Messages Sent by **Interactions**
- Use the **Internal Client** Concept
- Distinguish Yourself - **Execute**

3 Tips to Set the Stage

Tip 1 - **Take charge** of your career

Tip 2 - Establish a **support system**

Tip 3 - **Goals** & a doable **plan**

4 Disciplines of Execution – *Tip 3*

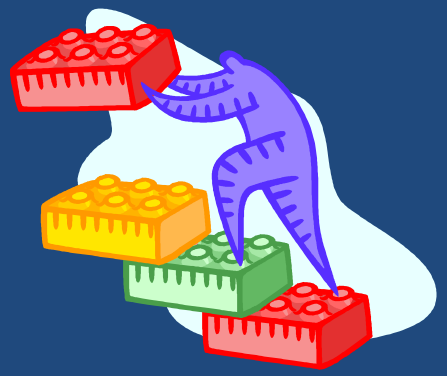
- Identify ***WIG(s)***
- Identify how to **Measure** if goal is met
- Identify **Actions** to achieve you control
- Establish **Cadence of Accountability**

5 Tips to Accelerate Development

Tip 4 - Expand your **Comfort Zone**

Tip 5 - Be **Engaged** and **Enthused**

Tip 6 - **Opportunities** - take & create



5 Tips to Accelerate Development (cont.)

Tip 7 – Distinguish thru **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 **Right Message** if busy

6 Tips to Get Most Out of Work

(cont.)

Tip 12 – Understand **Expectations**

Tip 13 - Seek **Feedback** – react

Tip 14 - Think through **Meetings**

Meeting Tips – *Tip 14*

Preparation

- *What should you know before?*

Participation

- *Interactions send messages*

End

- *Confirm take aways*

3 Tips to Cultivate Relationships & Clients

Tip 15 – Learn about **EQ**

Tip 16 – Develop **Relationships**/**Networks**

Tip 17 – Give **More than Expected**

Clients Can Say 1 of 3 Things

About you and your work

- Something **Positive**
- Something **Negative**
- Say **Nothing**

Which will it be?

Make Clients Wildly Enthusiastic

"Wow" factors

- Responsiveness
- Keep them in the loop – no surprises
- Communicate in person if possible
- Know the key staff
- Periodic – How am I doing

4 Small Things That Matter

Tip 18 – **Be Punctual & Timely**.

Tip 19 – **Attitude** makes a difference

Tip 20 – **Appearances** matter

Appearances Matter – *Tip 20*

Your Office or Reception Area?

Small Things Matter

(cont.)

Tip 21 – Always be **Considerate**

In Conclusion

Every Interaction Matters

Keep Tips on Radar Screen

Now What?

- Need to **Be Intentional**
- Pick **2 or 3 Tips -** try them out
- Later try 2 or 3 **More**
- Hold yourself **Accountable**

That's All Folks !