2020

The ethics triangle

Indiana Continuing Legal Education Forum (ICLEF)

THE ETHICS TRIANGLE

August 19, 2020 – Evansville
October 8, 2020 – Muncie
November 6, 2020 – Merrillville
December 3, 2020 – Indianapolis

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INDIANA CONTINUING LEGAL EDUCATION FORUM

THE ETHICS TRIANGLE

Agenda

Registration will begin 30 minutes before the start of the program.

Wednesday, August 19: 9:00 A.M. - 12:15 P.M. local Evansville time
Tropicana Hotel of Evansville
421 NW Riverside Dr.
Evansville, IN 47708

Thursday, October 8: 9:00 A.M. - 12:15 P.M.
Horizon Convention Center
401 S. High St.
Muncie, IN 47305

Thursday, November 6: 9:00 A.M. - 12:15 P.M.
Avalon Manor
3550 East US Hwy 30
Merrillville, IN 46410

Thursday, December 3: 9:00 A.M. - 12:15 P.M.
ICLEF Conference Facility
230 E. Ohio Street, 5th Floor
Indianapolis, IN 46204

THE ETHICS TRIANGLE

Topics

Meg Christensen and Chuck Kidd analyze ethical challenges arising out of today's Legal Practice. Featuring a fresh approach with a new perspective, this program examines a multitude of disciplinary misconduct situations that can lead to ethics violations, using a three-way interactive paradigm.

Here's a sampling of the ethical categories:

- Morality vs. Ethics
- The Shrinking Profession
- Privileged Information
- Lying
- Attorney Fees / Fee Agreements / Non-Refundable Fees
- Social Media
- Transactional Practice
- Inadvertent Communications
- Technology "Reasonable Measures" - Document Retention, Confidentiality, Tracking Devices, Encrypted Emails, etc.
- International Travel Issues
- Conflict Checks
- Lawyer Advertising
- Mediation Ethics
- Neglect / Failure to Communicate
- Publicity - Judicial Criticism; Trial Publicity
- Sex
- Substance & Stress
- Corporate Disputes
- Who Really is the Client?

Faculty

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Margaret M. Christensen

Dentons Bingham Greenebaum LLP, Indianapolis

Meg Christensen concentrates her practice on three main areas of law: lawyer ethics, appeals and business litigation. Since 2017, she has served as co-chair for Dentons Bingham Greenebaum's Recruiting Committee.

Her focus includes:
- Ethics – Meg has represented lawyers in all stages of the disciplinary process pending before the Indiana Supreme Court. Additionally, she has represented other professionals in front of various state licensing boards, and the IRS Office of Professional Responsibility.
- Appellate – Meg brings a fresh perspective to identifying and analyzing issues on appeal. Meg's experience includes representing clients in the appellate phase of complex business disputes, contract and insurance coverage disputes, and shareholder liability.
- Business Litigation – Meg assists clients in litigation in both state and federal courts in claims involving multi-million dollar contract disputes, shareholder liability, enforcement of employee restrictive covenants, inter-governmental disputes, unfair competition claims, dissolutions, administrative enforcement and licensing. She is experienced in media law issues including defamation defense, reputation management, and social media harms. Meg also represents the media in pursuing access to public records and enforcing open door laws.
- Meg's clients are primarily concerned about the impact their legal disputes will have on their business or personal lives. Recognizing that litigation introduces uncertainty into her client's plans, Meg prides herself in clearly communicating with clients about the practical effect of various strategies. Meg's goal is to help busy clients focus on what they do best while she works to present their strongest arguments in pursuit of the best possible result.
- Between the Indiana State Bar Association (ISBA), the Indiana Continuing Legal Education Forum (ICLEF) and Association of Professional Responsibility Lawyers (APRL), Meg presents on ethics at over a dozen continuing legal education seminars each year. As part of ISBA's Ethics Committee, she considers and issues advisory opinions, recommends rule changes and facilitates lawyer education events. Meg is an active member of the APRL and devotes her time to researching trends in disciplinary enforcement and lawyer ethics.
- In her free time, Meg enjoys cooking, hosting dinner parties, and attending yoga or barre class. She's an avid NPR listener, loves old homes and house rehabs and

attending camp with her two children. She has a vested interest in voting advocacy and once served as a member of the United Nations Election Protection Delegation, monitoring the polls in El Salvador’s National Election.

Charles M. Kidd

Indiana Supreme Court Disciplinary Commission, Indianapolis

Deputy Executive Director, Indiana Supreme Court Disciplinary Commission. Admitted to bar, 1988, Indiana, Northern and Southern Federal Districts of Indiana. Education: Butler University, B.S. 1979; Indiana University School of Law--Indianapolis, J.D. 1987. Member: American Bar Association, Indiana State Bar Association and Indianapolis Bar Association (Distinguished Fellow); Roster of the National Organization of Bar Counsel. Former Master member, Sagamore American Inn of Court. Former Indiana Deputy Attorney General (1988-1991). Author of numerous continuing legal education works including the Survey of Recent Developments in Professional Responsibility in volumes 26 through 28 and 30 through 36 of the Indiana Law Review. AV Rated by Martindale-Hubbell.

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Indiana Supreme Court Disciplinary Commission
Indianapolis, Indiana

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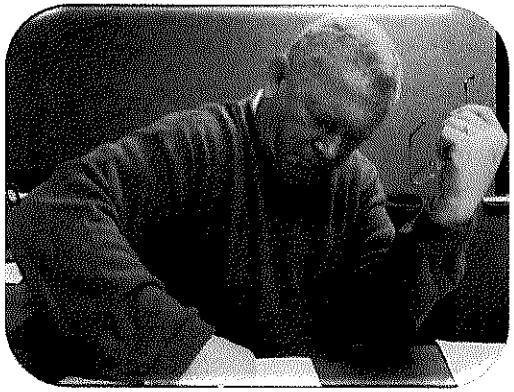

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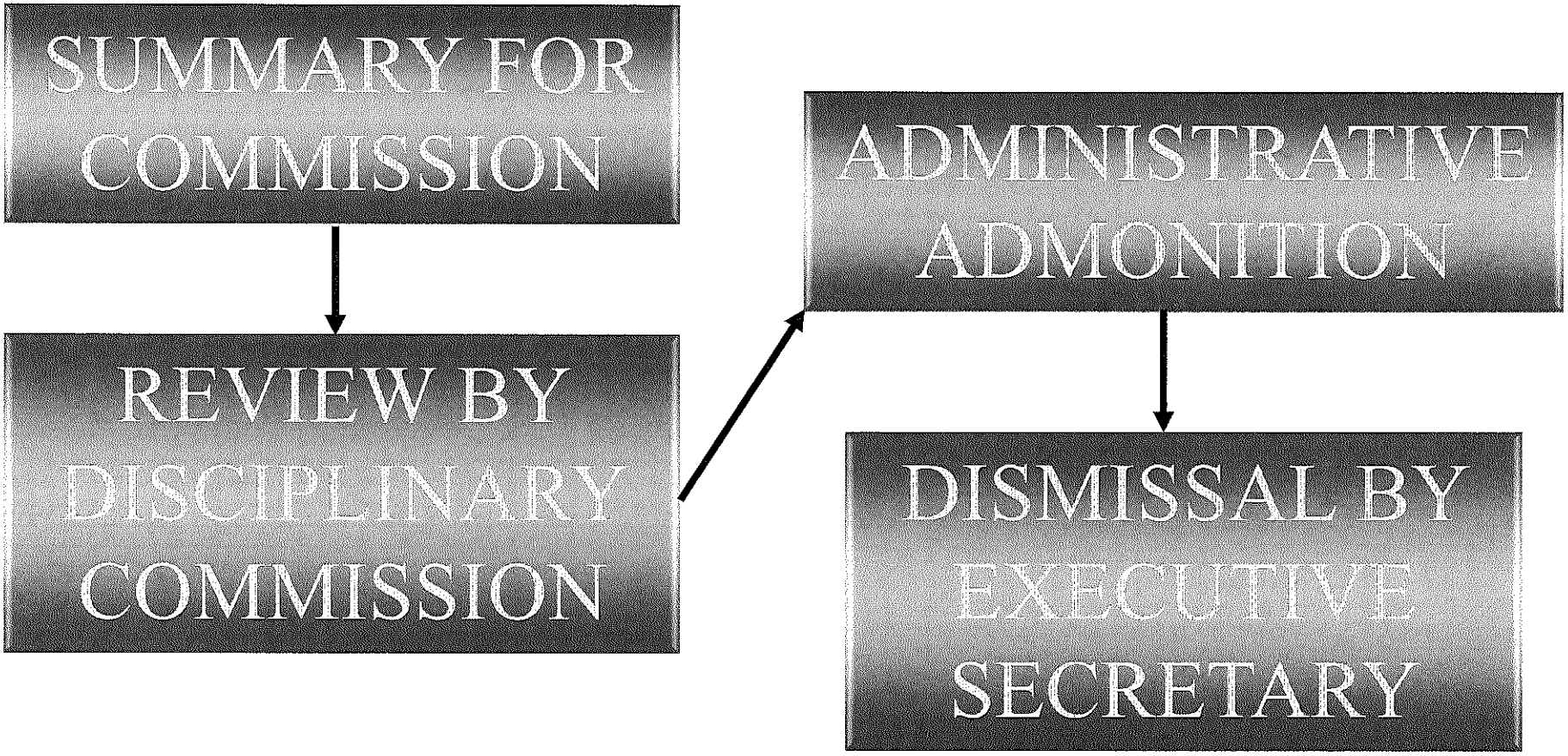

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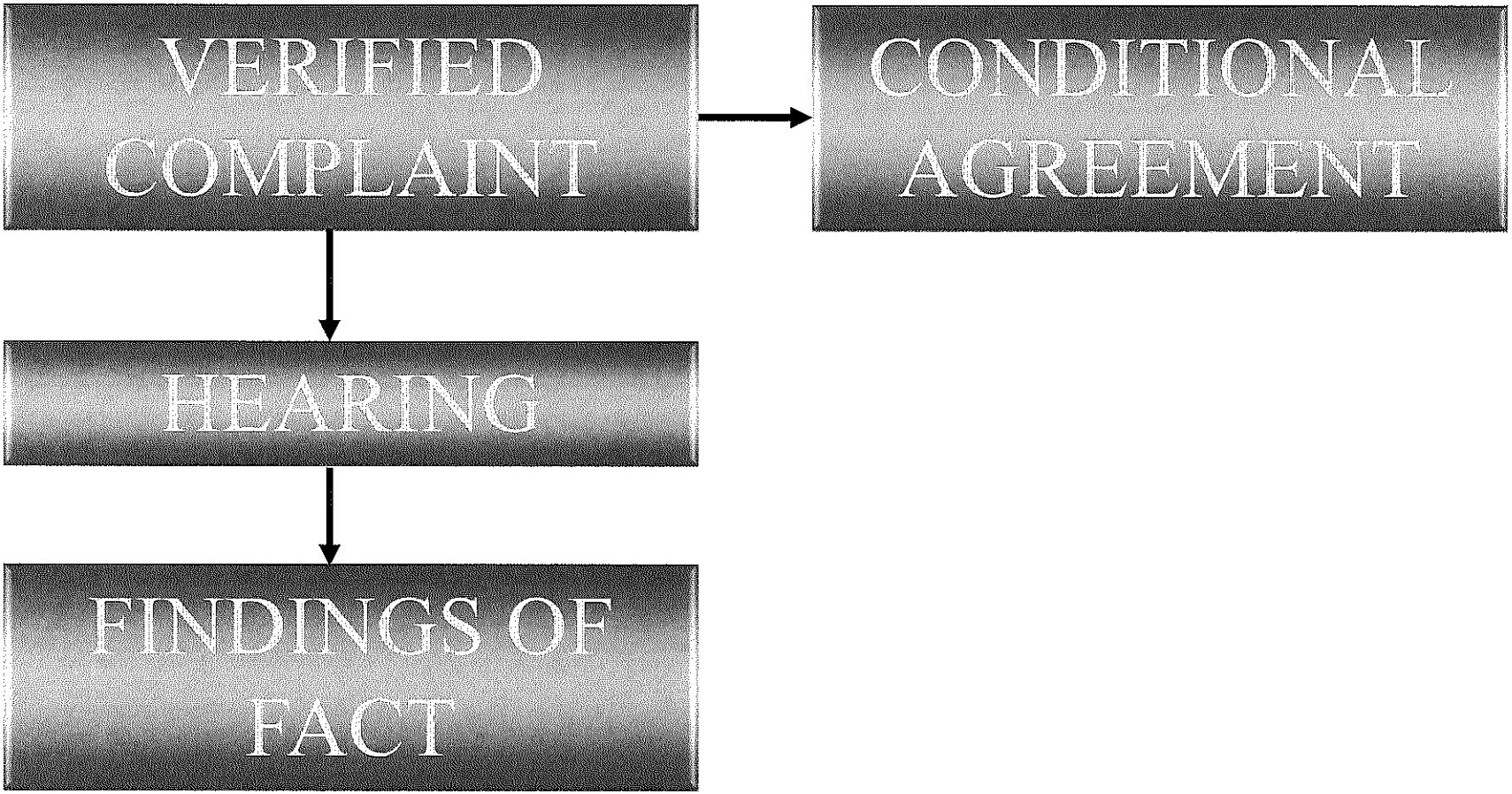

The Attorney Discipline Process

PETITION FOR REVIEW

SUPREME COURT OPINION

DISCIPLINARY COUNSEL *v.* BROCKLER.

[Cite as *Disciplinary Counsel v. Brockler*, 145 Ohio St.3d 270, 2016-Ohio-657.]

Attorneys—Misconduct—Violations of the Rules of Professional Conduct—One-year suspension, stayed on conditions.

(No. 2015-0280—Submitted May 6, 2015—Decided February 25, 2016.)

ON CERTIFIED REPORT by the Board of Professional Conduct of the Supreme Court, No. 2014-030.

Per Curiam.

{¶ 1} Respondent, Aaron James Brockler of Lakewood, Ohio, Attorney Registration No. 0078205, was admitted to the practice of law in Ohio in 2004. In an April 7, 2014 complaint, relator, disciplinary counsel, charged Brockler with engaging in professional misconduct while he served as the assistant Cuyahoga County prosecutor assigned to a murder case. Specifically, relator alleged that while investigating the shooting death of Kenneth "Blue" Adams, Brockler created a fictitious Facebook account and used it to contact the alibi witnesses of Damon Dunn, who had been indicted for the murder.

{¶ 2} The parties entered into stipulations of fact and submitted 15 stipulated exhibits. After a two-day hearing, a panel of the Board of Professional Conduct issued a report finding that Brockler's use of the fictitious Facebook account to contact the alibi witnesses involved dishonesty, fraud, deceit, or misrepresentation and that it prejudiced the administration of justice. It recommended, however, that we dismiss an alleged violation arising from certain statements that Brockler made to the media.

{¶ 3} Citing substantial mitigating evidence and finding that Brockler's misconduct was an isolated incident in an otherwise notable legal career, the panel

recommended that he be suspended for one year, with the suspension fully stayed on conditions. The board adopted the panel's report in its entirety, and neither party has filed objections. We adopt the board's findings of fact and conclusions of law and suspend Brockler from the practice of law in Ohio for one year, fully stayed on conditions.

Misconduct

{¶ 4} Before he was indicted, Dunn denied any involvement in Adams's death and told Cleveland police that at the time of the murder, he was with his girlfriend, Sarah Mossor, and her friend Marquita Lewis. Brockler did not believe that Dunn's alibi was true, but Mossor and Lewis refused to talk with him on numerous occasions when he identified himself as the assistant prosecutor assigned to the case.

{¶ 5} As part of his investigation, Brockler listened to recordings of telephone calls that Dunn had made from the Cuyahoga County Jail. On the morning of December 14, 2012, he listened to a recording of a heated conversation in which Dunn and Mossor argued over Dunn's fear that Mossor would not be a reliable witness and Mossor's belief that Dunn had not been faithful to her. Mossor suspected that Dunn had had a romantic relationship with a woman named "Taisha" and indicated that if her suspicion was true, she would end her relationship with Dunn. Believing that Mossor's relationship with Dunn was near a breaking point, Brockler saw an opportunity to exploit her feelings of distrust and get her to recant her support for Dunn.

{¶ 6} Recalling a Facebook ruse he had used in a prior case, Brockler planned to create a fictitious Facebook identity to contact Mossor. He attempted to obtain assistance from several Cleveland police detectives and the chief investigator in the prosecutor's office, but they were not available. Believing that time was of the essence, Brockler decided to proceed with the Facebook ruse on his own approximately one hour after he heard the recording of Mossor and Dunn's

conversation. He created a Facebook account using the pseudonym "Taisha Little," a photograph of an African-American female that he downloaded from the Internet, and information that he gleaned from Dunn's jailhouse telephone calls. He also added pictures, group affiliations, and "friends" he selected based on Dunn's telephone calls and Facebook page.

{¶ 7} Posing as Little, Brockler simultaneously contacted Mossor and Lewis in separate Facebook chats. He falsely represented that Little had been involved with Dunn, that she had an 18-month-old child with him, and that she needed him to be released from jail so that he could provide child support. He also discussed Dunn's alibi as though it were false in an attempt to get Mossor and Lewis to admit that they were lying for Dunn (or would lie for him in the future) and to convince them to speak with the prosecutor.

{¶ 8} After chatting for several hours, Brockler sensed that Mossor and Lewis were suspicious, so he shut down the chat and deleted the fictitious account. He testified that he printed copies of the chats and placed them in a file—with the intent to provide copies to defense counsel—before he deleted the account, but those copies were never found. He attended five pretrial conferences from January through April 2013 but did not disclose the circumstances or content of his conversations with Mossor or Lewis.

{¶ 9} Brockler was scheduled to take an extended medical leave beginning April 16, 2013, and assistant prosecutor Kevin Filiatraut was assigned to handle the Dunn case in his absence. Brockler gave his file to Filiatraut, reviewed the case with him, and attended a pretrial conference with him. Brockler also disclosed that he might need to be a witness at trial because both Mossor and Lewis had told him they would not support Dunn's alibi, although they were afraid to say so in court. Brockler did not disclose *how* he obtained that information.

{¶ 10} On the second day of Brockler's leave and less than one week before Dunn's trial, a police detective gave Filiatraut several documents, including a

transcript of Lewis's chat with "Taisha Little" (obtained from Lewis) and Lewis's written statement about the chat. Filiatraut immediately made the documents available to defense counsel and began to investigate Little.

{¶ 11} Although Filiatraut quickly informed Brockler about this new information, Brockler waited nearly three weeks to disclose that he was "Taisha Little." Upon learning of Brockler's ruse, Filiatraut reported this information to his superiors. The prosecutor's office withdrew from the case and the court appointed the attorney general to serve as a special prosecutor. Shortly after Brockler returned from his medical leave in June 2013, his employment was terminated.

{¶ 12} Soon thereafter, Brockler spoke with reporters from the Cleveland *Plain Dealer* and a local television affiliate in response to Cuyahoga County Prosecuting Attorney Timothy McGinty's statements that Brockler was fired for his unethical conduct in creating false evidence, lying to witnesses and another prosecutor, and damaging the prosecution's chances in a murder case in which an innocent man was killed at work.

{¶ 13} The subsequently published article and broadcasted interview included statements by Brockler—which he does not dispute—to the effect that (1) prosecutors have long engaged in ruses to obtain the truth, (2) his firing was an overreaction because he only did what the police should have done, (3) he engaged in an investigative ruse to uncover the truth and keep a murderer behind bars, (4) the public was better off because of his actions, (5) if he had not taken these actions, a murderer might be walking the streets, (6) he promised the victim's mother that he would not let a horrible killer walk out of the courthouse to kill someone else, and (7) McGinty chose to follow the technical rules of ethics, while he chose to protect the public.

{¶ 14} Approximately one year after Brockler's termination, Dunn was convicted of aggravated murder, murder, felonious assault, and having weapons while under disability. The parties stipulated in January 2015 that his conviction

was on appeal, but it has since been affirmed, *see State v. Dunn*, 8th Dist. Cuyahoga No. CR-12-568849-A, 2015-Ohio-3138.

{¶ 15} Brockler admitted that the Facebook ruse violated the plain language of Prof.Cond.R. 8.4(c) (prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation), but he urged the board to carve out an exception for "prosecutorial investigation deception."

{¶ 16} Noting that a comment to Prof.Cond.R. 8.4 already recognizes an exception for lawyers who supervise or advise nonlawyers about lawful covert investigative activities and that this court has found in two cases that lawyers in private practice violated the analogous provisions of DR 1-102(A)(4) by personally engaging in investigatory deceptions, the board refused to carve out a broader exception to the rule. *See* Prof.Cond.R. 8.4, Comment 2A; *Columbus Bar Assn. v. King*, 84 Ohio St.3d 174, 702 N.E.2d 862 (1998) (finding that two attorneys engaged in dishonest conduct by conspiring for one of them to place a phone call while posing as someone else in order to generate evidence in furtherance of a client's case); *Cincinnati Bar Assn. v. Statzer*, 101 Ohio St.3d 14, 2003-Ohio-6649, 800 N.E.2d 1117, ¶ 17 (finding that an attorney engaged in dishonesty, fraud, deceit, or misrepresentation when she intimidated a deposition witness by creating the false impression that she possessed compromising personal information that could be offered as evidence).

{¶ 17} Instead, the board found that Prof.Cond.R. 8.4(c) requires an assistant prosecutor to refrain from dishonesty, fraud, deceit, or misrepresentation when personally engaging in investigatory activity and that Brockler's Facebook ruse therefore violated the rule.

{¶ 18} Brockler argued that his conduct did not violate Prof.Cond.R. 8.4(d) (prohibiting a lawyer from engaging in conduct that is prejudicial to the administration of justice) as charged in the complaint because it encouraged witnesses to come forward and tell the truth. But the board found that his subterfuge

prejudiced the administration of justice because it had the potential to induce false testimony, injected significant new issues into the case shortly before trial, and materially delayed the resolution of the case by requiring further investigation and the appointment of a special prosecutor.

{¶ 19} Relator's complaint also alleged that Brockler's statements to the media violated Prof.Cond.R. 3.6(a) (prohibiting a lawyer who has participated in the investigation or litigation of a matter from making extrajudicial statements that he knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter). While the board did not condone Brockler's statements, it found that relator failed to carry his burden of proving not only that the statements were made but that Brockler knew or reasonably should have known that his statements would have a substantial likelihood of materially prejudicing Dunn's trial. Therefore, the board recommended that we dismiss the alleged violation of Prof.Cond.R. 3.6(a).

Sanction

{¶ 20} When imposing sanctions for attorney misconduct, we consider relevant factors, including the ethical duties that the lawyer violated and the sanctions imposed in similar cases. *Stark Cty. Bar Assn. v. Buttacavoli*, 96 Ohio St.3d 424, 2002-Ohio-4743, 775 N.E.2d 818, ¶ 16. In making a final determination, we also weigh evidence of the aggravating and mitigating factors listed in Gov.Bar R. V(13).

{¶ 21} As an aggravating factor, the board found that Brockler's deceptions and misrepresentations in his contacts with Mossor and Lewis resulted in multiple violations of Prof.Cond.R. 8.4(c) and (d), though it treated them as a single instance of misconduct. *See* Gov.Bar R. V(13)(B)(4). The board also found that his extrajudicial statements to the media, deflecting blame for his own misconduct to the police department and the prosecutor's office, undermined the public's

confidence in the criminal-justice process. *See* Gov.Bar R. V(13)(A) (requiring the board to consider all relevant factors in determining the appropriate sanction for a lawyer's misconduct).

{¶ 22} In mitigation, the board found that Brockler did not have a prior disciplinary record, made a full and free disclosure and cooperated in the disciplinary process, submitted numerous letters attesting to his good character and reputation for honesty, and acknowledged that the loss of his "dream job" was a form of penalty. *See* Gov.Bar R. V(13)(C)(1), (4), (5), and (6). Although Brockler's use of deception violated core ethical values, the board also found that he was not motivated by self-interest, because he honestly—albeit erroneously—believed that his covert use of Facebook was an effective and acceptable tactic akin to more traditional investigative tactics such as staged drug buys and the use of undercover informants. *See* Gov.Bar R. V(13)(C)(2).

{¶ 23} Despite advocating for a public-policy exception for deceptive prosecutorial investigation tactics, Brockler admitted that his conduct violated the plain language of Prof.Cond.R. 8.4(c) and argued for no more than a stayed six-month suspension. Relator, in contrast, argued that Brockler should serve an actual suspension from the practice of law, but he did not suggest any specific duration.

{¶ 24} The board acknowledged that misconduct involving dishonesty, fraud, deceit, or misrepresentation generally warrants an actual suspension from the practice of law. *See, e.g., Disciplinary Counsel v. Karris*, 129 Ohio St.3d 499, 2011-Ohio-4243, 954 N.E.2d 118, ¶ 16; *Disciplinary Counsel v. Fowerbaugh*, 74 Ohio St.3d 187, 658 N.E.2d 237 (1995), syllabus.

{¶ 25} But the board also recognized that we may deviate from that rule in the presence of significant mitigating evidence. *See Disciplinary Counsel v. Potter*, 126 Ohio St.3d 50, 2010-Ohio-2521, 930 N.E.2d 307 (absence of a prior disciplinary record, efforts to rectify the consequences of the misconduct, full cooperation in the investigation, self-reporting, and evidence of good character and

reputation apart from the charged misconduct sufficient to fully stay 12-month suspension for violating fiduciary duty as the executor of an estate); *Disciplinary Counsel v. Niermeyer*, 119 Ohio St.3d 99, 2008-Ohio-3824, 892 N.E.2d 434, ¶ 12-13 (absence of prior misconduct, self-reporting, cooperation in the disciplinary process, acceptance of responsibility for misconduct, and evidence of good character and reputation sufficient to stay the entire 12-month suspension for altering a document to make it appear that it had been timely filed). *See also King*, 84 Ohio St.3d 174, 702 N.E.2d 862 (imposing a fully stayed one-year suspension based upon the presence of significant mitigating evidence); *Statzer*, 101 Ohio St.3d 14, 2003-Ohio-6649, 800 N.E.2d 1117 (imposing a fully stayed six-month suspension based upon the presence of significant mitigating evidence).

{¶ 26} Noting the substantial mitigating factors present in this case—including the board's finding that the misconduct was an isolated incident in an otherwise notable legal career—the board recommends that we suspend Brockler for one year, but stay that suspension on the conditions that he engage in no further misconduct and that he pay the costs of this action.

{¶ 27} Having determined that the board's findings of fact and conclusions of law are supported by the record and the law, we adopt the board's report, find that Brockler's use of a deceptive investigative technique to contact Dunn's alibi witnesses violated Prof.Cond.R. 8.4(c) and (d), and dismiss the alleged violation of Prof.Cond.R. 3.6(a). We also find that a one-year suspension, fully stayed on the conditions recommended by the board, is the appropriate sanction for Brockler's misconduct.

{¶ 28} Accordingly, Aaron James Brockler is suspended from the practice of law in Ohio for one year, fully stayed on the conditions that he engage in no further misconduct and pay the costs of this proceeding. If he fails to comply with the conditions of the stay, the stay will be lifted, and he shall serve the full one-year suspension. Costs are taxed to Brockler.

Judgment accordingly.

PFEIFER, KENNEDY, FRENCH, and O'NEILL, JJ., concur.

O'CONNOR, C.J., dissents with an opinion in which LANZINGER, J., joins.

O'DONNELL, J., dissents, with opinion.

O'CONNOR, C.J., dissenting.

{¶ 29} The preamble to the Ohio Rules of Professional Conduct, entitled "A Lawyer's Responsibilities," lays out broad obligations, recognizing that "a lawyer not only represents clients but has a special responsibility for the quality of justice" and that that responsibility extends "to practicing lawyers even when they are acting in a nonprofessional capacity." Prof.Cond.R., Preamble [1], [3]. By imposing a marginal sanction—a fully stayed one-year suspension—on respondent, Aaron Brockler, the majority minimizes his significant ethical violations and does so based upon a myopic view of the Rules of Professional Conduct. The men and women who serve as prosecutors in this state are authorized to enforce the law and administer justice, one of the noblest pursuits an attorney can enjoy. Accordingly, they must meet or exceed the highest ethical standards imposed on our profession. Given the significant ethical violations Brockler committed, I cannot implicitly condone the imposition of a negligible sanction for his egregious misconduct.

{¶ 30} The substantial evidence of wrongdoing and the aggravating factors in this case prove that Brockler committed significant violations of the Rules of Professional Conduct. Yet faced with Brockler's glaring disdain for the ethical responsibilities this court imposes on all attorneys in this state, a majority of this court imposes only a one-year suspension, fully stayed.

{¶ 31} In the past, our punishment for lawyers' conduct involving dishonesty, fraud, deceit, or misrepresentation has been significantly harsher. We indefinitely suspended an attorney who had lied to the disciplinary counsel's investigator. *Cleveland Metro. Bar Assn. v. Gruttadaurio*, 136 Ohio St.3d 283,

2013-Ohio-3662, 995 N.E.2d 190, ¶ 2-4. We imposed a one-year suspension, with six months stayed on conditions, on an attorney who had falsely advised that her client's case was being settled. *Disciplinary Counsel v. Johnson*, 122 Ohio St.3d 293, 2009-Ohio-3501, 910 N.E.2d 1034, ¶ 7, 14. We suspended a lawyer for six months for attempting to advance his client's interests with evidence that the lawyer knowingly fabricated. *Cleveland Bar Assn. v. McMahon*, 114 Ohio St.3d 331, 2007-Ohio-3673, 872 N.E.2d 261, ¶ 25, 30.

{¶ 32} The disciplined attorneys in those cases were ordered to serve actual suspensions, and none of them was a prosecutor. Instead, those cases all involved civil matters, in which the worst outcome risked by the lawyer's deception was the loss of money by a party.

{¶ 33} In contrast, the stakes in this case involved imprisonment for up to a life term. Brockler actively hindered the pursuit of justice in a criminal proceeding on multiple occasions, by lying to alibi witnesses in an effort to make them change their statements. He made every effort to hide his deceptive activities until they were uncovered, and then he refused to admit that his actions were wrong.

{¶ 34} Failing to require Brockler to serve even a single day of his suspension does little to establish that this court will ensure the integrity of prosecutors and the ethical administration of justice. Indeed, none of the cases upon which the majority opinion relies to support a fully stayed suspension involves a lawyer lying in a criminal case to the detriment of a criminal defendant and, ultimately, to the detriment of the public's faith in our courts and in justice.[1]

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[1] In *Columbus Bar Assn. v. King*, the attorney lied to a landlord in a slip-and-fall case in order to add a slander claim to the complaint of his client, the landlord's former tenant. 84 Ohio St.3d 174, 175-177, 702 N.E.2d 862 (1998). The opinion does not disclose if the landlord ever had to defend the false slander claim in court or if the deception came out prior to trial. In *Cincinnati Bar Assn. v. Statzer*, this court found that a lawyer engaged in subterfuge that intimidated a witness during a deposition related to a disciplinary investigation for failing to provide a file to a former client. 101 Ohio St.3d 14, 2003-Ohio-6649, 800 N.E.2d 1117, ¶ 2, 16. *Disciplinary Counsel v. Niermeyer* concerned an attorney who lied when he backdated a workers' compensation claim in order to cover up the fact that he missed a filing deadline. 119 Ohio St.3d 99, 2008-Ohio-3824, 892 N.E.2d 434,

{¶ 35} The stakes in this case are significantly higher than those in the cases cited in the majority opinion. The courts are the bulwark of justice, and we must prove that government is trustworthy and working tirelessly but fairly, ethically, and honestly in support of justice. To do that, we must require the offices of Ohio's prosecuting attorneys to strive for flawless obedience to the ethical rules governing all lawyers practicing in the state.

{¶ 36} Despite Brockler's claims about his training in the prosecutor's office, Brockler admits that his actions at issue in this case were not directed by a supervisor and that whatever a supervisor may have told him in the past does not excuse his conduct. It is the responsibility of every Ohio lawyer to know and follow the Rules of Professional Conduct. There is no separate code of conduct that prosecutors alone get to play by.

{¶ 37} I am cognizant of Brockler's desire to serve the public and to do what is "right" by protecting society from dangerous criminal defendants, just as I am aware of the intensely difficult nature of such work, which often involves tragic circumstances, elicits visceral reactions, and presents great risks for both the accuser and the accused. *See Disciplinary Counsel v. LoDico*, 106 Ohio St.3d 229, 2005-Ohio-4630, 833 N.E.2d 1235, ¶ 30. Although criminal cases "bring the responsibility and necessity" of zealous representation, a prosecuting attorney "is not endowed with a concomitant right to denigrate the court in discharging that responsibility." *Id.*

¶ 4. In that case, the attorney was "almost immediately * * * struck with regret and overwhelmed with guilt" over his deception. *Id.* at ¶ 5. In contrast, Brockler steadfastly denied that his actions were unethical. The deceit in *Disciplinary Counsel v. Potter*, 126 Ohio St.3d 50, 2010-Ohio-2521, 930 N.E.2d 307, bears even less resemblance to Brockler's case. There, Potter's deception involved giving money to a friend to purchase, at the fairly appraised value, property from an estate of which Potter was the executor, with the plan calling for Potter to ultimately become owner of the land. *Id.* at ¶ 6. While recognizing that each of these cases involved dishonesty, fraud, deceit, or misrepresentation that was wholly inappropriate for a lawyer and was a discredit to our honorable profession, the stakes at issue in these cases were, at most, monetary and wholly inapposite to the circumstances here.

{¶ 38} In light of the series of lies and misrepresentations here and the impact they have on the profession and our communities, I would indefinitely suspend Brockler's license to practice law in this state.

Conclusion

{¶ 39} Because I believe that the court's sanction in this case is entirely incongruous with Brockler's behavior, I cannot subscribe to it. For his ethical misdeeds, I would indefinitely suspend Brockler's license to practice law in the state of Ohio. Accordingly, I dissent.

LANZINGER, J., concurs in the foregoing opinion.

O'DONNELL, J., dissenting.

{¶ 40} Respectfully, I dissent.

{¶ 41} Respondent engaged in unacceptable dishonest conduct that materially affected the administration of justice, and I would impose an indefinite suspension.

Scott J. Drexel, Disciplinary Counsel, and Donald M. Scheetz, Assistant Disciplinary Counsel, for relator.

Montgomery, Rennie & Jonson, George D. Jonson, and Kimberly Vanover Riley, for respondent.

Section One

2018-2019
ANNUAL REPORT

OF THE

DISCIPLINARY COMMISSION

OF THE

SUPREME COURT OF INDIANA

PUBLISHED BY THE

INDIANA SUPREME COURT DISCIPLINARY COMMISSION
251 NORTH ILLINOIS STREET, SUITE 1650
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INDIANA SUPREME COURT DISCIPLINARY COMMISSION

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MARK CARNELL
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LAW CLERKS

REBECCA DEMBINSKI
ALEXANDRA KELLER
JORDAN QUILLEN
CALVIN BLANK

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I. INTRODUCTION

This is the annual report of the activities of the Disciplinary Commission of the Indiana Supreme Court for the period beginning July 1, 2018 and ending June 30, 2019. The Disciplinary Commission is the agency of the Indiana Supreme Court charged with responsibility for investigation and prosecution of charges of lawyer misconduct. The Indiana Rules of Professional Conduct set forth the substantive law to which lawyers are held accountable by the Indiana lawyer discipline system. The procedures governing the Indiana lawyer discipline system are set forth in Indiana Supreme Court Admission and Discipline Rule 23. The broad purposes of the Disciplinary Commission are to "protect the public, the court and the members of the bar of this State from misconduct on the part of attorneys and to protect attorneys from unwarranted claims of misconduct." Admission and Discipline Rule 23 § 1.

The Disciplinary Commission is not a tax-supported agency. It is funded through an annual fee that each lawyer admitted to practice law in the State of Indiana must pay in order to keep their license in good standing. The annual registration fee in this reporting year for lawyers in active status was $180.00. After paying the costs of collecting annual fees, the Clerk of the Supreme Court distributes the balance of fees to the Disciplinary Commission, the Commission for Continuing Legal Education and the Indiana Judges and Lawyers Assistance Program to support the work of those Court agencies.

The annual registration fee for inactive status lawyers in this reporting year was $90.00. The annual registration fee is due on or before October 1st of each year. Failure to pay either required fee within the established time subjects the delinquent lawyer to suspension of his or her license to practice law until such time as the fee and any delinquency penalties are paid.

Out-of-state lawyers who received court permission to practice law temporarily in the state of Indiana (*pro hac vice* admission) were required to pay a $180.00 registration fee for each year they are participating as counsel in an Indiana case.

On **June 4, 2019**, the Supreme Court issued an order suspending **144** lawyers on active and inactive status, effective **June 28, 2019**, for failure to pay their annual attorney registration fees.

II. HISTORY AND STRUCTURE OF THE DISCIPLINARY COMMISSION

The Indiana Supreme Court has original and exclusive jurisdiction over the discipline of lawyers admitted to practice law in the State of Indiana. Ind. Const. Art. 7 § 4. On June 23, 1971, the Indiana Supreme Court created the Disciplinary Commission to function in an investigatory and prosecutorial capacity in lawyer discipline matters.

The Disciplinary Commission is governed by a board of commissioners, each of whom is appointed by the Supreme Court to serve a term of five years. The Disciplinary Commission consists of seven lawyers and two lay appointees.

The Commission meets monthly in Indianapolis, generally on the second Friday of each month. In addition to acting as the governing board of the agency, the Disciplinary

Commission considers staff reports on claims of misconduct against lawyers and must make a determination that there is reasonable cause to believe that a lawyer is guilty of misconduct which would warrant disciplinary action before formal disciplinary charges can be filed against a lawyer.

The members of the Disciplinary Commission during the reporting year were:

Name	*Hometown*	*First Appointed*	*Current Term Expires*
Nancy L. Cross	Carmel	July 1, 2011	June 30, 2021
Andrielle M. Metzel	Indianapolis	July 1, 2011	June 30, 2021
Trent A. McCain	Merrillville	July 1, 2011	June 30, 2021
Leanna K. Weissmann	Aurora	July 1, 2013	June 30, 2023
Kirk White	Bloomington	July 1, 2013	June 30, 2023
Brian K. Carroll	Evansville	July 1, 2014	June 30, 2019
John L. Krauss	Indianapolis	July 1, 2014	June 30, 2019
William A. Walker	Gary	July 1, 2009	June 30, 2019
Molly Kitchell	Zionsville	July 1, 2015	June 30, 2020

Biographies of Commission members who served during this reporting year are included in **Appendix A**.

The Disciplinary Commission's work is administered and supervised by its Executive Director, who is appointed by the Commission with the approval of the Supreme Court. The Executive Director of the Commission is G. Michael Witte, appointed June 21, 2010.

The Disciplinary Commission's offices are located at 251 North Illinois Street, Suite 1650, Indianapolis, Indiana 46204.

III. THE DISCIPLINARY PROCESS

A. The Grievance Process

The purpose of the Disciplinary Commission is to inquire into claims of attorney misconduct, protect lawyers against unwarranted claims of misconduct, and prosecute meritorious cases seeking attorney discipline. Action by the Disciplinary Commission is not a mechanism for the resolution of private disputes between clients and attorneys. Disciplinary action is independent of private remedies that may be available through civil litigation.

An investigation into lawyer misconduct is initiated through the filing of a grievance with the Disciplinary Commission. Any member of the bench, the bar or the public may file a grievance by submitting to the Disciplinary Commission an affirmed written statement on a Request for Investigation (RFI) form. Any individual having knowledge about facts relating to a complaint may submit a grievance. An RFI form is readily available from the Commission's office, from bar associations throughout the state, and on the Internet at **http://www.in.gov/judiciary/discipline/2373.htm**.

The Disciplinary Commission may also initiate a grievance concerning alleged lawyer misconduct in the absence of a grievance from a third party. Acting upon information that is brought to its attention from any credible source, the Disciplinary Commission may authorize the Executive Director to prepare a grievance in the name of the Commission. This is known as a Commission Grievance.

B. Preliminary Inquiry

The Commission staff screens each newly filed grievance to initially determine whether the allegations contained therein raise a substantial question of misconduct. If a grievance does not present a substantial question of misconduct, it may be dismissed by the Executive Director with the approval of the Commission. Written notice of dismissal is mailed to the grievant and the lawyer.

A grievance that is not dismissed on its face is sent to the lawyer involved, and a demand is made for the lawyer to submit a mandatory written response within thirty (30) days of receipt. Additional time for response is allotted in appropriate circumstances, but strictly limited. Other investigation as appropriate is conducted to develop the facts related to a grievance.

The Executive Director may call upon the assistance of bar associations in the state to aid in the preliminary investigation of grievances. Larger bar associations maintain volunteer Grievance Committees to assist the Disciplinary Commission with preliminary investigations. These bar associations include the Allen County Bar Association, the Evansville Bar Association, the Indianapolis Bar Association, the Lake County Bar Association, and the St. Joseph County Bar Association.

Upon completion of the initial inquiry and consideration of the grievance and the lawyer's response, the Executive Director may:

- Dismiss the grievance, with approval by the Commission, upon a determination that a substantial question of misconduct has not been raised;
- Determine that a substantial question of misconduct has been raised and issue a caution letter with instructions for corrective action; or
- Determine that a substantial question of misconduct has been raised, open the matter for an inquiry, and demand a written response to the allegations from the lawyer.

The grievant and the lawyer are notified in writing of each of the above actions.

Lawyers must cooperate with the Commission's inquiry by answering grievances in writing and responding to other demands for information from the Commission. The Commission may seek an order from the Supreme Court suspending a non-cooperating lawyer's license to practice until the lawyer cooperates. If after being suspended for non-cooperation, the lawyer does not cooperate for a period of 90 days, the Court may indefinitely suspend the lawyer's license. An indefinitely suspended lawyer will be reinstated only after successfully completing the reinstatement process described in paragraph K below.

C. Further Investigation

A grievance that the Executive Director determines has reasonable cause to believe that a lawyer is guilty of misconduct is docketed for further investigation and, ultimately, for full consideration by the Disciplinary Commission. Both the grievant and the lawyer are notified of this step in the process. Upon completion of the investigation, the results of the investigation are composed in a written summary, and the matter is placed on the monthly agenda of the Disciplinary Commission for consideration.

D. Authorizing Charges of Misconduct

After a grievance has been investigated, it moves to the agenda of the full Disciplinary Commission. The Executive Director makes a report to the Commission, together with recommendation about the disposition of the matter. The Commission makes a final determination whether or not there is reasonable cause to believe the lawyer is guilty of misconduct that would warrant disciplinary action. If the Commission finds that there is not reasonable cause, the matter is dismissed with written notice to the grievant and the lawyer. If the Commission finds that reasonable cause exists, it directs the Executive Director to prepare and file with the Clerk of the Supreme Court a Disciplinary Complaint charging the lawyer with misconduct.

E. Filing Formal Disciplinary Charges

The Executive Director files the Disciplinary Complaint with the Clerk of the Supreme Court setting forth the facts related to the alleged misconduct. The Disciplinary Complaint also identifies the provisions of the Rules of Professional Conduct that the lawyer is alleged to have violated. The respondent must file an answer to the Disciplinary Complaint. Failure to answer the allegations will be taken as true.

F. The Evidentiary Hearing

Upon the filing of a Disciplinary Complaint, the Supreme Court appoints a hearing officer who will preside over the case. The hearing officer must be an attorney admitted to practice law in the State of Indiana and may be a sitting or retired judge. The hearing officer's responsibilities include supervising the pre-hearing development of the case including discovery, conducting an evidentiary hearing, and submitting a written report to the Supreme Court with findings of fact, conclusions of law and recommendations. The hearing officer is not a final arbiter of the facts and the law. That determination rests with the Supreme Court. A hearing may be held at any location selected by the hearing officer.

G. Supreme Court Review

After the hearing officer has issued a report to the Supreme Court, the parties may petition the Court for a review of any or all of the hearing officer's findings, conclusions and recommendations. The Court independently reviews every case, even in the absence of a petition for review by either party. The Court then issues its final order in the case.

H. Final Orders of Discipline

The conclusion of a lawyer discipline proceeding is an order from the Supreme Court setting out the facts of the case, determining the violations (if any) of the Rules of Professional Conduct, and assessing a sanction in each case where it finds misconduct. The sanction ordered by the Court is related to the seriousness of the violation and the presence or absence of mitigating or aggravating circumstances. The available disciplinary sanctions include:

- **Private Administrative Admonition (PAA).** A PAA is a disciplinary sanction that is an administrative resolution of a case involving minor misconduct. A PAA is issued as a sanction only when the Disciplinary Commission and the respondent lawyer agree to the PAA. Unlike other disciplinary sanctions, the Supreme Court does not directly issue the admonition. Instead, the Executive Director admonishes the lawyer. However, the Court receives advance notice of the parties' intent to resolve a case by way of a PAA and may reject such a proposed agreement. There is a public record made in the Office of the Clerk of the Supreme Court of every case resolved by a PAA, although the facts of the matter are not included in the public record.
- **Private Reprimand.** A private reprimand consists of a private letter of reprimand from the Supreme Court to the offending lawyer. The case does not result in a publicly disseminated opinion describing the facts of the case. The Court's brief order resolving the case by way of a private reprimand is a public record that is available through the office of the Clerk of the Supreme Court. Sometimes where a private reprimand is assessed, the Court may issue a *per curiam* opinion for publication bearing the caption *In the Matter of Anonymous*. While the published opinion does not identify the offending lawyer by name, the opinion sets out the facts of the case and the violations of the Rules of Professional Conduct involved for the edification of the bench, the bar and the public.
- **Public Reprimand.** A public reprimand is issued in the form of a publicly disseminated opinion or order by the Supreme Court setting forth the facts of the case and identifying the applicable Rule violations. A public reprimand does not result in any direct limitation upon the offending lawyer's license to practice law.
- **Short Term Suspension.** The Court may impose a short-term suspension of a lawyer's license to practice law as the sanction in a case. When the term of suspension is six months or less, the lawyer's reinstatement to the practice of

lawis generally, but not always, automatic upon the completion of the term of suspension. If a short-term suspension is ordered without automatic reinstatement, then the lawyer may be reinstated to practice only after petitioning for reinstatement and proving fitness to practice law. The procedures associated with reinstatement upon petition are described later in this report. Even in cases of suspension with automatic reinstatement, the Disciplinary Commission may enter objections to the automatic reinstatement of the lawyer's license to practice law.

- **Long Term Suspension.** The Court may impose a longer term of suspension, which is a suspension greater than six months. Every suspension greater than six months is without automatic reinstatement and the lawyer must petition the Court for reinstatement. The suspended lawyer must prove fitness to re-enter the practice of law before a long-term suspension will be terminated.
- **Disbarment.** In the most serious cases of misconduct, the Court will issue a sanction of disbarment. Disbarment revokes a lawyer's license to practice law permanently, and it is not subject to being reinstated at any time in the future.

The lawyer discipline process in Indiana is not a substitute for private or other public remedies that may be available, including criminal sanctions in appropriate cases and civil liability for damages caused by lawyer negligence or other misconduct. The sanctions that are issued in lawyer discipline cases do not generally provide for the resolution of disputed claims of liability for money damages between the grievant and the offending lawyer. However, a suspended lawyer's willingness to make restitution may be considered by the Court to be a substantial factor in determining license reinstatement upon conclusion of suspension.

Occasionally, the Court includes in a sanction order additional provisions that address aspects of the lawyer's misconduct in the particular case. Examples of these conditions include participation in substance abuse or mental health recovery programs, specific continuing legal education requirements, and periodic audits of trust accounts.

I. Resolution by Agreement

In some cases that have resulted in the filing of a Disciplinary Complaint, the respondent lawyer and the Disciplinary Commission are able to reach an agreement concerning the facts of a case, the applicable Rule violations and an appropriate sanction for the misconduct in question. In these instances, the parties submit their agreement to the Supreme Court for its consideration. Any such agreement must include an affidavit from the lawyer accepting full responsibility for the agreed misconduct. The Court may accept or reject the agreement.

A lawyer charged with misconduct may also tender his or her written resignation from the practice of law. *Resignation is a discipline sanction. It is not the equivalent of retirement. It is not a graceful avoidance of discipline.* A resignation is not effective unless the lawyer fully admits his or her misconduct and the Court accepts the resignation as tendered. A lawyer who has resigned with pending misconduct allegations must wait five years before

seeking license reinstatement. Reinstatement after resignation is a very steep burden to overcome. It requires the attorney to prove to the Court worthiness of reinstatement despite the dark shadow of the misconduct previously admitted.

A lawyer charged with misconduct may also submit to the mercy of the Court by fully admitting the allegations and consenting to such discipline as the Court deems appropriate under the circumstances.

J. Temporary Suspension

While a lawyer's Disciplinary Complaint is pending, the Disciplinary Commission may seek the temporary suspension of the lawyer's license to practice law pending the outcome of the proceeding. Temporary suspensions are reserved for cases of the most serious misconduct or on-going risk to clients or the integrity of client funds. A hearing officer is responsible for taking evidence on a petition for temporary suspension and making a recommendation to the Supreme Court. The Court may grant or deny the petition for temporary suspension.

A separate temporary suspension procedure applies whenever an Indiana licensed lawyer is found guilty of a crime punishable as a felony. The Executive Director must report the finding of guilt to the Supreme Court and request an immediate temporary suspension from the practice of law. Generally, a finding of guilt by a trial court in these instances does not occur until the sentencing hearing. The Court may order the temporary suspension without a hearing, but the affected lawyer may submit to the Court reasons why the temporary suspension should be vacated. A temporary suspension granted under these circumstances is effective until there is a resolution of related disciplinary charges or further order of the Court. Trial judges are required to send a certified copy of the order adjudicating criminal guilt of any lawyer for *any crime, misdemeanor or felony*, to the Executive Director of the Commission within ten days of the finding of guilt.

Finally, the Executive Director is required to report to the Supreme Court any time the Commission receives notice that a lawyer has been found to be *intentionally* delinquent in the payment of child support. After being given an opportunity to respond, the Supreme Court may suspend the lawyer's license to practice law until the lawyer is no longer in intentional violation of the support order.

K. The License Reinstatement Process

When any lawyer resigns or is suspended without provision for automatic reinstatement, the lawyer may not be reinstated into the practice of law until the lawyer meets his or her burden of proof. The lawyer must prove by clear and convincing evidence that the causes of the underlying misconduct have been successfully addressed and demonstrate that he or she is otherwise fit to re-enter the practice of law. Additionally, the lawyer must successfully complete the Multi-State Professional Responsibility Examination, a standardized examination on legal ethics.

Lawyer reinstatement proceedings are heard by a hearing officer appointed by the Court. A past member of the Commission may serve as a hearing officer. After hearing evidence,

the hearing officer makes a recommendation to the Supreme Court. The Court reviews the recommendation of the Commission and may either grant or deny reinstatement.

L. Lawyer Disability Proceedings

Any member of the public, the bar, the Disciplinary Commission, or the Executive Director may file with the Commission a petition alleging that a lawyer is disabled by reason of physical or mental illness or chemical dependency. The Executive Director is charged with investigating allegations of disability and, if justified under the circumstances, prosecuting a disability proceeding before the Disciplinary Commission or a hearing officer appointed by the Court. The Court ultimately reviews the recommendation of the Commission and may suspend the lawyer from the practice of law until the disability has been remediated.

IV. COMMISSION ACTIVITY IN 2018-2019

A. Grievances and Investigations

An investigation into allegations of lawyer misconduct is commenced by the filing of a grievance with the Disciplinary Commission. During the reporting period, **1,414** grievances were filed with the Disciplinary Commission. Of this number, **113** were Commission Grievances. The total number of grievances filed was a **24%** increase above the number filed the previous year. **Appendix B** presents in graphical form the number of grievances filed for each of the past ten years.

There were **18,608** Indiana lawyers in active, good-standing status and **3,676** lawyers who were inactive, good-standing as of June 30, 2019. In addition, **1,167** lawyers regularly admitted to practice in other jurisdictions were granted temporary admission to practice law by trial court orders in specific cases during the year, pursuant to the provisions of Indiana Admission and Discipline Rule 3 (commonly known as *pro hac vice* admission). The total grievances filed represent **12.95** grievances for every one hundred actively practicing lawyers. **Appendix C** presents in graphical form the grievance rate for each of the past ten years.

Distribution of grievances is not even. Far fewer than **1,414** individual lawyers received grievances during the reporting period. Many lawyers were the recipients of multiple grievances. It is important to note that the mere filing of a grievance is not, in and of itself, an indication of misconduct on the part of a lawyer.

During the reporting period, **1,285** of the grievances either received or carried over from previous years were dismissed without further investigation upon a determination that, on their face, they presented no substantial question of misconduct.

Upon receipt, each grievance that is not initially dismissed is classified according to the type of legal matter out of which the grievance arose, and the type of misconduct alleged by the grievant. The table in **Appendix D** sets forth the classification by legal matter and by misconduct alleged of all grievances that were pending on June 30, 2019, or that were dismissed during the reporting year after investigation. Many grievances arise out of more than one type of legal matter or present claims of more than one type of alleged misconduct.

Accordingly, the total numbers presented in **Appendix D** represent a smaller number of actual grievances.

Ranked in order of complaint frequency, the legal matters most often giving rise to grievances involve *Criminal, Divorce Matters, Tort, Administrative Matters, Wills/Estates, Real Estate, Guardianship, Contract Matter, Personal Misconduct, Collection, Bankruptcy, Workmen's Compensation, Adoption, Other, Judicial Action, Condemnation and Patent.* To understand the significance of this data, it is important to keep in mind that criminal cases make up the largest single category of cases filed in our trial courts. Except for civil plenary filings, domestic relations cases account for the next highest category of cases filed. The high rates of grievances arising from criminal and domestic relations matters reflect the high number of cases of those types handled by lawyers in Indiana. The predominant types of legal matters out of which grievances arose during the reporting period are presented graphically in **Appendix E**.

Ranked in order of complaint frequency, the alleged misconduct types most often giving rise to grievances are *Improper Influence, Incompetence, Neglect, Communication/Non Diligence, Improper Withdrawal, Failure to Communicate, Excessive Fees, Conflict of Interest, Personal Misconduct, Misinforming, Lying, Other, Illegal Conduct, Fraud, Conflict, Revealing Confidences and Conversion* with complaints about Improper Influence being close to one and a half times as frequent as the next category of alleged misconduct. The predominant types of misconduct alleged in grievances during the reporting period are presented graphically in **Appendix F**.

The following is the status of all grievances that were pending before the Disciplinary Commission on June 30, 2019, or that had been dismissed during the reporting period:

	DISMISSED	OPEN
Grievances filed before July 1, 2018	**1,171**	**104**
Grievances filed on or after July 1, 2018	**1,159**	**7**
Total carried over from preceding year:	**304**	
Total carried over to next year:	**124**	

This represents an increase of **34** files carried over into the following year.

B. Non-Cooperation

A lawyer's law license may be suspended if the lawyer has failed to cooperate with the disciplinary process. The purpose of this is to promote lawyer cooperation to aid in the effective and efficient functioning of the disciplinary system. The Commission brings allegations of non-cooperation before the Court by filing petitions to show cause. During the reporting year, the Disciplinary Commission filed **51** petitions to suspend the law licenses of **26** lawyers with the Supreme Court for failing to cooperate with investigations. The following are the dispositions of the non-cooperation matters that the Commission filed with the Court during the reporting year or that were carried over from the prior year:

Show Cause petitions filed.....51

Dismissed as moot after cooperation before show cause order 0

Petition pending on June 30, 2019, without show cause order 0

Show cause orders with no suspension.....40

- Dismissed after show cause order due to compliance **32**
- Dismissed due to disbarment, resignation or suspension.....**14**
- Show cause orders pending on June 30, 2019 .....**9**

Suspensions for non-cooperation.....12

- Non-cooperation Suspensions still in effect on June 30, 2019 .....**1**
- Reinstated due to cooperation after suspension……..…**2**

Non-Cooperation Suspensions Converted to Indefinite Suspensions 4

C. Trust Account Overdraft Reporting

Pursuant to Admis. Disc. R. 23 § 29, all Indiana lawyers must maintain their client trust accounts in financial institutions that have agreed to report any trust account overdrafts to the Disciplinary Commission. Upon receipt of a trust account overdraft report, the Disciplinary Commission sends an inquiry letter to the lawyer directing that the lawyer supply a documented, written explanation for the overdraft. After review of the circumstances surrounding the overdraft, the investigation is either closed or referred to the Disciplinary Commission for consideration of filing a disciplinary grievance.

The results of inquiries into overdraft reports received during the reporting year are:

Carried Over from Prior Year **11**
Overdraft Reports Received.....**51**
Inquiries Closed **52**
Inquiries Carried Over Into Following Year.....**10**
Reason for Inquiries Closed:

- Bank Error.....**11**
- Deposit of Trust Funds to Wrong Trust Account **0**
- Disbursement from Trust Before Deposited Funds Collected.....**5**
- Referral for Disciplinary Investigation **19**
- Disbursement from Trust before Trust Funds Deposited **5**
- Overdraft Due to Bank Charges Assessed Against Account.....**0**
- Inadvertent Deposit of Trust Funds to Non-Trust Account.....**2**
- Overdraft Due to Refused Deposit for Bad Endorsement **1**
- Law Office Math or Record-Keeping Error.....**9**
- Death, Disbarment or Resignation of Lawyer **2**
- Inadvertent Disbursement of Operating Obligation from Trust **4**
- Non-Trust Account Inadvertently Misidentified as Trust Account.....**0**
- Fraudulent Office Staff Conduct.....**1**

D. Litigation

1. Overview

In 2018-2019, the Commission filed **28** Disciplinary Complaints for Disciplinary Action with the Supreme Court, **3** more than in the previous year. These Disciplinary Complaints, together with amendments to pending Verified Complaints, represented findings of reasonable cause by the Commission in **48** separate counts of misconduct during the reporting year.

In 2018-2019 the Supreme Court issued **106** final dispositive orders, **5 less** than in the preceding year, representing the completion of **106** separate discipline files, **5** less than the preceding year. Including **1** private administrative admonitions, **65** individual lawyers received final discipline in the reporting year, compared to **81** in the previous year. **Appendix G** provides a comparison of disciplinary sanctions entered for each of the past ten years.

2. Disciplinary Complaints for Disciplinary Action

a. Status of Disciplinary Complaints Filed During the Reporting Period

The following reports the status of all new Disciplinary Complaints filed during the reporting period:

Verified Complaints Filed During Reporting Period.....**28**
Number Disposed Of By End of Year.....**5**
Number Pending At End of Year.....**23**

The Commission filed **3** Notice of Foreign Discipline and Requests for Reciprocal Discipline with the Supreme Court pursuant to Admission and Discipline Rule 23 §20(b) and (d).

During the reporting year, the Disciplinary Commission filed Notices of Felony Guilty Findings and Requests for Suspension pursuant to Admission and Discipline Rule 23 § 11.1(a) in **3** cases.

b. Status of All Pending Disciplinary Complaints

The following reports the status of all formal disciplinary proceedings pending as of June 30, 2019:

Cases Filed; Appointment of Hearing Officer Pending.....**1**
Cases Pending Before Hearing Officers.....**23**
Cases Pending On Review Before the Supreme Court.....**11**
Total Verified Complaints Pending on June 30, 2019.....**25**

Of cases decided during the reporting year, **12** were tried on the merits to hearing officers at final hearings, **15** cases were submitted to the Supreme Court for resolution by way of Affidavit for Resignation, Conditional Agreement for Discipline, or Consent to Discipline, and **4** case was submitted by hearing officer findings on an Application for Judgment on the Complaint.

3. Final Dispositions

During the reporting period, the Disciplinary Commission imposed administrative sanctions and the Supreme Court imposed disciplinary sanctions, made reinstatement determinations, or took other actions as follows:

Dismissals of Disciplinary Complaint 0

Findings for Respondent on Merits 0

Caution Letters 14

Private Administrative Admonitions 1

Private Reprimands 1

Public Reprimands 5

Suspensions With Automatic Reinstatement 1

Suspensions With Reinstatement on Conditions 8

Suspensions Without Automatic Reinstatement 6

Accepted Resignations 3

Disbarments 2

Reinstatement Proceedings

Disposed of by Final Order

Granted **2**

Denied **1**

Petition Withdrawn **2**

Findings of Contempt 3

Emergency Interim Suspension Granted 2

Emergency Interim Suspension Denied 0

Temporary Suspensions (Guilty of Felony) 3

V. SUMMARY OF DISCIPLINARY COMMISSION ACTIVITIES

	2018-19	2017-18	2016-17	2015-16	2014-15
Matters Completed	1,414	1,411	1,485	1,437	1,715
Complaints Filed	28	25	30	33	32
Final Hearings	12	10	19	2	10
Final Orders	106	111	93	99	120
Reinstatement Petitions Filed	4	4	2	4	6
Reinstatement Hearings	0	2	5	3	3
Reinstatements Ordered	2	2	2	3	2
Reinstatements Deny/Dismiss	2	1	3	1	2
Income	$1,700,245	$2,214,469	$2,312,026	$2,267,417	$2,611,327
Expenses	$2,533,270	$2,391,756	$2,219,778	$2,332,029	$2,253,684

VI. AMENDMENTS TO RULES AFFECTING LAWYER DISCIPLINE

There were no amendments to the Rules of Professional Conduct or the Admission and Discipline Rules during the fiscal year 2018-19.

VII. OTHER DISCIPLINARY COMMISSION ACTIVITIES

Outreach to the bar and to the public is an important function of the Commission staff. In the past fiscal year staff of the Disciplinary Commission appeared more than **45** times as faculty at continuing education programs and as speakers at other events. These outreach opportunities occurred both in-state and out-of-state. Staff is encouraged to serve in these capacities.

Staff actively engage in outreach to in-state law schools with course presentations on professional responsibility and law practice management. Additionally, Disciplinary Commission staff have joined with the staff of the Commission on Continuing Legal Education, the Board of Law Examiners, and the Judges and Lawyers Assistance Program to develop and present a program titled “A Life in the Law”. The program instructs the audience on the functions of these bar regulatory agencies and advises on the benefits that the bar and the public receive from these agencies. To date, the program has been presented twenty (20) times and will continue to be a staple in this agency’s continuing education inventory.

VIII. FINANCIAL REPORT OF THE DISCIPLINARY COMMISSION

A report setting forth the financial condition of the Disciplinary Commission Fund is attached as **Appendix H**.

IX. APPENDICES

BIOGRAPHIES OF DISCIPLINARY COMMISSION MEMBERS

Nancy L. Cross is a senior partner of the Cross Glazier Burroughs, P.C. firm, a Certified Family Law Specialist-Family Law Certification Board, a Registered Family Law Mediator, and has been a fellow of the American Academy of Matrimonial Lawyers since 1993. In 2011 she was appointed by the Supreme Court as a Commissioner on the State of Indiana Disciplinary Commission, is currently serving on the Legislative Committee of the Indiana State Bar Association, has served on the Board of Governors, and is a former Chairperson of the Family Law Section of the Indianapolis Bar Association. Ms. Cross has written numerous articles and lectured at family law seminars throughout her career. Ms. Cross is listed in The Best Lawyers in America (Woodward/White) and has been featured in Indianapolis Monthly magazine as one of the top ten divorce attorneys in Indianapolis. Beginning in 2005 and continuing to date, she has been recognized by Indianapolis Monthly as one of the 25 foremost female attorneys in Indiana and has consistently been named one of the state's Super Lawyers by Indianapolis Monthly since 2004. Ms. Cross has restricted her practice to family law, including divorce litigation, mediation and appellate work for more than 30 years. She is a 1979 graduate of the University of Nebraska College of Law and resides with her two sons in Zionsville, Indiana. Ms. Cross began her first five-year term on the Disciplinary Commission on July 1, 2011.

Trent A. McCain is a native of Gary, Indiana. In 1995, he graduated *cum laude* from Florida A&M University in Tallahassee where he earned a Bachelor of Science degree in Business Administration. While in college, like most of America, McCain was captivated by the O.J. Simpson trial and the unparalleled advocacy of the late Johnnie L. Cochran, Jr. Little did he know then that their paths would cross years later. After college, McCain went to work for Eastman Kodak Company as an Account Executive. In 1998, he returned to Northwest Indiana to work for the local utility company as an Industrial and Commercial Sales Representative. In 1999, McCain started law school at Valparaiso University School of Law. During his time at "Valpo," McCain was awarded the Charles R. Gromley Memorial Scholarship for service to the university for two consecutive years. In his second year, he was elected President of the Black Law Students Association and in his last year, he served on the Executive Board of the Midwest BLSA. In March 2000, Johnnie L. Cochran, Jr. announced his partnership with the law office of recognized Chicago attorney James D. Montgomery. This announcement captured McCain's attention and he began his quest to work for the man he so admired five years earlier. After one solid year of persistent telephone calls and letter writing, Cochran's Chicago partner hired McCain as a law clerk in the Summer 2001. After a stellar summer, The Cochran Firm offered McCain a permanent position when he graduated the following year. Six months after the passing of his legal mentor, McCain left the Cochran Firm to establish his own practice. Now, McCain practices in both Northwest Indiana and Chicago and is the principal of McCain Law Offices. McCain's firm concentrates on permanent and catastrophic personal injury, wrongful death, medical negligence, police misconduct, and civil rights cases. On January 1, 2012, McCain co-founded McCain & White, P.C. with attorney, Kelly White Gibson. McCain is also a founding member of the National Law Group, LLC and serves as the organization's secretary. In May 2011, McCain was admitted to practice before the Supreme Court of the United States. In the same month, the Indiana Supreme Court appointed McCain to a five-year term as Commissioner on its attorney Disciplinary Commission. The Commission consists of seven (7) attorneys statewide and two (2) lay people. McCain is a Past President (2009-10) of the James C. Kimbrough Bar Association. McCain is also a member of the Indiana State, Illinois State, and Chicago Bar Associations; the Illinois and Indiana Trial Lawyers Associations; and the Chicago Inn of Court. McCain is married to Akilia McCain, an opera singer and speech language pathologist. They reside in the Miller Beach section of Gary, Indiana with their infant daughter, Nina Lauren. Mr. McCain began his first five-year term on the Disciplinary Commission on July 1, 2011.

Andrielle M. Metzel is a partner at Taftt in the firm's Litigation Group. She represents corporate and individual clients in state and federal courts and before local and state administrative bodies and agencies. Ms. Metzel has extensive experience negotiating resolutions in complex business, personal and transactional disputes. She handles employment, dispute resolution and supply chain litigation matters for her clients. Ms. Metzel is actively involved in land use, development and strategic consulting for businesses seeking to invest and grow in Indiana. Ms. Metzel is a frequent public speaker and participant in numerous seminars concerning labor and employment law issues. Ms. Metzel also provides customized, in-house training on a variety of employment law subjects. Ms. Metzel is a 1996 graduate of Robert H. McKinney School of Law. She is admitted to practice law in Indiana, the U.S. District Court for the Northern District of Indiana, U.S. District Court for the Southern District of Indiana, and U.S. Court of Appeals for the Seventh Circuit. She is a member of the Indiana State Bar Association, American Bar Association, and Indianapolis Bar Association. Ms. Metzel has served on the Board of Directors, Indianapolis Bar Association; Legal Ethics Committee, Indiana State Bar Association; the Development Chair, Indianapolis Bar Foundation; Board of Governors, District 11 Representative, Indiana State Bar Association; Board of Directors, D.A.R.E. Indiana Board of Governors; Secretary, Indiana State Bar Association; Chair-Women in the Law Division, Indiana State Bar Association; Executive Committee - Land Use Section, Indianapolis Bar Association; Advisory Panel Member, American Bar Association; Member, IndyCREW Network of Commercial Real Estate Women; Alcohol Beverage Subcommittee Member, Indiana State Bar Association; Land Use & Zoning Section Member, Indiana State Bar Association; Employment & Labor Section Member, Indiana State Bar Association; Litigation Section member, Indiana State Bar Association; Corporate Counsel Section Member, Indiana State Bar Association; Employment & Labor Relations Committee Member, American Bar Association; Women Advocate Committee Member, American Bar Association; and International Council of Shopping Centers. Ms. Metzel is currently serving her first five-year term on the Disciplinary Commission which began July 1, 2011.

Tony Walker has been practicing law for 22 years. He is the Managing Attorney of The Walker Law Group, P.C., a firm of seven attorneys, based in Gary, Indiana with additional offices in Indianapolis, Chicago, and Washington, D.C.. Attorney Walker focuses upon representing churches, schools, and government agencies. He is a graduate of the University of Massachusetts-Amherst where he received a degree in Social Thought and Political Economy. Attorney Walker continued his post-baccalaureate education studying political science at Clark Atlanta University and then law at DePaul University College of Law in Chicago. After completing law school, Attorney Walker clerked for Indiana Supreme Court Justice Robert D. Rucker, then of the Indiana Court of Appeals, and later entered private practice with the firm Meyer, Lyles & Godshalk in Northwest Indiana. Attorney Walker served as Legislative Counsel to the late Congresswoman Julia Carson in her Washington D.C. office. He has previously been Chief of Staff of Radio One, Inc., a national broadcasting company targeting urban listeners, and Chief Operating Officer and Vice-President of Business and Legal Affairs for its gospel recording label, Music One. Attorney Walker presently serves as the Executive Producer of several radio programs airing on WLTH Radio in Merrillville, Indiana, and he hosts a weekly public affairs talk show. The Indiana Supreme Court appointed Attorney Walker as a Commissioner of the Supreme Court Attorney Disciplinary Commission in 2009, and in 2011 the Governor appointed him to represent the First Congressional District on the State Board of Education. Attorney Walker also serves on the boards of the Gary Public Library and is a past chairman of the Urban League of Northwest Indiana. He is also a former member of the Gary Police Foundation and Second Chance Foundation boards. He belongs to various professional organizations including the American Bar Association, National Bar Association, Chicago Bar Association, the District of Columbia Bar Association, Indiana State Bar Association and is a former board member of the Lake County (Indiana) Bar Association. In 2018, Mr. Walker participated as appellate counsel in a case that was granted certiorari by the U.S.

Supreme Court, *Zanders v. Indiana*, 138 S. Ct. 2702 (2018). Mr. Walker concluded his service on the Commission at the close of this reporting year, completing ten years of service.

Leanna K. Weissmann is a native of Aurora, IN. She graduated from Indiana University-Bloomington in 1991 with a double major in journalism and English, and then earned her law degree from Indiana University Robert H. McKinney School of Law in 1994. From 1993-1995 she served as a law clerk for Court of Appeals Judge Robert D. Rucker (now Justice Rucker of the Indiana Supreme Court). Ms. Weissmann then engaged in the private practice of law in Rising Sun, Indiana until 1998, and served as Referee of Dearborn Superior Court No. 1 from 2000-2007. She now maintains a solo law practice in Lawrenceburg, Indiana, focused entirely on appellate practice. A veteran of appellate advocacy, Ms. Weissmann has briefed over 150 cases and participated in more than 20 oral arguments before the Indiana Court of Appeals and the Indiana Supreme Court. In 2018, Ms. Weissmann was lead appellate counsel in a case that was granted certiorari by the U.S. Supreme Court, *Zanders v. Indiana*, 138 S. Ct. 2702 (2018). In 2005 Ms. Weissmann was appointed by Governor Mitch Daniels to serve on the Indiana Criminal Justice Institute Board of Trustees for a three (3) year term. She has served as appellate counsel in the following notable cases: Louallen v. State, 778 N.E.2d 794 (Ind. 2002); Tyler v. State, 903 N.E.2d 463 (Ind. 2009); Gallagher v. State, 925 N.E.2d 350 (Ind. 2010); Ripps v. State, 968 N.E.2d 323 (Ind. 2012); and Conley v. State, 972 N.E.2d 864 (Ind. 2012). Ms. Weissmann teaches fitness and is active in youth ministry programs at her church. She founded SamieSisters.com, an Internet ministry for "tween" girls. She was appointed to the Indiana Supreme Court Disciplinary Commission in 2013.

Kirk White is Assistant Vice President for Strategic Partnerships at Indiana University. He joined the IU Office of the Vice President for Engagement in 2010 and is responsible for coordinating national defense and homeland security partnerships with state and federal government agencies and IU's mutually beneficial relationships with economic development organizations in southwest Indiana. He holds additional appointments as Military Liaison for the IU Office of the President and as a member of the IU Emergency Management incident management team. Kirk joined the professional staff of IU in 1984 after completing the Bachelor of Science degree from the Indiana University School of Public and Environmental Affairs. He has served IU in several external, alumni and government relations assignments including: Assistant to the Vice President, Director of Alumni Chapters, Assistant Director and Director of Hoosiers for Higher Education, Coordinator of IU's Critical Incident Communications Team and most recently as Director of Community Relations. In June 2013, Kirk was appointed by the Indiana Supreme Court to serve a five-year term on the court's attorney disciplinary commission. A former elected official, Kirk served eight years as a member of the Bloomington City Council (1988-95), and one term as Monroe County Commissioner (1997-2000). In city and county office he focused on land use planning, improving public works, utilities, public safety, emergency management, animal control and fleet management. The Association of Indiana Counties awarded Monroe County the 2001 Local Government Cooperation Award for an emergency communications system project that Commissioner White directed. Lt. Colonel White is a Field Artillery officer in the Indiana Army National Guard and currently serves as Operations Officer for 81st Troop Command, headquartered in Terre Haute. In 24 years of service, he has been assigned as Battery Fire Direction Officer, Battery Commander, Battalion Executive Officer and Battalion Commander at Headquarters, 2nd Battalion, 150th Field Artillery Regiment and G5/Chief of Plans for the 38th Infantry Division. He was called to active duty in support of Operation Enduring Freedom and served as chief of an Embedded Training Team with a light infantry battalion of the Afghanistan National Army (2004-05) where he was awarded the Meritorious Service Medal and Combat Action Badge. He served a second tour in Afghanistan (2009-10) as commander of a provisional task force responsible for base operations and force protection in

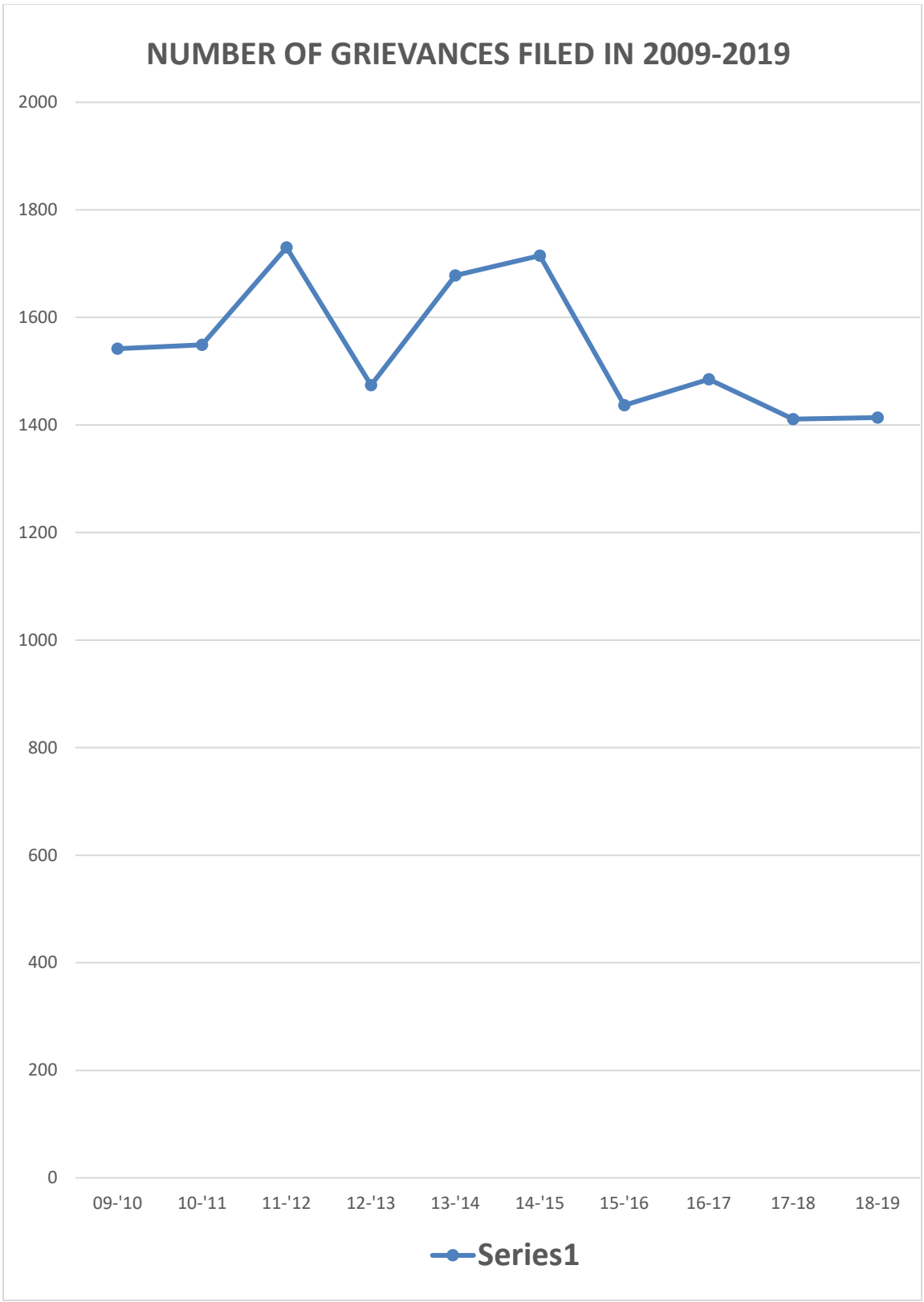
Kabul and was awarded the Bronze Star Medal. He again was called to active duty in April, 2019, for service in the Middle East. Kirk serves as a member of the Monroe County Economic Development Commission and a board member of the Bloomington Economic Development Corporation. He is a former board member of the Greater Bloomington Chamber of Commerce, former chairman of the board of trustees at First United Methodist Church in Bloomington and is Past President of the Rotary Club of Bloomington North. He and his wife Janice have two daughters.

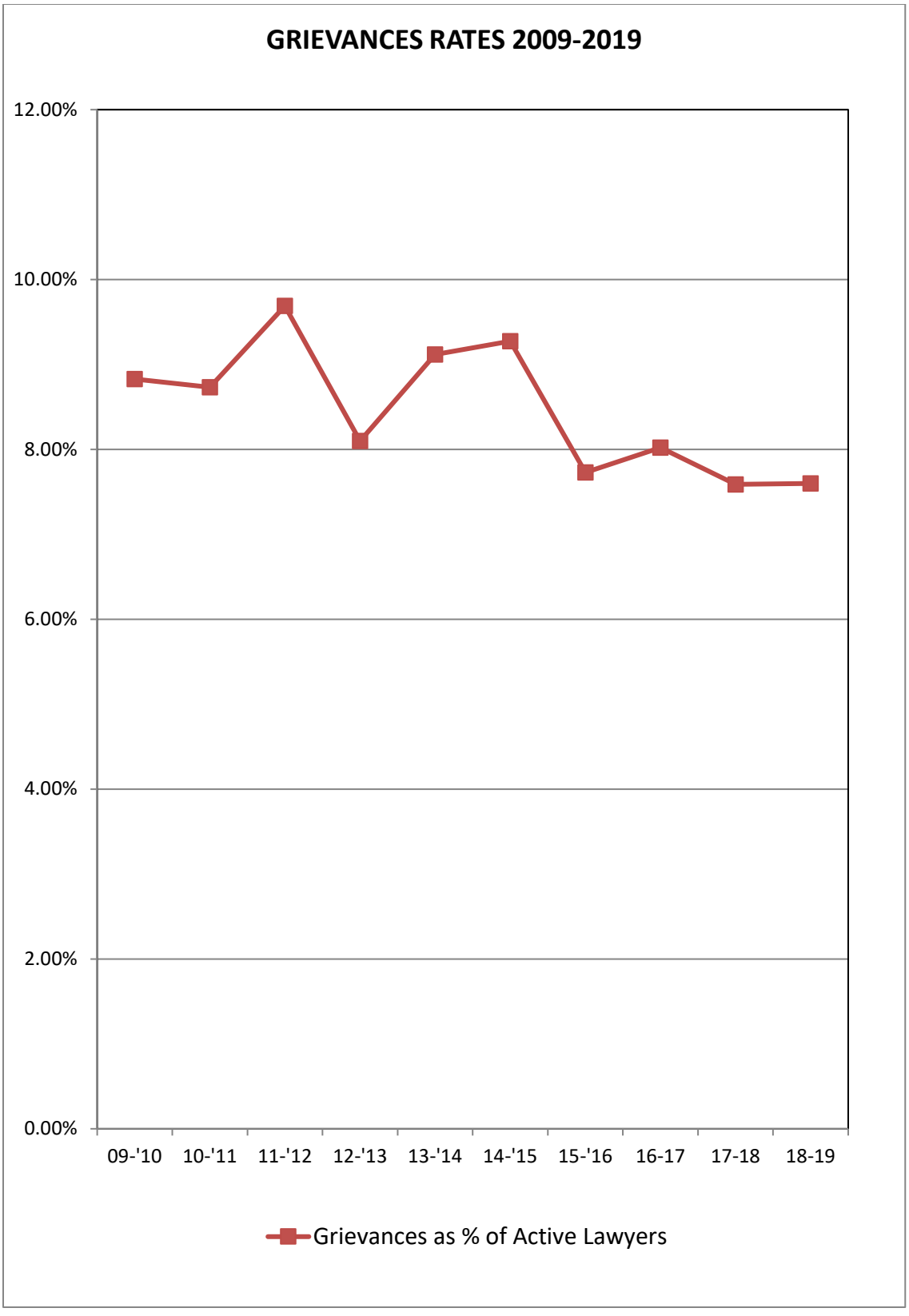
Brian K. Carroll is a partner at Johnson Carroll Norton & Ken P.C. Mr. Carroll practices in the areas of business law, estate and trust planning and administration, real estate and elder law. He is a Certified Elder Law Specialist and a Certified Estate Planning and Administration Specialist. Mr. Carroll is a fellow of the Indiana Bar Foundation as well as a fellow of the American College of Trust and Estate Counsel. Mr. Carroll graduated with a Bachelor of Science degree from Indiana University in 1978 and graduated *Cum Laude* from Indiana University Robert H. McKinney School of Law in 1982 when he was admitted to the Indiana Bar. Mr. Carroll has served as a Member of the Board of Governors and House of Delegates of the Indiana State Bar Association; and as Chair of the Indiana State Bar Association, Young Lawyer, Probate, Trust and Real Property and General Practice, Solo and Small Firm Sections. He also has served as a Director for the Evansville Bar Association and Chair of the Evansville Bar Association Probate Committee. President of the Harlaxton Society of the University of Evansville. Mr. Carroll began his first five-year term on the Disciplinary Commission on July 1, 2014.

John L. Krauss is an attorney, mediator, and arbitrator. He recently retired from Indiana University and IUPUI after 23 years. He served as the founding director of the Indiana University Public Policy Institute and a clinical professor at the IU School of Public and Environmental Affairs. He know is a Clinical Professor Emeritus – SPEA. Previously, Krauss served as Deputy Mayor of Indianapolis (1982-1991). Krauss currently serves as a senior advisor to the Chancellor of IUPUI and as adjunct professor at the Indiana University McKinney School of Law-Indianapolis. He teaches mediation and dispute resolution and has an alternative dispute resolution and mediation consultant practice. Krauss holds leadership positions with a diverse array of civic and corporate organizations, including Indiana Supreme Court Disciplinary Commission, Tourism for Tomorrow, Inc., the President Benjamin Harrison Foundation Advisory Board, Arthur Jordan Foundation and the Indianapolis Museum of Art. Past service included Chair of the Indiana Supreme Court Commission on Continuing Legal Education, Vice Chair and President of the Indianapolis Museum of Art. Krauss is a panel member for the American Arbitration Association, US Postal System, FINRA, US Institute for Environmental Conflict, National Futures Association, US Bankruptcy Court for the Southern District of Indiana. He chaired the Labor Management Committees for the closure of both Fort Benjamin Harrison and US Naval Air Warfare Center – IN and has served as a Special Mediator for the Indiana Attorney General. An avid amateur photographer. Krauss' images are in private collections and national publications.

Molly (Peelle) Kitchell was appointed to the Indiana Supreme Court Disciplinary Commission in 2015. Kitchell holds a Bachelor of Arts degree from Purdue University and a Master of Science in Occupational Therapy from the University of Indianapolis, graduating from both institutions with a 4.0 GPA. No longer practicing, her professional career in Occupational Therapy was primarily focused on Neuro rehabilitation. Raised in Kokomo, IN, she and her husband, Ryan Kitchell, returned to Indiana in 2002 after living in New Hampshire. Now residing in Zionsville,

her primary role has been caregiver to their four children. She was appointed to Indiana's Interagency Coordinating Council on Infants and Toddlers by Gov. Mitch Daniels as a parent representative. In 2019, Kitchell completed her second term on the Judicial Qualifications and Nominating Commission, having been appointed by Gov. Mitch Daniels in 2011 and Gov. Mike Pence in 2017. She is actively involved with the Children's Museum Guild of Indianapolis, the Zionsville Foundations Grants Committee, and her children's schools.

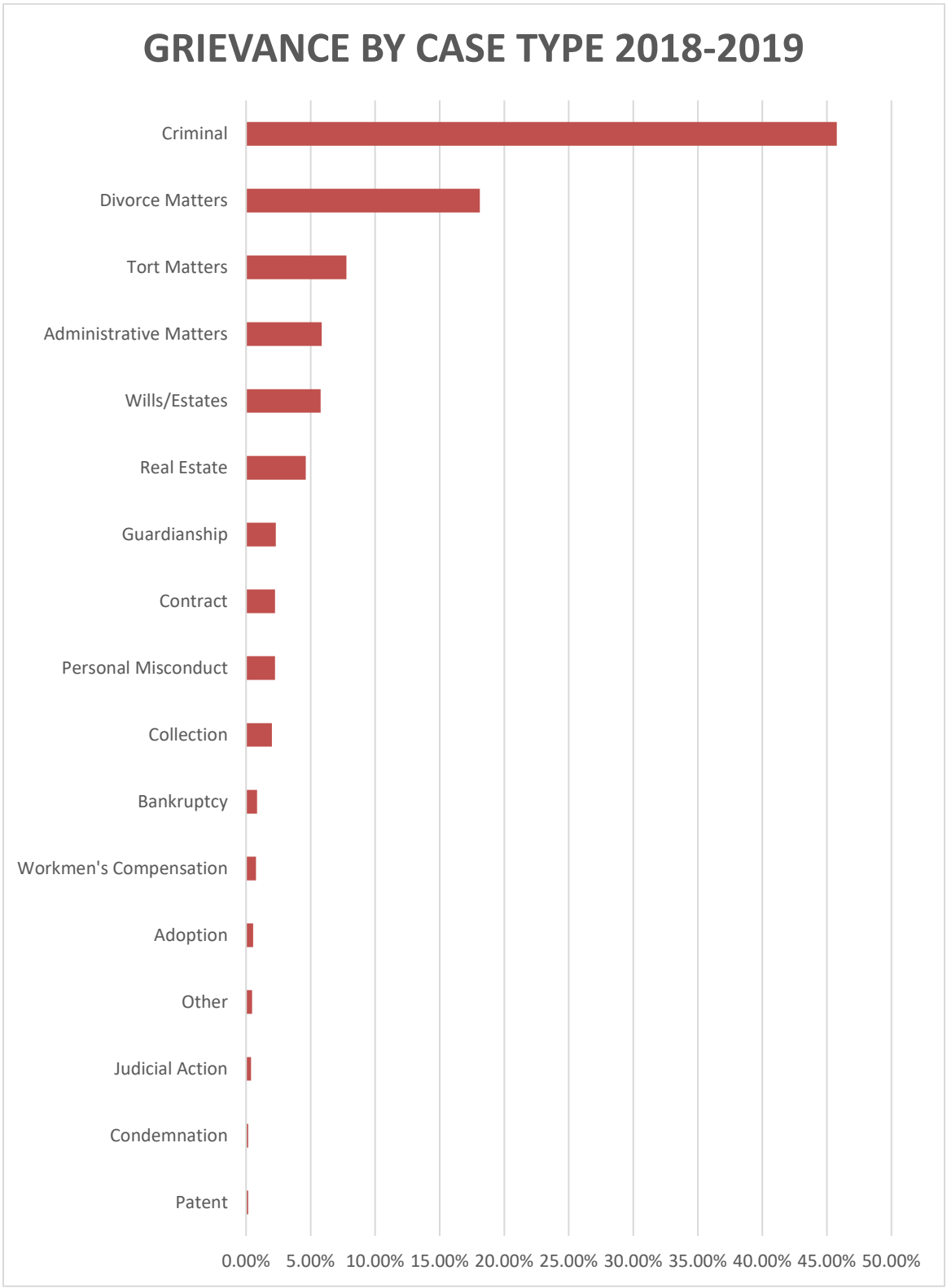

NUMBER OF GRIEVANCES FILED IN 2009-2019
2000
1800
1600
1400
1200
1000
800
600
400
200
0
09-'10
10-'11
11-'12
12-'13
13-'14
14-'15
15-'16
16-17
17-18
18-19
Series1

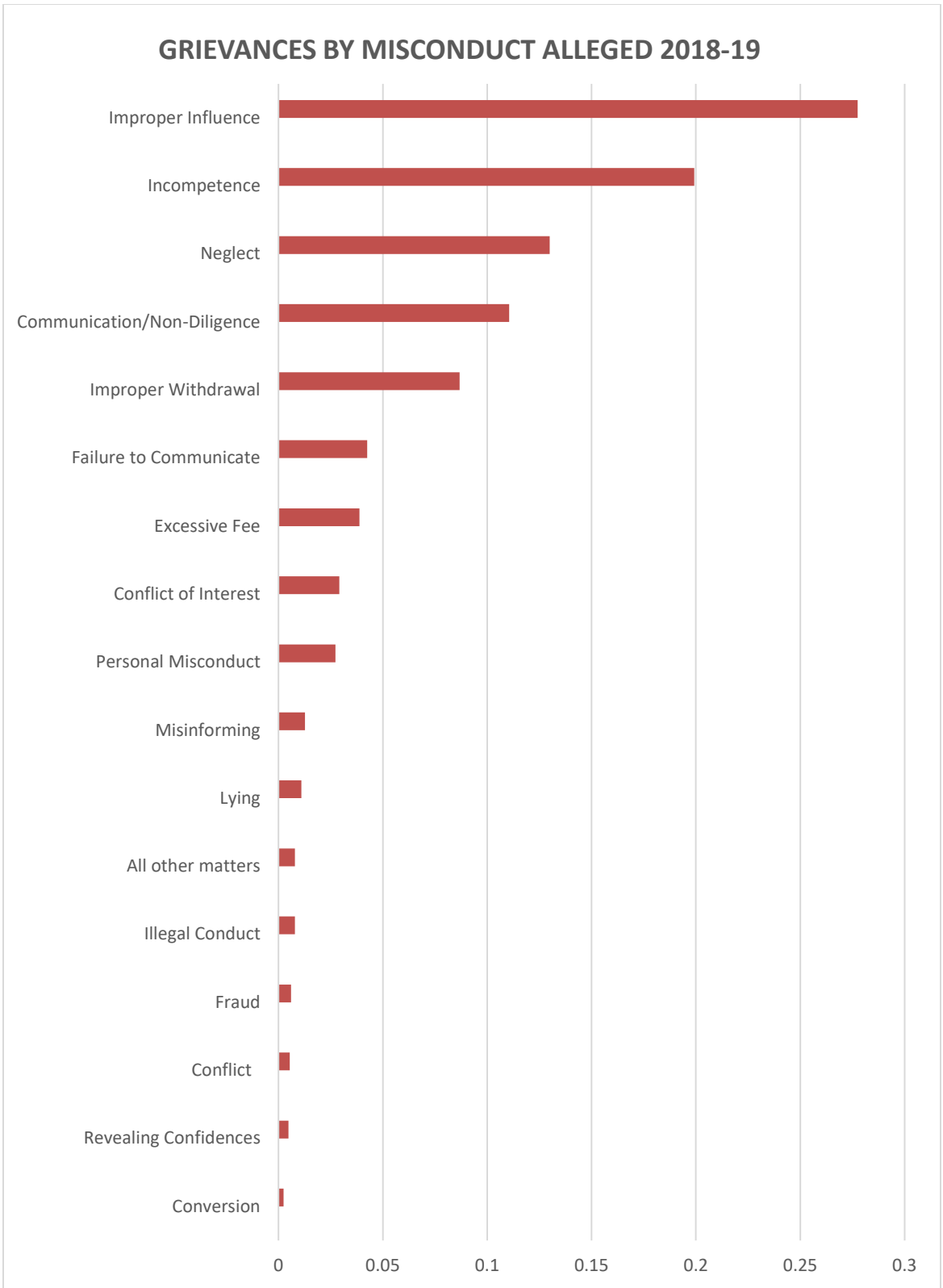

GRIEVANCES RATES 2009-2019
12.00%
10.00%
8.00%
6.00%
4.00%
2.00%
0.00%
09-'10
10-'11
11-'12
12-'13
13-'14
14-'15
15-'16
16-17
17-18
18-19
Grievances as % of Active Lawyers

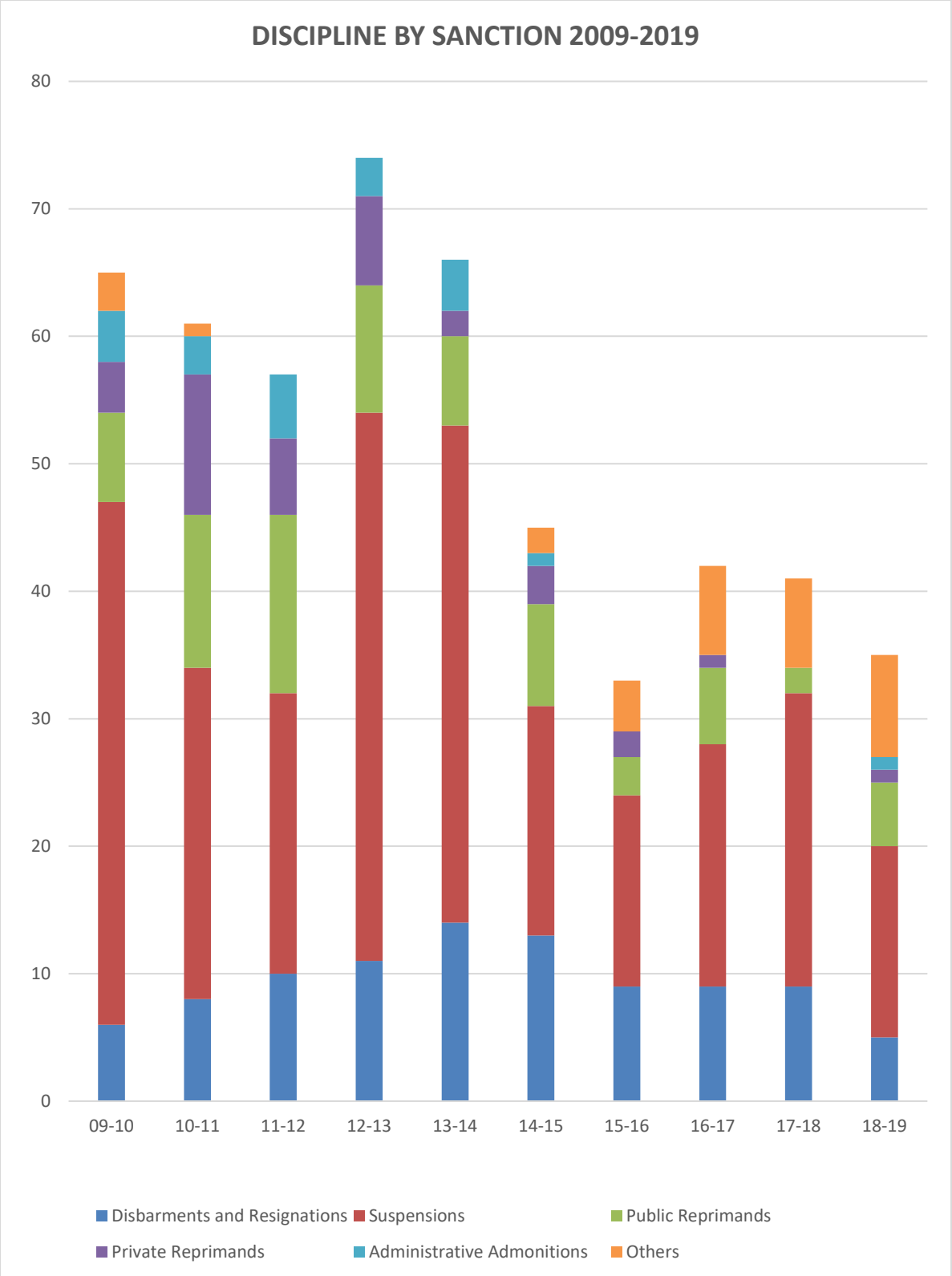
GRIEVANCES BY CASE TYPE AND MISCONDUCT ALLEGED 2018-2019

Case Type	Number	% of Total
Criminal	597	45.76%
Divorce Matters	235	18.10%
Tort	101	7.78%
Administrative Matters	76	5.86%
Wills/Estates	75	5.78%
Real Estate Matters	60	4.62%
Guardianship	30	2.31%
Contract Matter	29	2.23%
Personal Misconduct	29	2.23%
Collection	26	2.00%
Bankruptcy	11	.85%
Workmen's Compensation	10	.77%
Adoption	7	.54%
Other	6	.46%
Judicial Action	5	.39%
Condemnation	2	.15%
Patent	2	.15%
TOTAL	1298	100%

Alleged Misconduct	Number	% of Total
Improper Influence	457	27.75%
Incompetence	328	19.91%
Neglect	214	12.99%
Communication/Non-Diligence	182	11.05%
Improper Withdrawal	143	8.68%
Failure to Communicate	70	4.25%
Excessive Fee	64	3.89%
Conflict of Interest	48	2.91%
Personal Misconduct	45	2.73%
Misinforming	21	1.28%
Lying	18	1.09%
All Other Matters	13	.79%
Illegal Conduct	13	.79%
Fraud	10	.61%
Conflict	9	.55%
Revealing Confidences	8	.49%
Conversion	4	.24%
TOTAL	1647	100%


GRIEVANCE BY CASE TYPE 2018-2019
Criminal
Divorce Matters
Tort Matters
Administrative Matters
Wills/Estates
Real Estate
Guardianship
Contract
Personal Misconduct
Collection
Bankruptcy
Workmen's Compensation
Adoption
Other
Judicial Action
Condemnation
Patent
0.00% 5.00% 10.00% 15.00% 20.00% 25.00% 30.00% 35.00% 40.00% 45.00% 50.00%


GRIEVANCES BY MISCONDUCT ALLEGED 2018-19
Improper Influence
Incompetence
Neglect
Communication/Non-Diligence
Improper Withdrawal
Failure to Communicate
Excessive Fee
Conflict of Interest
Personal Misconduct
Misinforming
Lying
All other matters
Illegal Conduct
Fraud
Conflict
Revealing Confidences
Conversion
0
0.05
0.1
0.15
0.2
0.25
0.3


DISCIPLINE BY SANCTION 2009-2019
80
70
60
50
40
30
20
10
0
09-10
10-11
11-12
12-13
13-14
14-15
15-16
16-17
17-18
18-19
Disbarments and Resignations
Suspensions
Public Reprimands
Private Reprimands
Administrative Admonitions
Others

INDIANA SUPREME COURT DISCIPLINARY COMMISSION FUND
Statement of Revenues and Expenses (Unaudited)
Fiscal Year Ending June 30, 2019

BEGINNING DISCIPLINARY FUND BALANCE		$869,943
REVENUES:		
TOTAL REGISTRATION FEES COLLECTED		$1,702,985
REVENUE FROM OTHER SOURCES:		
Court Costs	20,872	
Reinstatement Fees	2,500	
Investment Income	240	
Rule 7.3 Filing Fees	7,400	
Other	0	
TOTAL REVENUE FROM OTHER SOURCES		$31,012
TOTAL REVENUE		$1,733,997
EXPENSES:		
OPERATING EXPENSES:		
Personnel	1,690,195	
Travel	51,429	
Investigations/Hearings	40,130	
Dues and Library	24,284	
Postage and Supplies	24,251	
Utilities and Rent	93,694	
Maintenance	17,314	
Equipment	28,422	
Other Expenses	718	
TOTAL OPERATING EXPENSES		$1,970,437
TOTAL EXPENSES		$1,970,437

Section Two

Donald R. Lundberg, *Ten Ways to Stay Out of Trouble*, Vol. 50, No. 9 RES GESTAE 30 (2007)

ETHICS CURBSTONE

TEN WAYS TO STAY OUT OF TROUBLE

Trouble you can't fool me, I see you behind that tree,
Trouble you can't fool me, trying to get the ups on me,
Trouble you can't fool me, I see you behind that tree,
You want to jump on me.

"Trouble, You Can't Fool Me", lyrics by Frederick Knight and Aaron Varnell

From the esoterica of last month's column about lawyer bashing to something more practical, here is a list of some things lawyers can do to stay out of trouble. My focus is staying out of trouble with the Disciplinary Commission, with the added benefit that this same list works well for avoiding malpractice claims. Since they account for the vast majority of all grievances filed against lawyers, I will focus on client relationships.

Each year, the Disciplinary Commission receives about 1,600 grievances against some of our 16,000 active lawyers, or one for every ten active lawyers per year. Put another way, the average lawyer will receive a grievance every ten years, or between four and five grievances during a typical legal career. Some practice areas spawn more grievances than others, but odds are at least one will finds its way to your door.

Defying the odds, many lawyers never receive a grievance. This is a worthy goal—one that every lawyer should strive to achieve—even though there can be no guarantee that one can avoid all grievances in the rough and tumble of the adversary system. I've had some of my own, but that's a story for another day.

What are the complaints against lawyers that are most easily avoidable? Here's my top ten list, in no particular order. It isn't scientific, but reflects my impressions after fifteen years or so of looking over grievances.

First, know how to operate a trust account. Even if you aren't in charge of your firm's trust account, you still have a responsibility to make sure that your firm's trust account is being properly managed. Managing a trust account correctly isn't rocket science, but there are a lot of detailed tasks that must be done right. For a fairly comprehensive guide to managing your trust account, look at the manual the Disciplinary Commission publishes on its website at: http://www.in.gov/judiciary/discipline/docs/trust-guide.pdf.

Second, communicate with your clients. There is a client communications death spiral. It goes like this. The client hasn't heard from the lawyer. She wants to know what's going on. She calls the lawyer and leaves a message. There isn't all that much to report, so the lawyer doesn't return the call. The client becomes frustrated. Calls again. Leaves another message. And so it continues. The client is now thoroughly frustrated with the lawyer. And the lawyer has now identified the client as a "problem" client, a pest. Perceiving that the client is no longer a happy client, the lawyer engages in normal human behavior—avoidance of the unpleasant. Wouldn't it be better if the lawyer

preemptively contacted the client at regular intervals, rather than waiting to react to the client? Plus, clients can be put at ease about periods of rare communications by being reassured that significant developments in the matter are not expected and that the lawyer can be trusted to promptly contact the client when something arises. Being preemptive doesn't always work, so make sure you respond to all client contacts within twenty-four hours. If you're too tied up to do it yourself, have a staff person make the contact to either assist the client or, if it requires your personal attention, explain the reason for your delay. There are many other efficient client communication techniques that preempt client concerns about their cases, including always sending the client a copy of correspondence and pleadings pertaining to the matter.

Third, educate your client in order to create realistic expectations. But notice that I didn't say to deflate your client's otherwise reasonable expectations. If you allow your client to leave your office with unrealistic expectations about how long a case is going to take or what the probable outcome of a case is going to be, you are guaranteed to have a frustrated client during the representation and a disappointed client at the end.

Fourth, when unforeseen negative developments occur in a case, be prompt and candid about notifying your client. Especially when it is significant, don't hide behind letters or staff. You need to personally contact the client by telephone or schedule the client in for an office meeting. The client is entitled to an explanation of what happened and what can be done to address the problem.

Fifth, it is not a betrayal of the client's interests to practice law defensively. This includes documenting the substance of communications with clients, especially when those communications pertain to client decisions about the representation. You should send a confirming letter to the client documenting every client decision that is significant for the case. Sometimes it is good to get a client sign-off on the written documentation. This is especially so with matters pertaining directly to the outcome of the matter—such as settlement authority and client acceptance of a settlement.

Sixth, have your fee understanding with the client documented in writing. I know, Rule of Professional Conduct 1.5(c) requires written fee agreements (signed by the client) only in contingent fee representations. But, c'mon, that doesn't mean it's a good idea to have your fee understanding with the client entirely undocumented. And when you do have a written fee agreement, avoid using words, like "retainer," that don't clearly communicate to the client what is intended. The fee letter should fulfill the broader function of being an engagement letter that clearly defines the scope of the representation and sets out other important aspects of the lawyer-client employment contract. Fee disputes are not always avoidable. But most of them can be resolved when the lawyer and client discuss the dispute in good faith. Lawyers throw fuel on the fire of the client's unhappiness with a fee by avoiding candidly discussin http://www.wral.com/ g it with the client. And it is a whole lot easier to work things out with the client when the basics of the fee agreement have previously been reduced to writing, and both lawyer and client can refer to it as a foundation for further discussions.

Donald R. Lundberg, *Ten Ways to Stay Out of Trouble*, Vol. 50, No. 9 RES GESTAE 30 (2007)

In hourly representation matters, a good initial fee agreement is not enough if the lawyer isn't diligent about billing the client at regular intervals. Most clients are highly sensitive to the transaction costs of using lawyers to resolve disputes. It is the client, not the lawyer, who needs to keep tabs on escalating legal fees in order to make rational economic decisions about forging on, bailing out, or seeking compromise.

Seventh, you're either in or you're out. Sometimes clients get behind in paying fees. But much like child support and visitation, the client's obligation to pay fees and the lawyer's duty of diligence are not dependent on each other. You can't hold your reasonably necessary legal services ransom as leverage to get your client to pay up. If the client doesn't hold up his end of the fee bargain, you have a basis to terminate the representation. But if you choose to continue, you are still obligated to pursue the client's case with reasonable diligence.

Eighth, don't play games with the client's file. I know, I know, the common law of Indiana gives lawyers a right to assert a retaining lien against a former client's file in order to protect the lawyer's claim to unpaid fees. See *State ex rel. Shannon v. Hendricks Circuit Court*, 183 N.E.2d 331, 333 (Ind. 1962) and a bunch of court of appeals cases. But just because you can, doesn't mean you should. Asserting a retaining lien is a brilliant strategy for making an angry client even angrier, perhaps to the point of filing a grievance or making a malpractice claim.

Ninth, be careful of what you promise your clients, but when you make a promise, keep it. Promising a specific outcome of a representation is always risky business. It should be avoided. The greatest risk of this occurs when lawyers and prospective clients initially consult on a matter. The client wants to hear a rosy prognosis. The lawyer normally wants the case and is too often ready to give the rosy prognosis the client wants to hear. The lawyer may forget about that conversation, but the client won't.

Along the way, lawyers often make commitments to their clients to accomplish tasks or otherwise handle aspects of a case within a particular timeframe. There's nothing wrong with this—it's a good thing, especially if you follow through. My point is, once committed, you have a strong obligation to complete the task in line with your promise, or failing that, to notify the client as soon as you know that it can't be done. At that point you owe your client a truthful explanation of why you couldn't keep your word.

Tenth, don't aggravate matters by failing to comply with your obligations if you do receive a grievance. This includes timely responding to the grievance in writing with a response that is thorough, accurate and well documented. See, Lundberg, *Ethics Curbstone: What Do You Do When You Receive a Grievance?*, Vol. 49, No. 2 RES GESTAE 35 (September 2005).

Applying even the best client relations techniques, there is no guarantee that a grievance will not come your way—if not from your client, then from a disgruntled opposing party. But maintaining good client relations and being a civil advocate will take you a long way to staying off the Disciplinary Commission's radar screen.

The Top Ten:
A Summary of Recent Professional Liability Cases
2019 UPDATE

Chuck Kidd,
Kevin McGoff,
Margaret Christensen &
Katie Dickey

TABLE OF CONTENTS

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

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

In ***Matter of Fontanez*, 53 N.E.3d 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 unemployed and addicted to drugs, threatening to take the child from the grandparents' home.

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

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

In ***Matter of Drendall*, 53 N.E.3d 404 (Ind. 2015)**, Respondent violated Indiana Professional Conduct Rules 3.5(b), 8.4(d), and 8.4(f). Respondent represented the maternal grandparents in a custodial action of their five-year-old grandson because the child's mother had just died. The child's father did not live in Indiana, was in arrears on child support, and had very little contact with his child. The grandparents were from Kenya and wanted to take their grandson there after the funeral. Respondent filed a motion in probate court seeking leave for the grandparents to intervene and for the court to award custody to the grandparents. Respondent did not serve the motion on the father.

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

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

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

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

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

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

Number 9 CRIMINAL CONDUCT

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

In ***Matter of Brewer*, 110 N.E.3d 1141 (Ind. 2018)**, Respondent faced 13 counts of attorney misconduct that were brought against her by the Disciplinary Commission. Counts 1 through 11 involved Respondent neglecting eleven different cases of clients who had hired her for criminal and family law matters. Respondent failed to attend hearings and timely file briefs, failed to return a client's file after being terminated, failed to keep clients informed about their status of their case, etc. She later admitted to using cocaine during these representations.

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

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

In ***Matter of Smith*, 97 N.E.3d 621 (Ind. 2018)**, Respondent violated Indiana Professional Conduct Rule 8.4(b) when he committed a criminal act that reflected

adversely on his honesty, trustworthiness, or fitness as a lawyer. During a phone conversation between the Respondent and his wife, the Respondent threatened to murder his wife with an axe. He then drove to his wife's house, with the axe in the front seat, and was trying to enter her home when the police arrived. The Court points out the "profoundly troubling" facts of this case and states that there was a "heightened possibility that Respondent might have carried out his threat" if his wife had not left the house and called the police before he arrived.

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

In ***Matter of Johnson III*, 74 N.E.3d 550 (Ind. 2017)**, Respondent, who was the chief public defender in Adams County and married, had an affair with "Jane Doe" ("J.D.") who had a conviction for operating while intoxicated. Shortly after Respondent's wife left him, Respondent began harassing Jane Doe by phone and Facebook, including a phone call where Respondent was crying and shooting a gun during the phone call. Eventually, a protective order was issued, but was thereafter violated. The Court held that a suspension for a period of not less than one year, without automatic reinstatement, was warranted for Respondent's pattern of harassment of Jane Doe. The Court declined to determine whether Respondent's criminal stalking, harassment, and invasion of privacy conduct violated Rule 8.4(b) because the hearing officer did not make specific findings on these allegations.

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

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

Professional Conduct Rules 8.4(b) and 8.4(c) and was required to pay restitution to the victim before petitioning for reinstatement.

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

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

In ***Matter of Keaton*, 29 N.E.3d 103 (Ind. 2015)**, Respondent was a married attorney who began an intimate relationship with his daughter's college roommate ("JD"). The Respondent and JD maintained a long-distance relationship for three years. JD permanently ended the relationship in March 2008.

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

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

JD received an *ex parte* protective order against Respondent in response to the stalking and threats.

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

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

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

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

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

In ***In re Knight,* 42 N.E.3d 80 (Ind. 2015)**, Respondent pled guilty to domestic battery, a Class A misdemeanor, and received a suspended sentence of probation that included drug and alcohol monitoring. In the Order, there were no facts cited in aggravation. On

the other hand, the Court agreed with multiple mitigating facts including: the Respondent had no prior discipline, promptly reported his conviction, voluntarily enrolled in JLAP, was successfully discharged from JLAP, received counseling that involved domestic violence therapy, and was remorseful for his actions. Respondent violated Indiana Professional Conduct Rule 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. Respondent came across a police report of a woman who had been arrested for engaging in prostitution. The report contained the woman's personal phone number. The Respondent recognized the phone number from an online escort service and proceeded to send text messages to the phone number. Respondent told the woman that a former client had given him her information and that he could help with the woman's situation; stating he would "work with" her regarding her attorney fees.

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

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

Number 8

CONFLICTS OF INTEREST

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

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

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

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

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

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

The Court found Respondent in violation of Rules 1.1, 1.7(a), and 5.3(b) and imposed a public reprimand for his misconduct.

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

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

In ***Matter of Kirsh*, 83 N.E.3d 699 (Ind. 2017)**, Respondent was retained to represent clients who were seeking to adopt children. The "Birth Mother" decided to select another set of adoptive parents after the Respondent provided her with profiles of other candidates seeking to adopt. Respondent acted without consulting with his clients and attempted to have the clients sign a release form, which would bar clients from seeking

an action against Respondent with the Disciplinary Commission. Respondent violated Indiana Professional Conduct Rules 1.7(a), 1.8(b), 8.4(d) and was disciplined with a public reprimand.

In ***Matter of 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 attorney 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 Indiana Professional Conduct Rules 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 Indiana Professional Conduct Rule 1.4(b), for failure to explain a matter to the extent reasonably necessary to permit a client to make informed decisions regarding the representation, and 5.6(a) for making an employment agreement that restricts the rights of a lawyer to practice after termination of the relationship. The Court imposed a public reprimand for Respondent's misconduct.

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 Indiana Professional Conduct 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 fee if the case was resolved without trial, 45% plus expenses if the case was resolved with trial and a $175 per hour of work performed on the case if the case was discharged by Client prior to an eventual settlement recover. Respondent was an associate with Law Firm, however, while Client's case was ongoing, Respondent left Law Firm and began work with a new law firm. Client chose to have Respondent continue to represent him under the same fee terms. When the case was settled, Respondent kept 35% as her fee and negotiated a $2,000 settlement with Law Firm for the time spent on the case. This resulted in the Client being charged 46% of the settlement amount. Rule 1.5(a) prohibits the collection of an unreasonable fee, but the Respondent returned the excess amount to Client upon facing disciplinary charges. The Court issued a public reprimand for Respondent's misconduct.

In ***Matter of Emmons*, 68 N.E.3d 1068 (Ind. 2017)**, Respondent was appointed guardian of an 88-year old incapacitated woman where his duties included being a signatory on her bank accounts. Respondent wrote three checks to himself from the PTSB account, totaling $20,000, indicating that they were for legal fees. The Court

ordered Respondent to file accounting records and appear before the court, which Respondent failed to do. The Court held that first, Respondent was under an indefinite suspension due to his noncooperation with the Commission's investigation, and second, a suspension of not less than three years was warranted for Respondent's misconduct regarding converting guardianship funds.

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

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

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

***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, 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 that he wanted to resolve the case through a plea agreement.

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

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

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

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

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

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

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

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

appropriate.

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

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

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

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

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

The Court then determined that Indiana Professional Conduct Rule 1.15(a) generally requires the segregation of advance payments of attorney fees until actually earned. However, the segregation and accounting requirements are not applicable to flat fees, as discussed in *Matter of Stanton*, 504 N.E.2d 1 (Ind. 1987). In determining whether the

fee was reasonable, the Court relied on ***Matter of Thonert*, 682 N.E.2d 522 (Ind. 1997)**. In *Thonert*, the Court noted that nonrefundable retainers are not per se unreasonable, but that one should be justified by value received by the client or detriment incurred by the attorney. When such justification exists, the Court emphasized that it should be included in the fee agreement. Thus, the Court held that an assertion that an advance payment is nonrefundable violates the requirement in Rule 1.5(a) that a fee be reasonable. In the case of a flat fee, the agreement should reflect the fact that such a flat fee is nonrefundable except for failure to perform the agreed legal services.

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

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

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

> The trial court in this case held that the reasonable value of Lyons' work should be determined commensurate with the hourly rate of a community attorney charging for similar services. Judge Staton, dissenting in the Court of Appeals in this case, read this as requiring a fee equal [to] 'the hourly rate of a community attorney…' [citation omitted]. The parties apparently make the same assumption. Lyons challenges this method of

> calculating the reasonable value of the firm's work. If a fee agreement provides for an hourly rate in the event of a pre-contingency termination, it is presumptively enforceable, subject to the ordinary requirement of reasonableness. See Indiana Professional Conduct Rule 1.5. We agree with Lyons that, in the absence of such an agreement, the value of a discharged lawyer's work on a case is not always equal to a standard rate multiplied by the numbers of hours of work on the case. Where the lawyers have agreed to work on contingent fees and there is no contractual provision governing payment in the event of discharge, compensating the predecessor lawyer on a standard hourly fee could produce either too little or too much, depending on how the total hourly efforts of all lawyers compare to the contingent fee.

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

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

Number 6

MALPRACTICE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Number 5

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 regarding letterhead, in-person solicitation and advertising of "specialty" practices.

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

In ***Matter of Wray*, 91 N.E.3d 578 (Ind. 2018)**, Respondent used a referral system with non-lawyers to solicit clients for claims against a mobile and modular home manufacturer. During his solicitation of the homeowners, Respondent and his agents would have clients sign agreements regarding Respondent's representation without discussing the merits of their claims. These agreements inaccurately reflected how litigation costs would be advanced and Respondent misled homeowners to settle their existing claims in anticipation of new potential claims. Respondent also did not properly manage trusts and ledgers for the clients. The Court held that Respondent's relationship with the non-lawyers who were soliciting clients for him constituted an agent relationship and that the signed agreements and statements to clients were misleading and

deceptive. The Court found that Respondent violated Rules requiring reasonable consultation and communication with clients; prohibiting unreasonable fees; requiring lawyers to maintain trust account records; requiring reasonable efforts to supervise nonlawyers employees; prohibiting the sharing of fees with nonlawyers; prohibiting direct solicitation and payment in exchange for a referral; and prohibiting dishonesty. The Court suspended Respondent from practicing for nine months without automatic reinstatement.

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

In ***Matter of Fratini*, 74 N.E.3d 1210 (Ind. 2017)**, Respondent was affiliated with a California corporation that advertised various debt-relief services nationwide via a website and direct mail solicitation. The debtors were screened by nonlawyers who asked clients to sign nonrefundable retainer agreements. The retainer agreements contained a $399.00 fee, a legal fee equal to 18% of the total debt at issue, and monthly payments toward escrow and legal fees over a four-year span. The Respondent's only role was to review and sign the retainer agreements after they had been signed by the debtor and the USLSG nonlawyer. The Court approved a Conditional Agreement which stipulated that Respondent violated: Rules 1.4(a)(1) and (5), Rule 5.3 and Guideline 9.3 by failing to reasonably supervise nonlawyers, Rule 5.5(a) by assisting in the unauthorized practice of law, and Rule 8.4(a) by knowingly assisting another to violate the Rules (charging and collecting an unreasonable fee and using an improper trade name). The Court suspended Respondent from the practice of law for a period of not less than six months, without automatic reinstatement.

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

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

Number 4

CLIENT 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, the size of his practice, and his specialties within the law. The Court found the Respondent's willful dishonesty harmful to his clients and the public and suspended Respondent for 18 months, without automatic reinstatement.

In ***Matter of Mulvany*, 83 N.E.3d 72 (Ind. 2017)**, Respondent represented clients in federal court seeking judicial review of Social Security claims where he applied for attorney fees that did not accurately reflect his "actual time," which was a statutory requirement. Respondent was found to have a tendency to round up to the nearest hour on each of his tasks. Upon review of the inappropriate timekeeping practices, the parties agreed that the Respondent was in violation of knowingly making a false statement of fact to a tribunal and engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. The Court held that a public reprimand was warranted for the Respondent's misconduct.

In ***Matter of Jun*, 78 N.E.3d 1100 (Ind. 2017)**, Respondent was hired by a United States citizen to assist his wife, a citizen and resident of South Korea, in immigrating to the United States to live permanently. Respondent proposed that the client's wife enter the United States on a non-immigrant visa or visa waiver, and then seek a permanent residency status. Respondent knew that to obtain the non-immigrant visa or visa

waiver, his client's wife would have to state falsely on her application that she intended to leave at the expiration of her non-immigrant visa period, fail to reveal her marital status to a United States citizen, or make other false or misleading statements. When the client's wife arrived in the United States, she was denied entry based on false statements to customs officials and forced to take the next return flight to South Korea. The Court found that Respondent counseled or assisted his client to engage in conduct he knew to be criminal or fraudulent in violation of Rule 1.2(d) and imposed a public reprimand.

In ***Matter of Yudkin*, 61 N.E.3d 1169 (Ind. 2016)**, Respondent, knowingly made several misrepresentations regarding the timeliness of a motion to correct error ("MTCE") during trial. In May of 2013, the trial court ruled in favor of the Respondent, but the appellate court found that Respondent's statements were misleading. In response, Respondent filed a frivolous federal lawsuit against the opposing party, alleging defamation. Upon review, the Commission found that Respondent had "selectively quoted the language of Trial Rule 59(C) in a manner that suggested" the opposing party's MTCE would have been untimely regardless of the misrepresentation. The Court suspended Respondent for 90 days, without automatic reinstatement.

In ***Matter of Epstein*, 87 N.E.3d 470 (Ind. 2017)**, the Respondent represented a defendant that recorded their phone conversations. The phone conversations demonstrated that Respondent improperly bragged about his personal relationships with the judges, which implied that he could influence the judges' decisions; used derogatory terms when discussing another client's race; and told the defendant that he could flee to avoid or delay criminal prosecution. Respondent violated Rules 1.2(d), 8.4(e), and 8.4(g). Thus, Respondent was suspended from the practice of law for 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 Respondent tracked T.G. down to Iowa in order to make "restitution." He convinced her to forge a notarized document purporting to give her $15,000 in restitution but only actually gave her $1,500. He presented this document to the Commission during his reinstatement hearing, but T.G. testified that she never received anything greater than $1,500. The Court determined that the "Respondent's elaborate scheme to convince the Commission and this Court that he made full restitution to T.G. when in fact he had not –are but the culmination of a years-long endeavor to game the system." The Court ultimately disbarred the Respondent.

In ***Matter of Fox*****,** 78 N.E.3d 1096 (Ind. 2017), Respondent moved for leave to correct a one-page Table of Contents and a four-page Table of Authorities. The Court granted the motion and specifically ordered Respondent not to make any substantive changes. However, when Respondent filed a corrected brief it contained a thirty-six page Table of Contents and fifty-nine additional sources. The Court held that a public reprimand was warranted for Respondent's misconduct.

In ***Matter of Cohen*****, 18 N.E.3d 996 (Ind. 2014)**, Respondent received a ninety-day suspension with automatic reinstatement for violating Professional Conduct 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 disc. 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 disc 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 the intern and to interfere with her employment. Respondent sent the clip to attorneys at the firm where she had accepted a job offer in an effort to adversely affect her employment. Respondent sent Intern an email accusing her of lying and misleading him, and Respondent drafted a fictitious email thread with the subject line "Firm slogan becomes 'Bose means Snuff Porn Film Business' w/addition of [Jane Doe] "Bose means Snuff Porn Film Business" w/ addition of [Jane Doe]", and suggested the Intern was a danger to female professionals.

Respondent recruited a paralegal to disseminate the email with directions on how to avoid having the e-mail linked back to them. Respondent was out of town when the email was sent. Thereafter, the intern served him with a protective order with the email attached.

Respondent's firm demanded he resign, and he complied. The hearing officer found the email was a "vindictive attempt to embarrass and harm [Intern] both personally and professionally." The Court found that Respondent violated Professional Conduct Rule 3.3(a)(1) by knowingly submitting false responses to RFAs in defense of Intern's civil action against him. Respondent admitted to originally misrepresenting his involvement with the email.

The Court concluded that Respondent violated Indiana Professional Conduct Rules 3.3(a)(1), 8.1(a), 8.1(b), 8.4(a), 8.4(c), and 8.4(d), by, among other things, engaging in a pervasive pattern of conduct involving dishonesty and misrepresentation that was prejudicial to the administration of justice. For Respondent's misconduct, the Court suspended Respondent for three years, without automatic reinstatement.

Number 2 TRUST ACCOUNTS

Misconduct involving the funds of clients and third parties is one of the most serious acts of misconduct a lawyer can commit. As a result, the sanctions for misconduct in these cases are equally serious. What follows are highlights of recent cases provided for a flavor of the kind of sanctions the Supreme Court metes out for violations in this area.

In ***Matter of Gabriel*, 120 N.E.3d 189 (Ind. 2019)**, Respondent was appointed as guardian of her incapacitated father's person and estate by the guardianship court. The Respondent spent considerable sums of her own money taking care of her incapacitated father, which significantly depleted her personal assets. After the sale of her father's residence, the guardianship received approximately $40,000. The Respondent started taking withdraws and making payments to herself from the estate without obtaining the requisite court approval and in violation of a restraining order that had been issued by the guardianship court. The Respondent also failed to file an accounting with the court and subsequently failed to comply with a court order to do so.

The Commission and the Respondent agreed that the Respondent violated Rule 3.4(c) based on her failure to comply with the court order, but the Commission also alleged violation of Rule 8.4(b). The Court, however, found that the Respondent's actions did not violate Rule 8.4(b) because the Respondent's conduct did not rise to the level of criminal exploitation. The Court suspended Respondent for 90 days, with automatic restatement.

In ***Matter of Schuyler*, 97 N.E.3d 618 (Ind. 2018)**, Respondent stole at least $550,000 from the estates of six clients. One of the estates filed a grievance against the Respondent and the Commission found that Respondent did not comply with orders for accounting and distribution of assets. Respondent did not appear at multiple hearings and a warrant was issued for his arrest. He was eventually charged with fifteen felony counts and pled guilty, leaving him to spend 8 years incarcerated and to pay restitution. The Court disbarred Respondent.

In ***Matter of Mercho*, 78 N.E.3d 1101 (Ind. 2017)**, Respondent misappropriated funds from his attorney trust account over a period of several years, making dozens of

disbursements of client funds for purely personal purposes. At least two of these instances involved disbursement of funds Respondent was holding in trust for another attorney and that attorney's client. During the Commission's investigation, Respondent made numerous false statements, and submitted a client ledger containing false entries, in an attempt to extricate himself from the disciplinary process. The Court held that a suspension for a period of 180 days, with 90 days actively served and the remainder stayed subject to completion of at least one year of probation was warranted for Respondent's misconduct.

In ***Matter of James*, 70 N.E.3d 346 (Ind. 2017)**, Respondent significantly overdrew his trust account, mismanaged his trust account, converted client funds, made unauthorized withdrawals, and failed to cooperate with the Disciplinary Commission. During this case, Respondent was already under suspension in two other cases for failure to cooperate with the Commission. The Court disbarred Respondent.

In ***Matter of Ulrich*, 78 N.E.3d 1097 (Ind. 2017)**, Respondent represented his client in a personal injury lawsuit where the settlement was $100,000. The settlement was deposited into Respondent's trust account where he held the client's funds while Respondent sued the client's insurer. The client was only able to obtain its settlement claim after bringing suit under new legal representation. During this time, Respondent failed to keep individual client ledgers, withdrawal fees earned, and unauthorized withdrawals. The Court held that a suspension for a period of six months, all stayed subject to completion of at least two years of probation, was warranted for Respondent's misconduct.

In ***Matter of Safrin*, 24 N.E.3d 417 (Ind. 2015)**, Respondent maintained two attorney/client trust accounts ("Trust Accounts"), neither of which were registered as an Interest on Lawyers Trust Account ("IOLTA"). Respondent did not notify the banks that the Trust Accounts were subject to overdraft reporting to the Commission. On his Attorney Annual Registration Statements from 2008 through 2011, Respondent falsely stated that he was exempt from maintaining an IOLTA. Over several years, Respondent shared signatory authority for the Trust Accounts with another lawyer, who stole money from the Trust Accounts. This resulted in overdrafts, which were not reported to the Commission because the accounts were not registered as IOLTA accounts. Additionally, Respondent falsely claimed to the Commission that his fee arrangements never contained a nonrefundable fee provision. The parties agree that Respondent violated Rules 1.5(a), 1.15(g), 8.1(a)-(b) and 8.4(c). The violations stemmed from Respondent falsely certifying he was exempt from holding an IOLTA trust account, making an agreement for an unreasonable fee, providing false statements to the Commission, and engaging in dishonesty and deceit. The Court suspended Respondent from practicing law for six months, without automatic restatement.

In ***Matter of Thomas*, 30 N.E.3d 704 (Ind. 2015)**, Respondent initially employed various experienced persons to manage his law office and attorney trust account. However, at some point between 2002 and 2004, Respondent's wife took over management of Respondent's trust account. The wife had no prior experience with trust accounts or

fiduciary accounting. Beginning in 2004 or 2005, Respondent gave control of his trust account to his wife and did not adequately supervise her. In 2006, Respondent became aware that his trust account was in poor shape and needed to be "untangled." Despite knowing his wife's accounting was incorrect, during the next several years Respondent failed to take appropriate measures to supervise his wife or reconcile his trust account issues. Throughout 2009 and 2010, Respondent's wife signed Respondent's name to the drawer's line on trust account checks and opened trust account bank statements received in the mail prior to giving them to Respondent. Monies from Respondent's trust account and operating account would routinely intermix. In 2009, Respondent filed for bankruptcy but failed to list his attorney trust account in his Statement of Financial Affairs. The Court concluded that Respondent violated Rules 1.1, 1.15(a), 3.3(a)(1), 5.3(a)-(c), 8.4(a)-(b), for failing to diligently supervise his wife, commingling client and attorney funds, and engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. Respondent was suspended from the practice of law for eight months.

Number 1

NEGLECT AND LACK OF COMMUNICATION

By far and away, year after year, this is the most common complaint grievants make about their lawyers...or former lawyers. Almost invariably, the reported decisions involving this form of misconduct are multiple count matters which result in the lawyer's suspension or disbarment. For illustration, what follows is a partial list of recent disciplinary actions involving these elements which resulted in public discipline.

In ***Matter of Ricks*, 124 N.E.3d (Ind. 2019)**, Respondent committed attorney misconduct by neglecting clients' cases on four separate occasions and by failing to cooperate with the disciplinary process. In Client 1's case, Respondent accepted a retainer payment to assist the client with an expungement petition. Respondent failed to advance the client's case for nearly three years and did not return client's initial retainer payment.

In Client 2's case, Respondent again collected a retainer payment to assist the client with a post-conviction relief action. Over the course of three years, Respondent grew less responsive to inquiries from Client 2 and ultimately failed to appear for a hearing where the court entered judgment against the client.

In Client 3's case, Respondent again accepted a retainer payment to assist the client with a post-conviction relief action and ultimately failed to advance the case. The court removed Respondent as counsel for failing to appear at a hearing. In Client 4's case, Respondent charged and collected an advance payment to assist the client with a sentence modification but quickly grew unresponsive and ultimately failed to advance the case. Respondent had been suspended twice before for almost identical transgressions, and the Court ultimately found the Respondent in violation of Professional Conduct Rules 1.3, 1.4, 1.16, 8.1, and 8.4. As a result, the Court suspended Respondent from the practice of law for two years, without automatic reinstatement.

In ***Matter of Coleman*, 67 N.E.3d 629 (Ind. 2017)**, Respondent falsely represented that he was associated with a law firm while soliciting employment with a client. During the representation, the client had difficulty communicating with Respondent, and Respondent failed to keep client informed about events in the case, made decisions about the case without consulting the client, and failed to appear at a pretrial

conference. Despite the client's prior instructions that he did not want to enter a plea agreement, Respondent negotiated a plea agreement without consulting the client. The client then fired Respondent and hired new counsel. Respondent did not withdraw his representation or forward a copy of the client's file to new counsel until after a show cause proceeding was initiated against him. The Court found Respondent's conduct to be "wide-ranging, pervasive, retaliatory, and deceptive." Respondent also struck his wife in the presence of four children. The Court suspended Respondent for two years, without automatic reinstatement.

In ***Matter of Staples*, 66 N.E.3d 939 (Ind. 2017)**, Respondent appeared as successor counsel for a criminal defendant. Respondent did not appear for a pretrial conference and did not timely respond to inquiries from court staff regarding his absence. When the client was unable to appear at a hearing due to his hospitalization, Respondent did not file a motion to continue although ordered to do so, and failed to appear during the show cause proceedings that ensued. Respondent was found in contempt, and failed to appear for a sanctions hearing. Respondent was ordered to appear with the client at a hearing; the client appeared, but Respondent did not. The trial court again found Respondent in contempt. The Court imposed a public reprimand for Respondent's misconduct.

In ***Matter of Jackson*, 24 N.E.3d 419 (Ind. 2015)**, Respondent signed an agreement with Consumer Attorney Services ("CAS"), a Florida firm, to be "of counsel" and to provide services to CAS's Indiana loan modification and foreclosure defense clients. CAS paid Respondent $50 (later raised to $75) for every Indiana loan modification client and $200 for each foreclosure client assigned to him. Non-lawyer employees of CAS performed all intake work for clients assigned to Respondent and drafted pleadings to review and file.

An Indiana resident hired CAS and was assigned to Respondent. The client was not informed that Respondent's role in his representation would be limited, nor was he informed about how fees would be shared between CAS and Respondent. The fee agreement called for an initial nonrefundable retainer followed by monthly payments for the duration of the representation. Other than making an initial brief phone call to the client and signing the fee agreement on behalf of CAS, Respondent had no involvement in attempting to obtain a loan modification from the client's lender. The client was eventually served a complaint for foreclosure. Following the foreclosure notice, a non-lawyer at CAS sent the client a "retainer modification agreement," which increased the client's monthly payments for continued representation. The lender of the home mortgage sought summary judgment, and Respondent filed a response on the client's behalf that was initially drafted by a non-lawyer at CAS. Throughout the proceedings, Respondent did not keep the client informed about the status of the litigation, did not consult with the client about the availability of a court-ordered settlement conference, and did not raise any substantive defenses. The client eventually terminated his relationship with CAS. CAS did not notify Respondent of the termination, and Respondent did not withdraw his appearance from the foreclosure action. The client eventually obtained a loan modification by directly negotiation with his lender. The client

sought a refund of unearned fees held by CAS but was unsuccessful.

The parties agreed that Respondent violated the following Rules of Professional Conduct: 1.4(a)(1)-(3),(5), 1.4(b), 1.5(e), 5.3(b), 5.4(c), 5.5(a), 8.4(a), (c)-(d). Among other things, Respondent failed to reasonably communicate and keep his client informed about the status of a matter, failed to obtain a client's required approval of a fee division, knowingly assisted another to violate the Rules of Professional Conduct, and engaged in deceitful misrepresentations. The Court suspended Respondent from practicing law for 120 days, with automatic reinstatement.

This has been an exposition of ten of the most common sources of disciplinary action and personal liability for lawyers. Although the list covers most of the territory, it is by no means an exclusive listing. There are new and different forms of misconduct appearing regularly for lawyers.

One purpose of this work is (hopefully) to cause lawyers to re-examine their practices and, where problems exist, formulate a plan for preventing or correcting some of the problems described herein.

These materials were originally prepared by Charles M. Kidd and Kevin McGoff.

They were last updated in September 2019 by Margaret M. Christensen and Katie Dickey of Bingham Greenebaum Doll LLP.

Ethics 2020: Mid-Year Case Law Update

Margaret Christensen
Max Hsu

Current through May 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

Section Four

ETHICS CURBSTONE – RES GESTAE Vol. 62, No. 5, PP 30-34 (2018)

ABA ethics opinion roundup

By Donald R. Lundberg and Caitlin S. Schroeder

Several times a year, the American Bar Association's Standing Committee on Ethics & Professional Responsibility issues formal ethics opinions on topics of interest to the bar. The opinions apply the Model Rules of Professional Conduct but are persuasive authority in Indiana in part because Indiana's Rules of Professional Conduct largely mirror the Model Rules. They are a good place to start when analyzing a tricky legal issue.

The Committee has issued five opinions so far in 2018, but we have thus far only written about one of them. Donald R. Lundberg & Caitlin S. Schroeder, "Talkin' 'Bout My Representation," Vol. 61, No. 4 *Res Gestae* 24 (April 2018). We are rectifying that now.

Disclosing material errors

Formal Opinion 481 analyzes a lawyer's duty to inform a client of a material error. At the outset, the Committee reminds us that "[e]ven the best lawyers may err in the course of clients' representations." That is a sound reminder. To err is human; to disclose material error is ethical. The duty to inform a current client of an error is not limited to those errors reasonably likely to give rise to a malpractice claim. Rather, the duty of communication under Rule 1.4 and its subsections guides what errors must be disclosed. Under Rule 1.4(a), a lawyer must reasonably consult with the client about the means to accomplish the client's objectives, keep the client reasonably informed about the matter, and promptly respond to requests for information. Under Rule 1.4(b), a lawyer must explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. If an error has an impact on one of these areas, it must be disclosed.

As the Committee explains it, errors occur on a continuum. At one end are those errors that prejudice the client's rights or claims, such as failing to file a complaint before the statute of limitations. These errors must be disclosed. On the other end are errors that are very unlikely to harm the client – typos, for example. Errors in the middle of the continuum should be tested against the Committee's two-pronged test. An error is material and must be disclosed if a dis-interested lawyer would conclude that the error is (1) reasonably likely to harm or prejudice a client or (2) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice. These situations trigger the duties of prompt communication under Rule 1.4.

A material error can also trigger another duty of communication under Rule 1.4(a). Because a material error may lead to a malpractice claim against the lawyer, the lawyer's personal interests in avoiding that claim could create a conflict of interest for the lawyer under Rule 1.7(a). If there is a significant risk that the lawyer's personal interest will materially limit the representation going forward, then Rule 1.7(a)(2) would prohibit continued representation unless informed consent is obtained under Rule 1.7(b). Here's where Rule 1.4(a)(1) comes in: a lawyer must promptly inform the client of any circumstance with respect to which informed consent is required.

On the other hand, the Committee concludes there is no duty to disclose errors to former clients. The duties of communication under Rule 1.4 extend only to current (not former) clients. Further, Rule 1.16(d), regarding duties upon withdrawal, does not impose a duty *after* withdrawal to disclose errors.

There are two caveats. First, a lawyer should carefully assess whether a client is truly a former client based on the nature of the historical representations of the client. The opinion contains a detailed breakdown of at least four types of client situations and warns that in three of them the person may be considered a current client for purposes of disclosing errors. Second, although not ethically required, lawyers may wish to disclose errors to former clients for business or other personal reasons.

Indiana law is generally in accord with the Committee's recommendations. In *Matter of Hoffman*, the respondent had filed suit on behalf of his clients in the wrong jurisdiction. 700 N.E.2d 1138 (Ind. 1998). More than a year after the statute of limitations had run, the matter was dismissed for lack of jurisdiction. Five months later, the clients learned from an independent source that their case was time-barred and the claim was gone. Two-and-a-half-years later still, the lawyer gave written notice to his clients regarding a potential malpractice claim against him and his insurance carrier.

After the clients complained, attorney discipline proceedings commenced and were eventually resolved by agreement. The Indiana Supreme Court found that respondent violated Rule 1.4(b) by failing to explain adequately to his clients the effect of a dismissal of the tort claim. Further, the respondent violated Rules 1.7(b) (now, Rule 1.7(a)(2)) and 1.16(a)(1) by continuing to represent his clients after it became apparent the representation might be materially limited by his own personal interest in avoiding liability for the error. Although not mentioned in the opinion, this type of conflict of interest has sometimes been described as a prior-work conflict. The Court noted that the respondent had practiced law for 20 years without previous disciplinary actions, but his actions deprived the clients of their tort claim and delayed initiation of a claim they may have had against him. The respondent was publicly reprimanded.

Ethics in time of disaster

Formal Opinion 482 provides guidance to lawyers in times of disaster. The recent hurricanes and wildfires stand as important reminders that lawyers' obligations to their clients include disaster preparedness.

Communication with clients following a disaster is key. Where the disaster was foreseeable, communication with clients in advance regarding the impending event is best. Lawyers should maintain ready, secure access to contact information for their clients in the event of disaster. The Committee advises that in early communications, the lawyer should advise the client regarding whether he has plans to continue handling the client's matters or whether he may need to withdraw. The lawyer should also advise clients of alternative methods of contact during or after the disaster.

Modern technology provides good opportunities for maintaining contact and continuing to practice that may not have been possible 20 years ago. However, under Rule 1.1, lawyers should act competently to protect their clients' information, even when disaster strikes. For example,

even in an emergency, lawyers should not use a restaurant's unsecured Wi-Fi to send and receive client information. They should also make sure that their current storage systems will be securely maintained and accessible in the event of disaster. Likewise, lawyers should make sure that they can still access funds or property being held on a client's behalf.

A lawyer who is able to continue representing a client during a disaster may have evacuated the state where he is practicing. In that case, the lawyer should consult the rules of professional conduct for the state where he temporarily resides to make sure he is not committing the unauthorized practice of law.

Consider, for example, a lawyer who has fled a hurricane in Louisiana and is staying with family for several weeks in Indiana. Under Indiana's Rule 5.5(c), that lawyer could likely continue representing his clients from afar, so long as he meets one of several conditions. Critically, the lawyer's presence must be temporary. A lawyer may not establish a systematic and continuous presence in Indiana without being admitted in Indiana.

In addition, the lawyer's practice while in Indiana must be: (1) undertaken in association with an Indiana lawyer who actively participates in the matter; (2) related to a pending or potential proceeding in the other jurisdiction; (3) related to a pending or potential arbitration, mediation or other ADR proceeding in the other jurisdiction; or (4) otherwise reasonably related to the lawyer's practice in the other jurisdiction. Under our example, the Louisiana lawyer could continue working on a pending litigation or transaction while in Indiana if those matters were originally part of his Louisiana practice, without associating with Indiana counsel.

Depending on the jurisdiction, the displaced lawyer may also be able to rely on the ABA's Model Court Rule on Provision of Legal Services Following Determination of Major Disaster. At last count, 18 states had adopted the rule, although Indiana is not one of them. Under that rule, a jurisdiction's highest court may issue an order approving the temporary practice of law in that jurisdiction by lawyers unable to practice law in their home jurisdictions due to disaster.

Relatedly, lawyers from other jurisdictions may wish to provide pro bono legal services in the jurisdiction affected by the disaster. This is certainly a worthy endeavor, but lawyers should make sure they comply with that jurisdiction's rules on temporary multijurisdictional practice, typically found in each state's Rule 5.5, because there is no general exception to the requirement that the practice of law be authorized for providing pro bono services.

Indiana permits lawyers admitted in other jurisdictions to provide pro bono services in Indiana, but only if those lawyers have applied for admission to the Indiana bar. Ind. Admis. Disc. R. 6.1. We suspect that few lawyers would be willing to apply for admission to the Indiana bar so that they could provide temporary pro bono services in the wake of disaster. In that event, pro bono service may still be possible under Rule 5.5(c), if the out-of-state lawyer provides pro bono services in association with an Indiana attorney who actively participates in the matter.

Cyberattack!

In Formal Opinion 483, the Commit- tee analyzes a lawyer's obligations after an electronic data breach or cyberattack. Lawyers should take reasonable measures to prevent a cyberattack, monitor systems on an ongoing basis, investigate an attack if it occurs, and notify clients of the

attack. The opinion is limited to a lawyer's ethical obligations, but lawyers experiencing an attack should also consult substantive state and federal law.

The Committee's opinion is based in part on Model Rule 1.6(c). Under that rule, "[a] lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." Indiana has not adopted this part of Model Rule 1.6, but many of the obligations discussed in the opinion may find equal footing in the duty of competence under Rule 1.1.

Lawyers' duty of competence includes a duty to keep abreast of changes in the law and its practice, including the benefits and risks associated with the technology relevant to the lawyer's practice. Comment [6] to Ind. Prof. Cond. R. 1.1. This duty encompasses not only leveraging technology efficiently in representing clients, but also understanding the risks associated with technology and employing reasonable measures to mitigate those risks. Thus, lawyers must take reasonable measures to prevent a cyberattack and monitor their systems for an attack on an ongoing basis. Further, under Rules 5.1 and 5.3, lawyers should make sure that all lawyers and non-lawyer staff in their firms are aware of the risks of technology and trained to use technology in a way that mitigates that risk.

If a lawyer detects a breach, it should go without saying the lawyer has an obligation to reasonably and promptly stop the breach and mitigate damage. The Committee recommends that lawyers prepare an incident response plan so they can respond systematically and effectively. Once the breach has been stopped, the duty of competence includes making reasonable efforts to determine what happened and why. The lawyer should then take reasonable steps to improve security systems to prevent further breach.

The Committee also notes that, depending on the circumstances, the lawyer may be able to disclose information about the breach to law enforcement. In doing so, the lawyer should consider (1) whether the client would object to disclosure; (2) whether the client would be harmed by disclosure to law enforcement; and (3) whether reporting the theft would benefit the client by assisting in ending the breach or recovering stolen information. If time permits, the best course of action would be to consult with the client about these matters and obtain client consent.

Rule 1.4 requires lawyers to disclose material breaches to their current clients. As defined by the Committee, a "material" breach involves the "misappropriation, destruction or compromise of client confidential information, or a situation where a lawyer's ability to perform the legal services for which the lawyer was hired is significantly impaired by the event." Obviously, current clients affected by such a breach should be notified. What about unaffected current clients? The answer depends on the circumstances. Much like disclosing lawyer error, a lawyer should consider whether the circumstances of the breach would reasonably cause an unaffected client to be legitimately concerned about the security of the client's information. If so, unaffected clients should also be notified of the breach and, as applicable, steps the lawyer has taken to enhance protection of information of unaffected clients.

On the other hand, the Committee was unwilling to conclude that there was any duty to notify former clients of a breach in absence of black letter provision in the rules requiring notice. Nevertheless, like disclosing lawyer error, there may be business or personal reasons to notify former clients if their confidential information has been compromised. In addition, other laws,

such as state data privacy laws, may require former clients to be notified. Any time there has been a security breach resulting in the unauthorized disclosure of client information, lawyers must consult applicable state law and comply with it. *See, e.g.*, Ind. Code 24-4.9.

Fee financing

Finally, the Committee recently issued Opinion 484 regarding a lawyer's obligations when clients use companies or brokers to finance the lawyer's fee. What is helpful about this opinion is that it describes six different fee-financing situations and points to more in-depth state bar ethics opinions on each topic. The Committee then provides a checklist of all the Rules of Professional Conduct implicated by these arrangements. There are a lot of different rules to consider, but here are some of the key decision points.

The first decision point in analyzing ethical fee financing is whether the lawyer has an ownership or other financial interest in the fee-financing company. If she does, then the financing of the client's fee is a business transaction with the client subject to Rule 1.8(a). Ordinary initial fee arrangements with clients are subject to Rule 1.5, but not Rule 1.8(a). Rule 1.8(a) governs other financial arrangements with clients, like loans or sales transactions. Comment [1] to Rule 1.8. Under Rule 1.8(a), the lawyer would need to make sure the terms are fair and reasonable and fully disclosed in writing; advise the client to seek independent representation; and obtain informed consent.

Rule 1.8(f) also needs to be considered: Under Rule 1.8(f), a lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation. The comments clarify that this rule is designed to prevent lawyers from gaining too great a financial stake in the litigation. Lawyers should analyze their particular fee-financing arrangement with this rule in mind as well.

The second decision point is whether the lawyer wants to be involved in recommending fee financing as an option. If not, the lawyer should obtain informed consent to limit the scope of representation under Rule 1.2(c) to exclude advice regarding fee-financing arrangements. This could be as simple as including in the engagement letter a short paragraph excluding advice regarding fee financing.

Our view is that Opinion 484 gets this point wrong. It strikes us as unrealistic to suggest that, unless expressly limited, whether and how the client will finance fees falls within the scope of most legal representations. In our opinion, the default position should be that, unless the scope of representation is expanded to include advice on fee-financing questions, a normal legal representation does not include advice on financing the client's fee obligation, which requires no limitation on scope.

A lawyer may recognize the benefits of fee financing for her clients and want to provide information about it to clients. A lawyer may do so, but she should assess whether a recommendation of a service or arrangement creates a conflict of interest in a particular case. As explained by the Committee, "arguably the greatest risk is that the lawyer will recommend the finance company or broker to the client even though fee financing is not in the client's interests because the client's arrangement of financing best assures payment or timely payment of the lawyer's fee." In that case, there may be a material limitation conflict under Rule 1.7(a)(2).

The third decision point is whether the lawyer wants to charge a higher fee to account for any finance fee or subscription that a lawyer must pay as part of the financing arrangement. The Committee suggests that a lawyer may charge a higher fee to recoup expenses related to financing, so long as the overall fee is reasonable, but it notes that certain states, such as Florida, have amended their versions of Rule 1.5 to prohibit charging higher fees for participating in a credit plan. By way of analogy, those states may also prohibit charging higher fees for participation in a fee-financing arrangement.

Indiana has not added a provision to its Rule 1.5 prohibiting higher fees for credit plans, but Indiana lawyers should analyze whether charging a higher fee in a given case to recognize the higher costs associated with fee financing is reasonable. Rule 1.5(a) provides a non-exhaustive list of factors in considering whether a fee is reasonable, including for example, the time required, novelty of legal issues, amount involved, and experience of the lawyer. Pertinent to the analysis here, Rule 1.5(a)(8) provides that the type of fee – fixed or contingent – is one such factor. Whether the fee is paid through a financing arrangement is similar to this factor and therefore may support a higher fee, so long as the total fee is still reasonable.

If the lawyer is willing and the client wants to proceed with fee financing, the lawyer must provide sufficient information regarding the arrangement to comply with Rules 1.4(b) and 1.5(c). Rule 1.4(b) generally requires lawyers to provide clients with sufficient information to make informed decisions regarding the representation. Rule 1.5(c) requires a lawyer to explain the basis or rate of the fee to the client, preferably in writing. If the fee is higher because of financing, for example, that fact should be disclosed.

Wrap-up

The ABA Committee was hard at work in 2018. We have offered here the highlights and some comments about Indiana law, but you should take a moment to review these opinions in full for more in-depth analysis.

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Section Five

SELECTED ETHICS ISSUES

Inadvertently Receiving a Fax or E-Mail

Sex with a Client

Non-Refundable Retainers

Contingent Fee Agreements

Supervision of Staff

INADVERTENTLY RECEIVING A FAX OR E-MAIL

Issue:

A lawyer receives a fax or e-mail from opposing counsel, with very confidential information regarding the case, which was clearly not meant to be transmitted to the recipient.

Question for Discussion:

What course of action should the defense counsel take pursuant to the rules of ethics?

Discussion:

The duty described above is now specifically addressed under Rule 4.4 (b) which states that "a lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender."

According to Formal Op. 92-368 from the ABA Standing Committee on Ethics, the lawyer who receives such materials "should refrain from examining the materials, notify the sending lawyer and abide by the instructions of the lawyer who sent them." ABA Formal Op. 92-368 (1992). While acknowledging that no specific Model Rule that was in existence at the time of the Formal Opinion, addressed such an event, the committee referred to the words found in the Preamble to the Model Rules that "many difficult issues of professional discretion . . must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules."

In a case of particular note, the Indiana Court of Appeals examined the subject of inadvertent disclosure of confidential material. In a case of first impression, *JWP Zach, Inc. v. Hoosier Energy Rural Electric Cooperative,* 709 N.E.2d 336 (Ind.App. 1999), the Court looked

at a situation where one party in litigation inadvertently disclosed confidential communications during the discovery process. In *Zach*, the court looked as the three tests commonly used to analyze these problems. In one test, the disclosure is a *per se* waiver of the privilege. In another test, the fact that the disclosure was inadvertent is enough to save the privilege. In the third test, courts have balanced the facts and circumstances surrounding the disclosure before deciding whether or not a waiver of the privilege has occurred. In *Zach*, the court agreed with the trial court's use of the balancing test and held that the inadvertent disclosure did not waive the privilege, but acknowledged that the recipient was now free to explore the potentially damaging facts underlying the privileged communications.

Issue:

I am a male practitioner and in the course of representing a young woman in her divorce. A sexual encounter seems inevitable. Are there any problems with that?

Short Answer:

Yes, having sex with a client is in violation of the Indiana Rules of Professional Conduct. However, sexual relationships that predate the client-lawyer relationship are not prohibited.

Analysis:

Indiana Rule of Professional Conduct 1.8 was recently amended. Rule 1.8(j) now provides that "[a] lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced." Comment 17 to Ind. Prof. R. Cond. 1.8 makes it clear that a lawyer-client sexual relationship is prohibited, regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client. The Comment provides many reasons why such a relationship is not allowed:

> "The relationship between a lawyer and a client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

While the comments make clear that sexual relationships that predate the client-lawyer relationship are not facially prohibited, Comment 18 states that "before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship."

Indiana case law reveals that engaging in such behavior will likely result in a suspension of the attorney from the practice of law. *See, e.g. Matter of Coons*, 751 N.E.2d 678 (Ind. 2001) (where the Supreme Court found that the lawyer violated Rule of Professional Conduct 1.7(b),

which prohibits a lawyer from representing a client where the lawyer's interest materially limits the representation, and Rule of Professional Conduct 8.4(d) which prohibits lawyers from engaging in conduct prejudicial to the administration of justice, and ordered the lawyer suspended from the practice of law for a period of thirty days, with automatic reinstatement); *Matter of Tsoutsouris*, 748 N.E.2d 856 (Ind. 2001) (where the Supreme Court found that the lawyer violated Rules of Professional Conduct 1.7(b) and 8.4(d) and suspended the attorney for thirty days even though the relationship was consensual).

ATTORNEY FEES

Issue:

My fee agreements call for a non-refundable retainer.

Question for Discussion:

Is there a problem with that?

Short Answer:

Courts have held that non refundable 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 has emphasized that it should be included in the fee agreement.

Analysis:

Indiana Rule of Professional Conduct 1.5 prohibits a lawyer from making an agreement for an unreasonable fee. Although the rule further provides a list of eight nonexclusive factors to be considered in determining whether a fee is reasonable, there is no concrete test. The factors cited in the rule to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

The most recent holding relating to attorney's fees is *Matter of Kendall*, 804 N.E.2d 1152 (Ind. 2004). In that case, the lawyer required certain clients to pre-pay a portion of his fees before he performed any services. 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."

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 unrefundable 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 *Matter of Ellis*, 766 N.E.2d 350 (Ind. 2002), the Supreme Court accepted an agreement for discipline that called for a public reprimand for charging an excessive fee. Ellis was hired to defend a client who had struck two pedestrians, seriously injuring both, while driving intoxicated. The client had a prior OVWI conviction. Ellis charged the client $25,000 for his representation. Within a couple of days, Ellis was able to negotiate a plea agreement by which his client would plead guilty to misdemeanor OVWI and would receive home detention. Civil litigation resulted in an agreed settlement of the client's claim for a refund.

In the recent decision of *Matter of Neeb*, 810 N.E.2d 718 (Ind. 2004), the attorney charged the client a $1,000 "non-refundable" retainer as part of his "Hourly Fee Agreement for Legal Representation." After failing to return the client's phone calls and failing to notify the client that he was moving his office, the client hired new counsel. Neeb's billings showed that he had earned no more than $866.80 of the retainer and that approximately $200 of this was for work done after the client hired new counsel. The attorney failed to refund any of the retainer to the client. The Court held he was in violation of Prof. Cond. R. 1.5(a), which prohibits an attorney from charging an unreasonable fee; and Prof. Cond. R. 1.16(d), which requires an attorney, upon termination of representation, to take steps to protect the client's interests, including returning any advance payment of fee that has not been earned. After finding that Neeb also violated Ind. Prof. Cond. R. 1.4(a) for failing to keep clients reasonably informed, the attorney was suspended for sixty days without automatic reinstatement.

ATTORNEY FEES

Issue:

Should contingent fee agreements be in writing?

Short Answer:

Yes. Pursuant to the Rules of Conduct, contingent fee agreements must be in writing.

Analysis:

Indiana Rule of Professional Conduct 1.5 requires that agreements involving contingent fees must be writing. One significant addition to the rule in 2005 was the additional requirement that the written agreement contain the signature of the client. The relevant section of the rule pertaining to contingent fee agreements appears in section (c) which states, a "contingent fee agreement shall be in writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated."

Two recent cases, decided on the same day, included violations of Rule 1.5 for failure to reduce the contingent fee agreement to writing. In *Matter of Salwowski*, the respondent received a public reprimand since, among other violations, his contingent agreement was not in writing. 819 N.E.2d 823 (Ind. 2004). In *Matter of Howe*, the Supreme Court imposed a six month suspension with automatic reinstatement as punishment for respondent's numerous ethical violations, including failure to reduce the contingency fee agreement to writing. 819 N.E.2d 380 (Ind. 2004).

Issue:

My secretary got drunk and went to Broad Ripple and started talking about the particular facts of one of our criminal cases. The Deputy Prosecutor was in the room, but was not quite as intoxicated and overheard her comments.

Question for Discussion:

Am I in trouble? What kind of trouble?

Short Answer:

Lawyers with managerial authority within a firm must make reasonable efforts to ensure that the firm has measures giving reasonable assurance that non-lawyers will act in a way compatible with the Rules of Professional Conduct.

Analysis:

Indiana Rule of Professional Conduct 5.3 discusses the responsibilities that a lawyer with managerial authority has regarding non-lawyer assistants. Rule 5.3(a) states that a lawyer who has managerial authority should make sure that there are internal policies and procedures in place to ensure that the person's conduct is compatible with the professional obligations of the lawyer. Rule 5.3(c) states that "a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if: (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer . . . knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."

The last decade has seen a significant increase in the use of paralegals performing tasks previously done by lawyers at the direction of the attorneys for whom they work. The economics of the practice of law, the ability of clients to pay, and the efficiency of the lawyer are three influences on this practice. In law offices, no matter how large or small, a skilled and experienced legal secretary may perform jobs that have traditionally been the function of the lawyer.

In *Matter of Drozda*, 653 N.E.2d 991 (Ind. 1995), among many other violations, the attorney was found to have violated Rules 5.3(b) and 5.3(c)(2) for failure to adequately supervise his staff in communicating with clients. The attorney allowed or directed members of his staff to misinform the client as to the status of a bankruptcy which had not been filed as promised. A three year suspension was imposed for the collective misconduct.

In *Matter of Thonert,* 693 N.E.2d 559, 563 (Ind. 1998), the Indiana Supreme Court defined "the practice of law" in a case wherein a suspended lawyer was disciplined for his staff's unauthorized practice of law. The Supreme Court concluded that "the practice of law is not defined only as the giving of legal advice or acting in a representative capacity-- it also had been extended by this Court to conducting the business management of law practice." Because Thonert's staff conducted the business management of a law practice and gave legal advice to clients without the supervision of Thonert, the Court found that Thonert had violated Guideline

9.1 and that his conduct merited suspension.

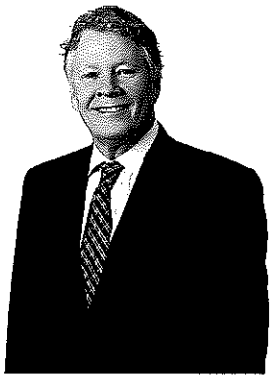
In a unique case, *Matter of Graddick*, 719 N.E.2d 1245 (Ind. 1999), a lawyer was found not to have violated Rule 5.3(c) for failure to supervise a non-lawyer employee because he did not order or have knowledge of any offending conduct. The non-lawyer employee was a disbarred lawyer who made a telephone call that was a violation of Rule 4.2, as he was communicating with a person whom he knew to be represented by counsel without consent or authorization. However, this was not done at the direction of the respondent or with his knowledge. The lawyer did not escape discipline, however. A public reprimand was ordered for other Rule violations, including failing to diligently pursue matters on behalf of his clients, failing to return unearned fees to clients after being discharged, and failing to hold finds collected on behalf of clients in trust account.

Therefore, the lawyer delegating tasks to staff, and a partner using an associate, must be familiar with the Rules of Professional Conduct beginning with 5.1.

Section Six

Recent Malpractice Cases

Kevin P. McGoff, Attorney
Bingham Greenebaum Doll LLP



Kevin P. McGoff is an experienced professional liability and litigation attorney. He represents attorneys and judgesin professional licensure matters, assists lawyers and law firms on issues pertaining to firm management, law firm dissolution and organization, malpractice, legal ethics and related litigation.

Kevin has more than 35 years of experience defending lawyers and other professionals in state and federal court at trials and on appeal. His practice is now focused on proactively assisting law firms with risk management and professional liability issues. Kevin draws on his experience in law firm management, as well as his role as general counsel to Bingham Greenebaum Doll, to provide clients with insight and analysis on risk management and professional liability issues.

Kevin can be your firm's resource for efficient and cost effective resolution of professional liability and ethics issues. His consultation services allow firm partners and senior lawyers to concentrate on their work by referring ethics questions posted by junior lawyers and staff to Kevin for risk management counsel. An experienced consultant creates greater efficiency for your firm and greater dependability for a proper resolution.

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DiBenedetto v. Devereux, No. 49A05-1609-CT-2146, 2017 Ind. App. LEXIS 274 (Ct. App. June 23, 2017).

This case arose out of the theft committed by former attorney William F. Conour leading to the downfall of the Conour Law Firm in Indianapolis. Rene DiBenedetto was a client of the Firm and filed a claim against Timothy Devereux, an associate of the Conour Law Firm at the time of DiBenedetto's case. Devereux was not assigned to DiBenedetto's case, nor did he perform any work related to her case. However, DiBenedetto stopped by the firm while Conour was away to inquire about the disbursement of her settlement, and Devereaux—being the only attorney in the office at the time—agreed to speak with her. DiBenedetto alleged Devereux committed malpractice by failing to honestly and accurately advise her regarding the distribution of her settlement funds. Devereux moved for summary judgment. The trial court granted Devereux's motion, and DiBenedetto appealed. Finding no genuine issues of material fact that would negate at least one element of a legal malpractice claim, the Court of Appeals affirmed.

The Court of Appeals relied on *Devereux v. Love*, 30 N.E.3d 754 (2015), a factually similar case that also arose out of Conour's misconduct. The Court reasoned it must not "consider the matter 'through the lens of hindsight,' but rather focus on what Devereux knew at the time he was alleged to have committed malpractice by failing to warn [the plaintiff] of Conour's potential wrongdoing." In both cases, the Court found the evidence indicated Devereux was not aware of Conour's misconduct at the time of the consultation. Attorney fees were not awarded to Devereux.

Mundia v. Drendall Law Office, P.C., No. 71A05-1610-PL-2388, 2017 Ind. App. LEXIS 231 (Ct. App. May 31, 2017).

This case arose out of a negligence and wrongful death claim against St. Joseph County and the City of South Bend based on acts and omissions of the prosecutor's office. Under the Indiana Tort Claims Act ("ITCA"), Mundia was required to notify the city and county within 180 days of the date of her loss. The Defendant failed to file her Tort Claim Notice with within the statutory period and her claims were barred. Mundia discovered a year later that the Defendant had never filed the notice, upon which she filed a complaint for legal malpractice against the Defendant. The Defendant argued, however, that Mundia's damages were caused by her previous attorney. The Defendant filed a motion for summary judgment seeking to negate the proximate cause and damages elements of Mundia's malpractice claims—arguing that Mundia would not recover from the underlying claims because the Prosecutor's Office and Police Department had immunity. Mundia argued, however, that the possibility of settlement should be considered as a part of her damages. The trial court granted the Defendant's motion for summary judgment. On appeal, the Court determined whether the Defendant had adequately met its burden of proving an absence of any genuine issue of material fact or affirmatively negating at least one element of Mundia's malpractice claim. Reversing the trial court's decision, the Court explained the Defendant failed to provide factual details regarding the underlying case, and as such, failed to carry its burden.

Roumbos v. Vazanellis, 71 N.E.3d 64 (Ind. Ct. App. 2017).

Roumbos hired Defendant Vazanellis to represent her in a slip and fall case against a hospital. The Defendant failed to file her complaint within the relevant statute of limitations. Roumbos filed a complaint for legal malpractice against the Defendant accordingly, and the Defendant moved for summary judgment. The trial court found in favor of the Defendant, holding that the evidence Roumbos presented failed to meet the burden of showing there was no genuine issue of material fact warranting presentation to a jury, and that all the plaintiff could determinatively say is that she slipped and fell near a table in a hospital where wires were visible, whether she saw the wires or not. On appeal, the Court reversed and remanded the lower court's decision in favor of the Roumbos after applying the "case-within-a-case" analysis, holding the Defendant failed to designate evidence demonstrating the hospital could not have reasonably anticipated an invitee might forget about the dangerous condition and later be injured by it.

Sawyer v. Matthews, No. 1:15-cv-01541-SEB-DML, 2016 U.S. Dist. LEXIS 181679 (S.D. Ind. Dec. 15, 2016).

This case arose out of a product liability lawsuit filed against Eli Lilly involving the drug Zyprexa. Sawyer, the plaintiff in the underlying lawsuit and Texas resident, hired a Texas law firm and local counsel in Indianapolis after responding to the law firm's advertisement soliciting Zyprexa patients. Sawyer alleged his claims were dismissed without his knowledge or consent, and that his attorneys' "(in)actions" caused him to believe his case was active and pending. The Defendants filed a motion for judgment on the pleadings, arguing that documents attached to the answer filed by local counsel in Indianapolis proved there was no failing on part of the Defendants leading to any harm to Sawyer, but rather that Sawyer's own inaction caused the dismissal of his suit against Lilly.

The Court denied the Defendants' motion. First, the Court reasoned that the Defendants had not argued which of Sawyer's "claims" should be dismissed based on the analysis in *Shideler v. Dwyer*, 417 N.E.2d 281 (Ind. 1981), because Sawyer's complaint did not simply list the theory, "legal malpractice." Second, the Court had no way to determine at that point in the litigation whether concepts associated with claims brought under other theories of relief (such as breach of fiduciary duty, fraud, or breach of contract, etc.) would be germane to some aspect of the case. Finally, the Defendants were unable to demonstrate that they had breached no duty to Sawyer leading to the alleged harm.

Chenore v. Plantz, 56 N.E.3d 123 (Ind. Ct. App. 2016).

Chenore hired Defendant Plantz to pursue a claim against William D. Knight. An award of $10,930 was entered in favor of Chenore. Roughly six months later, Knight filed a Chapter 13 Bankruptcy petition. Plantz was notified and collection proceedings were stayed. Plantz notified Chenore of the petition. Specifically, Plantz told Chenore to "wait until notified by the Bankruptcy Court." Over the next two years, Chenore made inquiries of Plantz, but received no response. Knight ultimately paid 100% of claims filed, but did not pay Chenore anything because no claim was filed on her behalf. Chenore learned of Knight's bankruptcy discharge several years thereafter. Chenore filed a malpractice claim which was dismissed by the trial court. Chenore then appealed the denial of a motion to correct error challenging the dismissal of her attorney malpractice action against Plantz. Chenore argued in response to a statute of limitations defense that the statute of limitations was equitably tolled because Plantz had pursued collection of the Knight judgment but did not inform Chenore he did not represent her for purposes of filing a claim in bankruptcy court. The Court found that Chenore's complaint asserted facts in avoidance of the statute of limitations and her complaint was improperly dismissed.

Barkal v. Gouveia & Assocs., 65 N.E.3d 1114 (Ind. Ct. App. 2016).

This case arose out of the Defendants' representation of Barkal Industries in a complex bankruptcy proceeding spanning over ten years. Dr. Barkal alleged that the Defendants committed malpractice because they had lost "meritorious bankruptcy cases and the attendant bankruptcy protection available to [them] under [f]ederal [l]aw." The Defendants moved for summary judgment, asserting that Barkal had not produced expert testimony to support his allegation that he violated the applicable standard of care, that Barkal's claim failed as a matter of law under the unclean hands doctrine and were barred under the Rooker-Feldman Doctrine, and that Barkal failed to demonstrate the existence of any damages as a result of the breach in standard of care. The trial court granted summary judgment to the Defendants, finding that Barkal failed to present expert testimony to establish the appropriate standard of care and breach thereof. Barkal Appealed.

On appeal, Barkal sought to rely on the depositions of Attorneys Welch and Zuckerberg. The Indiana Court of Appeals affirmed the trial court, reasoning the trial court did not abuse its discretion in refusing to consider the expert testimony because such testimony is admissible only if the court is satisfied that the principles upon which the testimony rests are reliable. The Court reasoned that, while Welch and Zuckerberg were qualified as experts, they were not retained as such and neither attorney had reviewed the materials relevant to the case nor were they able to formulate opinions on the matter. Although Welch and Zuckerberg were able to answer general questions related to bankruptcy proceedings, they were not qualified as experts with regard to the specific malpractice case. The common knowledge exception did not apply.

Atl. Credit & Fin., Inc. v. Robertson, No. 1:15-cv-00044-MJD-SEB, 2016 U.S. Dist. LEXIS 1612 (S.D. Ind. Jan. 7, 2016).

This case arose out of Defendant Robertson's representation of Atlantic Credit & Finance ("ACF") in pursuing collections against debtors in Indiana. ACF claimed the Defendant misappropriated cost advances to defray the initial costs required for the Defendant to file lawsuits on its behalf. ACF alleged breach of contract, breach of fiduciary duty, conversion, and unjust enrichment. The Court reasoned that ACF's breach of contract claim was analogous to a claim of legal malpractice, and would be subject to the statute of limitations and discovery rule. ACF argued that the cause of action did not accrue until it knew or could have discovered that the Defendant would not return the money. The Court agreed, reasoning that although the audits reflected shortfalls in accounting, they did not trigger the statute of limitations for the malpractice claim. Further, because of her continued representation, not even the Defendant's refusal to pay the amounts owed would have triggered the limitation period. Finally, the Court concluded that the audit letters did not disrupt the attorney-client relationship such that the benefits of the continuous representation doctrine were negated.

Fletcher v. Hoeppner Wagner & Evans, LLP, No. 2:14-CV-231, 2015 U.S. Dist. LEXIS 52535 (N.D. Ind. Apr. 22, 2015).

Fletcher filed a complaint pro se against the Defendant law firm alleging legal malpractice. The Defendant moved to dismiss for failure to state a claim and that the malpractice claim was barred by the applicable two-year statute of limitations. The only issue regarding the statute of limitations was whether Fletcher timely filed his lawsuit. The Court agreed with Fletcher that no injury occurred until after the Defendant was given leave to withdraw as his attorney. The amended complaint alleged that as a result of failing to conduct discovery, his adversary in the underlying case was granted summary judgment, which caused damage to Fletcher. The Court denied the Defendant's motion for summary judgment, reasoning that even if Fletcher had known of his injury and suffered damage, the complaint would still be timely under the continuous representation doctrine adopted in *Biomet, Inc. v. Barnes & Thornburg*, 791 N.E.2d 760 (Ind. Ct. App. 2003).

Dotlich v. Tucker Hester, LLC, 49 N.E.3d 571 (Ind. Ct. App. 2015).

This case arose out of the Defendant's representation of Dotlich in the filing of a Chapter 7 bankruptcy petition. The Defendant law firm filed a Complaint of Account to recover fees for the representation. Dotlich's new counsel filed an answer, and was thereafter granted leave to amend and a motion to join William Tucker as a counter-defendant for malpractice. Dotlich alleged there was an attorney-client relationship, that the Defendant held itself out as having greater than ordinary knowledge and skill in bankruptcy law, that the Defendant's conduct was a breach of its duty to exercise reasonable care, and that Dotlich was harmed as a result. The trial court entered summary judgment in favor of the Defendant. The trial court concluded that the legal malpractice claim had sufficient roots in Dotlich's pre-bankruptcy activities to warrant inclusion into his estate. Affirming the trial court, the Indiana Court of Appeals held that the legal malpractice claim arose with the filing of the bankruptcy petition and constituted property of the estate and that the debtor was estopped from pursuing his claim.

Mills v. Hausmann-McNally, No. 1:13-cv-00044-SEB-DKL, 2015 U.S. Dist. LEXIS 7001 (S.D. Ind. Jan. 21, 2015).

In the underlying personal injury case, Larry Mills was injured in a traffic accident. The negligent driver was running an errand related to her employment with a state agency. Mills retained Hausmann-McNally ("HM"). HM discovered the limit on the insurance policy was significantly less than the damages suffered by Mills. HM made no further inquiries about employment status and quickly settled for the policy limit amount. Mills retained new counsel ("PWR") to facilitate expansion of his case.

During a deposition with the negligent driver, PWR first discovered the woman was operating within the scope of her employment. HM withdrew as co-counsel and Mills sued HM for malpractice for missing the 180-day deadline under ITCA. PWR's expert testified that HM failed to inquire about the scope of the negligent driver's employment at the time of the collision, for which such failure is below the standard of care for attorneys practicing tort law in Indiana. The trial court granted PWR's motion for summary judgment. In response, HM asserted that whether it conducted such an investigation was immaterial—arguing that PWR shares responsibility for the negligence because the state agency would have been estopped from invoking the notice deadline. The Court rejected HM's estoppel argument and granted PWR's motion for partial summary judgment for a breach in standard of care.

Notes

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Section Seven

SUPERVISING LAWYER'S RESPONSIBILITY FOR STAFF AND ASSOCIATES

The past decade has seen a significant increase in the use of paralegals performing tasks previously done by lawyers at the direction of the attorneys for whom they work. The economics of the practice of law, the ability of clients to pay, and the efficiency of the lawyer are three influences on this practice. In law offices, no matter how large or small, a skilled and experienced legal assistant may perform jobs that have traditionally been the function of the lawyer. It is not uncommon for a legal assistant to return phone calls or have a hand in drafting simple pleadings such as motions for extension of time or motions for continuance. It is not unusual to have a skilled legal assistant doing more complicated things in the law office, particularly in cases where she has worked with a certain lawyer for a long time. The lawyer delegating tasks to staff and a partner using an associate must be familiar with the Rules of Professional Conduct, beginning with 5.1.

The Responsibility of a Partner.

A) A partner shall make reasonable efforts to ensure that the firm has in effect measures that give reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

B) A lawyer with direct supervisory authority over another lawyer must make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

C) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer and knows of the conduct at a time when its consequences can be avoided or mitigated, but does not take reasonable remedial action.

The Responsibility of a Subordinate Lawyer.

A) The lawyer is bound by the Rules of Professional Conduct, even if acting at the direction of another person.

B) The subordinate lawyer does not violate the Rules of Professional Conduct if he or she acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty. The supervisor assumes responsibility for making the judgment.

The Responsibilities Regarding Non-Lawyer Assistants.

A) The firm's partners shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the staff's conduct is compatible with the professional obligations of the firm.

B) A lawyer with direct supervisory authority over a non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.

C) The lawyer shall be responsible for conduct of a non-lawyer employee that would be a violation of the Rules of Professional Conduct if engaged in by the lawyer if: (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at the time when its consequences can be avoided or mitigated and fails to take remedial action.

Rule 5.5 Unauthorized Practice of Law.

A) A lawyer shall not assist a person who is not a member of the bar in performing activities that constitute the unauthorized practice of law.

B) The use of a legal assistant is subject to guidelines that are set out as part of the Rules of Professional Conduct. It is suggested that all lawyers using legal assistants must do so in accordance with these guidelines and subject to the provisions set forth in Prof. Cond. R 5.3. These guidelines were adopted by the Indiana Supreme Court effective January 1, 1994.

Guideline 9.1 Supervision of Staff.

A) A legal assistant may perform services only under the direct supervision of a lawyer authorized to practice in the state and only as an employee of the lawyer. Independent legal assistants are prohibited. You will find, in states such as California, that paralegals set up offices and provide "services" to their "client"

only loosely under the supervision of an attorney. Such a business is prohibited in this state. The lawyer is, of course, responsible for the professional actions of the legal assistant, performing his or her duty at the lawyer's direction.

Guideline 9.2 Delegation.

A) A lawyer may delegate a task to a legal assistant, unless it may not be so delegated pursuant to a statute or court rule. For example, your paralegal cannot appear in court with a client, as that would violate the Rules of Professional Conduct, as well as the Indiana Criminal Code for unauthorized practice of law. The lawyer must maintain responsibility for the work product.

Guideline 9.3 Prohibited Delegation.

A) A lawyer may not delegate to a legal assistant (1) the responsibility for establishing an attorney/client relationship, (2) responsibility of establishing the amount of fees to be charged for legal services or (3) responsibility for a legal opinion rendered.

Guideline 9.4 Duty to Inform.

A) The lawyer must take reasonable measures to ensure clients, courts and other lawyers are aware that a legal assistant, whose services are used by the lawyer, is not licensed to practice law.

Guideline 9.5 Letterhead.

A) A legal assistant may be identified on the lawyer's letterhead by name and title, as well as on business cards identifying the law firm.

Guideline 9.6 Confidential Communication.

A) It is the responsibility of the lawyer to take reasonable measures to ensure all client confidences are preserved by the legal assistant.

Guideline 9.7 Fee for Services.

A) A legal assistant's work may be charged for by the attorney.

Guideline 9.8 Compensation.

A) A lawyer may not split legal fees with a legal assistant, nor pay the assistant for the referral of legal business.

B) A lawyer may pay a legal assistant based upon the quantity and quality of the work and the value of that work to the law practice, but the compensation may not be contingent by advance agreement upon the profitability of the practice.

Guideline 9.9 Continuing Legal Education.

A) A lawyer who employs a legal assistant should facilitate the legal assistant's participation in appropriate continuing education and *pro bono* activities.

Guideline 9.10 Legal Assistant Ethics.

A) Lawyers employing legal assistants in Indiana shall ensure that the assistants conform their conduct to be consistent with these ethical standards: (1) the assistant may perform any task delegated and supervised by a lawyer so long as the lawyer is responsible to the client, maintains a direct relationship with the client and assumes full professional responsibility for the work, (2) a legal assistant shall not engage in the unauthorized practice of law, (3) a legal assistant shall serve the public interest by contributing to the delivery of quality legal services and improvement of the legal system, (4) a legal assistant shall achieve and maintain a high level of competence and a high level of personal and professional integrity and conduct, (5) a legal assistant's title shall be fully disclosed in all business and professional communications, (6) a legal assistant shall preserve all confidential information provided by the client or acquired before, during, and after the course of representation.

B) A legal assistant shall avoid conflicts of interest and shall disclose any possible conflicts to the employer or client, as well as to a prospective employer or client.

C) A legal assistant shall act within the bounds of the law.

D) A legal assistant shall do all things incidental, necessary or expedient for the attainment of ethics and responsibilities imposed by statute or court rule.

E) A legal assistant shall be governed by the ABA Model Rules of Professional Conduct, the ABA Model Rules of Responsibility, and the Indiana Rules of Professional Conduct.

There have been lawyers that have received public discipline in cases wherein this lack of staff supervision or the actions of a staff member were the cause of the attorney's problem. Over the past few years, there have been several cases published in Indiana wherein the lack of

supervision of staff was at issue. The facts in these cases are briefly summarized for review, consideration and to note any similarities in your own practice.

In *Matter of Drozda*, 653 N.E.2d 991 (Ind. 1995), among many other violations, the attorney was found to have violated Prof. Cond. R. 5.3(b) and 5.3(c)(2) for failure to adequately supervise his staff in communicating with clients. The attorney allowed or directed members of his staff to misinform the client as to the status of a bankruptcy, which had not been filed as promised. A three year suspension was imposed for the collective misconduct.

Two years later, in *Matter of Cartmel,* 676 N.E.2d 1047 (Ind. 1997), the attorney's legal assistant ran an objectionable advertisement which predicted the future success of her employer and also stated an opinion as to the quality of the attorney's services. The Supreme Court pointed out that pursuant to Prof. Cond. R 9.1, lawyers are responsible for the professional services of their legal assistant and should take reasonable measures to insure that a legal assistant's conduct is consistent with the lawyer's obligations under the Indiana Rules of Professional Conduct. Due to the assistant's actions, the attorney was found to have violated this Rule.

In the same proceeding, Cartmel was again disciplined for the actions of his legal staff. In the second instance, a client hired the attorney to repair her negative credit history. The client ended up working exclusively with the attorney's legal assistant for almost two years. The legal assistant informed the client that he was working to repair the credit history.

The client then began dealing with a second legal assistant who informed the client that the first assistant had done little work on her case. The second assistant assured the client that progress would be made. A few months later, the client requested that her case be completed, to which the assistant responded that credit had been successfully applied for and that the attorney's

obligation to the case was complete. The Supreme Court found that by not ensuring that the actions of his staff were compatible with the attorney's obligation to diligently pursue a client's claim, the attorney violated Prof. Cond. R. 5.3(b).

In assessing an appropriate sanction, the Court considered the foregoing, as well as the mismanagement of client funds, and suspended the attorney for sixty (60) days. In commenting on the attorney's misconduct, the Court concluded that "[l]awyers should give legal assistants appropriate instruction and supervision concerning legal aspects of their employment, taking into account the fact that they do not have legal training." (For a similar case, in which the lawyer was disciplined for his failure to supervise an assistant in the administration of his client's estate, *See Matter of Beardsley,* 658 N.E.2d 591 (Ind. 1995)).

The next year, in *Matter of Thonert,* 693 N.E.2d 559, 563 (Ind. 1998), the Indiana Supreme Court defined "the practice of law" in a case wherein a suspended lawyer was disciplined for his staff's unauthorized practice of law. The Supreme Court concluded that "the practice of law is not defined only as the giving of legal advice or acting in a representative capacity-- it also had been extended by this Court to conducting the business management of law practice." Because Thonert's staff conducted the business management of a law practice and gave legal advice to clients without the supervision of Thonert, the Court found that Thonert had violated Guideline 9.1 and that his conduct merited suspension.

Supervision of nonlawyer employees extends also to incarcerated inmates. In *Matter of Anonymous*, 929 N.E.2d 778 (2010), an attorney had been assigned by the State Public Defender as an independent contractor to represent a client in a post-conviction relief proceeding. With the client's consent, the attorney retained a nonlawyer inmate in the same facility as an independent legal assistant who was not employed by a specific firm or lawyer. The inmate

researched and prepared the post-conviction relief petition for the attorney's client, and in exchange, the attorney agreed to represent the inmate in his own post-conviction relief proceeding. The nonlawyer inmate had limited access to communication, no expectation of privacy, and limited access to research resources, while the attorney had limited ability to review the inmate's work, could not supervise the inmate, and could not ensure that the inmate would be able to comply with the Rules of Professional Conduct. Because the attorney could not properly supervise the inmate's work, prevent client confidences from being compromised, and ensure that the inmate would be able to comply with the Rules of Professional Conduct, the Court found that the attorney's conduct violated Rule 5.3 and Guideline 9.1 and imposed a private reprimand. Mitigating facts include the attorney's lack of disciplinary history, his full cooperation with the Commission, and his good reputation in the area in which he practices.

In a unique case, *Matter of Graddick*, 719 N.E.2d 1245 (Ind. 1999), a lawyer was found ***not*** to have violated Prof. Cond. R 5.3(c) for failure to supervise a non-lawyer employee because he did not order or have knowledge of any offending conduct. The non-lawyer employee was a disbarred lawyer who made a telephone call that was a violation of Prof. Cond. R 4.2, as he was communicating with a person whom he knew to be represented by counsel without consent or authorization. However, this was not done at the direction of the respondent or with his knowledge. The lawyer did not escape discipline, however. A public reprimand was ordered for other Rule violations, including failing to diligently pursue matters on behalf of his clients, failing to return unearned fees to clients after being discharged, and failing to hold funds collected on behalf of clients in trust account.

Partners in a law firm must also be cognizant of the other attorneys' actions. In *Matter of Anonymous*, 724 N.E.2d 1101 (Ind. 2000), the respondent's partner entered into an agreement

with the client. The partner then failed to adequately prosecute the case. The respondent had minimal involvement in the case, but cosigned a pleading filed on behalf of the client. Therefore, the Court found a violation of Prof. Cond. R 5.1 and 5.2 and assessed a private reprimand. Similarly, in *Matter of Galloway*, 729 N.E.2d 574 (Ind. 2000), a partner at a law firm was held liable for Rule violations committed by other lawyers in the firm, to the extent the partner knew of the conduct when its consequences could have been mitigated or avoided. Other attorneys in the firm failed to live up to their obligations to perform diligently and communicate with their clients. Prof. Cond. R 5.1(c)(2) provides that a lawyer is responsible for another lawyer's ethical violation if the lawyer is a partner in the firm. The partner, therefore, was suspended for three years. However, the suspension was largely due to other personal violations involving multiple instances of neglect and being found in contempt of court.

It is extremely important to closely supervise staff when the employee maintains responsibility for trust account management. In *Matter of Silverman*, 750 N.E.2d 376 (Ind. 2001), an attorney received a thirty day suspension for a violation of Prof. Cond. R 5.3(b) and 5.3(c)(2). In this case, a paralegal was converting trust account funds. The attorney failed to wrest control of the funds away from the paralegal after he became aware of the acts.

In *Matter of Schuyler*, 894 N.E.2d 543 (Ind. 2008), an attorney failed to monitor the account of a probate estate. His office manager used the estate's funds to write unauthorized checks totaling $34,000. The office manager pled guilty to a class D felony, and the attorney was given a public reprimand for violating Prof. Cond. R. 5.3(b).

An attorney can even be punished for putting too much trust in a spouse. In *Matter of Anonymous*, 876 N.E.2d 333 (Ind. 2007), an attorney's wife served as his office accountant and bookkeeper. Over a five-month period, she forged his signature and wrote unauthorized trust

account checks totaling $22,257 to accounts that she could access. The Indiana Supreme Court issued a private reprimand to the attorney. It noted that failure to have proper internal safeguards—even for a long-time, trusted, non-attorney employee who is a close relative—is a breach of the attorney's fiduciary obligation to the client.

Attorneys from other states are not excluded from Indiana's Rules regarding the supervision of staff, as demonstrated by *Matter of Coale*, 775 N.E.2d 1079 (Ind. 2002). In this case, an out-of-state-attorney was held liable for sending advertising materials to Indiana residents who had lost loved ones in an airplane crash, even though he did not personally send the materials. He supervised attorneys and non-lawyers. Allowing the materials to be sent without labeling them as advertising materials was a violation of Prof. Cond. R 5.1(c) and 5.3. In addition, the materials contained statistical data and testimonials predicting future success. The out-of-state attorney was barred from practicing law in the state until further order by the Court.

In addition, other state courts have similarly disciplined their attorneys. *In re Braswell*, 663 P.2d 1228 (Okla. 1983), involved an Oklahoma lawyer who was charged with one count of misconduct for neglecting a client and received a public censure. The lawyer was hired by a client in October, 1979, to pursue a claim against a car owner who damaged the client's building. A lawsuit was finally filed in February, 1982, but only after the client filed a complaint with the bar. However, the cause of action was dismissed because the statute of limitations had expired. The Court noted that there was a dispute as to whether the case was given to a law clerk or misplaced in the office; nevertheless, the case ended up in the "dead files" cabinet. The lawyer made no misrepresentations to the client and subsequently reached an amicable settlement with the client. The Court criticized the lawyer's office procedures for monitoring cases.

A California lawyer, who had previously received a public reprimand for neglecting two cases and co-mingling client funds, received a one month suspension for neglecting a divorce case shortly after the first disciplinary sanction. *In re Spindell*, 530 P.2d 168 (Cal. 1975). During the investigation of the first disciplinary action, the bar received another complaint from a client who had hired the lawyer in January, 1966, to represent her in a divorce proceeding. The lawyer neglected the case for more than five years and misrepresented material facts to the bar during the investigation of this complaint. The lawyer described his conduct toward the client as "extreme neglect" and stipulated that he "willfully failed and refused to protect the interests of his client". *Id.* at 173. However, the lawyer blamed his secretary for his failure to communicate with the client. The secretary testified that she had withheld from the lawyer three or four client phone messages. More importantly, the secretary told the client that she could remarry even though the complaint seeking dissolution had not yet been filed. Relying on the secretary's statement, the client remarried eighteen months prior to the filing of the complaint. The Court imposed a thirty day suspension because of the lawyer's neglect of the case and the client's actual harm due to the illegal marriage.

In re Goldberg, 441 A.2d 338 (M.D. 1982), involved a Maryland lawyer, who operated a legal clinic and was charged with sixteen instances of misconduct involving client neglect. The office manager, who unbeknownst to the lawyer was on federal probation supervision for embezzlement, failed to prepare the necessary pleadings, documents, or papers, made excuses and misrepresentations regarding the progress of work, failed to deposit client funds into the appropriate account, misappropriated funds and intercepted letters from the Attorney Grievance Commission. The office manager hid her conduct by intercepting the mail, confiscating court notices or letters from clients, removing telephone messages, and intercepting calls to the lawyer.

The lawyer was totally unaware of any of the manager's behavior. However, a closer look revealed significant problems in the operation of the clinic. The lawyer's staff consisted of no more than two clerical employees and a part-time attorney. The office "would average 100 calls a day". *Id.* at 340. To handle the volume of work, the secretary would place all telephone lines on "hold" so that she could "get caught up". The lawyer never reviewed bank statements and failed to notice numerous overdrafts including a $40,000 overdraft. As a result, the legal clinic bounced numerous checks. Plain and simple, the lawyer was negligent in managing the affairs of his legal clinic.

The lawyer's unethical conduct consisted of more than failing to supervise the office manager. On one occasion, a client paid the lawyer a fee to file suit. The lawyer accepted the fee, but never filed the complaint. On another occasion, the lawyer failed to file an answer in a divorce proceeding resulting in a judgment against the client. During his testimony, the lawyer also admitted that he did not sign his pleadings. In mitigation, the lawyer overhauled his office, fired his office manager and brought in his wife to oversee the operation of the office. Amazingly, no client suffered any financial loss from the mismanagement of the lawyer's bank account. The court imposed a thirty day suspension because the lawyer negligently failed to manage his office and neglected his clients.

Courts sometimes overlook negligent supervision when it is a symptom of larger problems. In *Matter of Zoeller*, 878 N.E.2d 199 (Ind. 2007), an attorney came before the Indiana Supreme Court for violations of fourteen ethics provisions. The attorney failed to keep his clients informed about their cases, and this negligence caused courts to deny post-conviction relief petitions for two of his clients and to rule against another in a sentencing hearing. He also filed a motion to modify a fourth client's jail sentence (to which the government had no

objection)—but this motion was defeated due to a paralegal's mistake. The attorney was punished with a 180 day suspension and 18 months of probation, but the Disciplinary Commission did not allege a violation of Prof. Cond. R 5.3

In re Anonymous, 787 N.E.2d 883 (Ind. 2003), imposed a private reprimand for an attorney who hired a suspended attorney to work in her law office. "A suspended or disbarred attorney 'shall not maintain a presence or occupy an office where the practice of law is conducted.'" *Id.*, (quoting Ind. Admission and Discipline Rule 23, Section 26(b)). The Indiana Supreme Court held that the lawyer employed the disbarred lawyer as a bookkeeper and then a paralegal allowed the disbarred lawyer to engage in activities which constituted the practice of law. Thus, the employment of the disbarred lawyer was impermissible. *Id.* at 884.

This topic in the field of legal ethics will no doubt receive attention by the Court as lawyers delegate more work within the law office. Whether or not it is fair, in some instances the Indiana Supreme Court Disciplinary Commission's position has been that negligent supervision of staff may be grounds for discipline. Thus, it is important to develop a formal training program for staff to guard against the potential that the lawyer is sanctioned for something done by a poorly trained secretary, associate attorney or a paralegal.

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Section Eight

Trust Account Management

Introduction

A lawyer may end up with client and third party funds in his or her possession in a variety of ways. Probably the most common way is for a lawyer to receive a settlement or judgment check made payable to the lawyer, his or her client, and a subrogation lien holder in a personal injury action. Lawyers also end up with client and third party funds in other ways. In a divorce, a lawyer may be asked by the court to sell the real estate and hold the funds from the sale of the real estate until the court makes its final decision on the property settlement. A lawyer may also ask a client to give him an advance on the lawyer's fee and bill against this advance on an hourly basis. Another common way for lawyers to end up with client funds is for the lawyer to ask a client to give him or her an advance to pay the expenses of litigating a case.

These examples are not a comprehensive list of how a lawyer ends up with client and/or third party funds. There are numerous other ways that a lawyer may end up with client and/or third party funds in his or her possession. Because of their duties as fiduciaries, lawyers must treat these funds with special care. This special care begins with lawyers properly designating funds as belonging to the lawyer, the client, and to a third party. Lawyers' fiduciary duties also require lawyers to properly maintain client funds and third party funds separate from the lawyer's funds in a trust account. Lawyers' fiduciary duties are spelled out in several rules.

- Prof. Cond. R. 1.15: Safekeeping Property
- Prof. Cond. R. 1.16(d): Duty to refund unearned fees at the termination of representation
- Prof. Cond. R. 5.1: Responsibilities of a Partner or Supervisory Lawyer
- Prof. Cond. R. 5.2: Responsibilities of a Subordinate Lawyer
- Prof. Cond. R. 5.3: Responsibilities Regarding Nonlawyer Assistants
- Prof. Cond. R. 8.4(b): Misconduct; criminal acts
- Prof. Cond. R. 8.4(c): Misconduct; dishonesty, fraud, deceit or misrepresentation
- I.C. 35-43-4-2: Theft • I.C. 35-43-4-3: Conversion
- Admis. Disc. R. 23, §29(a): Trust Account Recordkeeping Requirements
- Admis. Disc. R. 23, §29(b) through (g): Trust Account Overdraft Notification
- Admis. Disc. R. 23, §30: Audits of Trust Accounts
- Rules Governing Attorney Trust Account Overdraft Reporting

Learn more about managing an attorney trust account in our continuing legal education guide that follows on the next pages.

TRUST ACCOUNT MANAGEMENT: HANDLING CLIENT AND THIRD PARTY FUNDS

By the Staff of the Indiana Supreme Court Disciplinary Commission

Revised March 2012

I. Introduction

How Lawyers End Up with Client and Third Party Funds

A lawyer may end up with client and third party funds in his or her possession in a variety of ways. Probably the most common way is for a lawyer to receive a settlement or judgment check made payable to the lawyer, his or her client, and a subrogation lien holder in a personal injury action. Lawyers also end up with client and third party funds in other ways. In a divorce, a lawyer may be asked by the court to sell the real estate and hold the funds from the sale of the real estate until the court makes its final decision on the property settlement. A lawyer may also ask a client to give him an advance on the lawyer's fee and bill against this advance on an hourly basis. Another common way for lawyers to end up with client funds is for the lawyer to ask a client to give him or her an advance to pay the expenses of litigating a case.

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II. Rules and Statutes Pertaining to Trust Account Management

- Prof. Cond. R. 1.15[1]: Safekeeping Property
- Prof. Cond. R. 1.16(d): Duty to refund unearned fees at the termination of representation
- Prof. Cond. R. 5.1: Responsibilities of a Partner or Supervisory Lawyer
- Prof. Cond. R. 5.2: Responsibilities of a Subordinate Lawyer
- Prof. Cond. R. 5.3: Responsibilities Regarding Nonlawyer Assistants
- Prof. Cond. R. 8.4(b): Misconduct; criminal acts
- Prof. Cond. R. 8.4(c): Misconduct; dishonesty, fraud, deceit or misrepresentation
- I.C. 35-43-4-2: Theft
- I.C. 35-43-4-3: Conversion
- Admis. Disc. R. 23, §29(a): Trust Account Recordkeeping Requirements
- Admis. Disc. R. 23, §29(b) through (g): Trust Account Overdraft Notification
- Admis. Disc. R. 23, §30: Audits of Trust Accounts
- Rules Governing Attorney Trust Account Overdraft Reporting

III. A Lawyer's Fiduciary Duties in Handling Client and Third Party Funds

A. What is a trust account?

Most trust account management obligations grow out of Prof. Cond. R. 1.15. Interestingly, Rule

[1] All references to the Indiana Rules of Professional Conduct are to the rules as amended effective January 1, 2011.

1.15(a) does not mention trust accounts by name, it merely states that, "Funds shall be kept in a separate account . . . ." The Comment [1], however, provides: "All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property, and, if monies, in one or more trust accounts." See also, Admis. Disc. R. 23, §29(a)(1): "Attorneys shall deposit all funds held in trust in accounts clearly identified as 'trust' or 'escrow' accounts . . . ."

B. Key Fiduciary Principles

In general, lawyers act in a fiduciary relationship to their clients. Many of the general principles that apply to a fiduciary's duties in handling the principal's property apply with equal (if not greater) force to lawyers. "A lawyer should hold property of others with the care required of a professional fiduciary." Comment [1] to Prof. Cond. R. 1.15.

With respect to handling property of others, here are some key fiduciary principles. Each of these principles is embedded in
Rule 1.15.

1. Duty to segregate: "A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property." Prof. Cond. R. 1.15(a).

2. Duty to safeguard: "Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded." Prof. Cond. R. 1.15(a).

3. Duty to promptly notify of receipt of funds: "Upon receiving funds or other property in which the client or third person has an interest, a lawyer shall promptly notify the client or third person." Prof. Cond. R. 1.15(d).

4. Duty to promptly deliver funds: "Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive . . . ." Prof. Cond. R. 1.15(d).

5. Duty to account: "[U]pon request by the client or third person, [a lawyer] shall promptly render a full accounting regarding such property." Prof. Cond. R. 1.15(d).

C. Prohibition against Commingling

The inverse side of the obligation to segregate client or third party funds is the prohibition against commingling. The concept of commingling is simple. Commingling is the simultaneous presence of funds belonging to a lawyer and a client or third party in the same account. When commingling occurs, there is a loss of identity of funds as between the lawyer and clients or third persons.

Commingling occurs anytime a lawyer's own funds are held in an account that also contains client or third party funds. Commingling can occur in two different ways. First, the lawyer deposits his own funds into a trust account containing funds belonging to clients or third parties.

Second, the lawyer deposits client or third party funds in an account that is not a trust account and that contains the lawyer's own funds.

1. Proper Identification of Trust Account

Part of the obligation to safeguard trust funds is the duty to assure that those funds are properly identified as such. It is insufficient for a lawyer to segregate trust funds in an account that is not properly designated as a trust account. The account must be formally designated a "Trust Account" or "Escrow Account." All documents associated with a trust account should indicate its trust nature by being properly labeled, including checks, deposit tickets, monthly bank statements. More importantly, the account must be identified as a trust account to the financial institution and the financial institution's records must reflect that it is a trust account. See Admis. Disc. R. 23, §29(a)(1). Thus, the lawyer's agreement with the bank[2] should clearly provide that it is a trust account.[3] This avoids any danger that the financial institution will freeze or attach the funds if proceedings supplementary to execution are filed by one of the lawyer's personal creditors or the bank exercises a set off against the funds upon a default on a personal obligation owed to the bank by the lawyer. It also assures that the funds in the account will not be considered a part of the lawyer's bankruptcy, probate or marital estate should the lawyer file for bankruptcy, die or divorce. It will also protect the funds from seizure by the IRS in the event of a levy against the lawyer.

2. Risks of Lawyer Commingling Money in Client Trust Account

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[2]For simplicity, financial institutions will be occasionally referred to as "banks." It is understood that lawyers may use a variety of financial institutions as depositories for their trust accounts, including banks, savings and loan associations, savings banks, credit unions and the like. See Admis. Disc. R. 23, section 29(g)(1).

[3]When opening a trust account, the bank is required to obtain a federal tax identification number or social security number from the lawyer or law firm for purposes of reporting interest (if any) to the Internal Revenue Service. How the lawyer handles this situation depends upon the circumstances. If the trust account is a non-IOLTA trust account that does not earn any interest, the lawyer may use his or her federal tax identification number or his or her own social security number. Because no interest will be earned or reported, there are no tax ramifications. If the trust account is an IOLTA account, the interest (less bank charges) will be paid over to the Indiana Bar Foundation pursuant to Prof. Cond. R. 1.15(f)(5)(A). For a discussion of the IOLTA program, see section III(E), infra. In this event, the lawyer will supply the Bar Foundation's federal tax identification number to the bank, and the bank will report the interest earned on the account to the IRS under the Bar Foundation's tax identification number. If a lawyer holds client funds that are not nominal in amount and not to be held for a short period of time, the lawyer may, in consultation with the client, determine to hold the funds in a separate interest-bearing account, with the interest, net of bank charges, accumulating for the benefit of the client. In this event, the lawyer **should not** use his or her tax identification or social security number on the account. If he or she does, the interest will be reported to the IRS as income of the lawyer or law firm. Instead, the lawyer should use the client's tax identification or social security number or apply for a separate federal tax identification number in the name of the client to assure that the interest is reported in the name of the client. The same rule applies to situations in which the lawyer controls an account as a fiduciary for a trust or an estate.

There are numerous risks that are imposed upon clients when a lawyer holds his own funds in a bank account that is denominated a trust account.

(a) There is the risk that the lawyer's personal creditors will be able to gain access to client funds in the trust account in order to satisfy the lawyer's personal obligations.[4]

(b) Negligent invasion of client funds. There is the problem that the lawyer is obligated to keep track of his or her own funds in the trust account, as well as funds of clients or third persons. Sloppiness in accounting or confusion in the identity of funds could lead to the reckless or negligent invasion of client funds when the lawyer innocently intends to access funds in the trust account erroneously thought to belong to the lawyer.

(c) A lawyer's tendency to look to the trust account as a source of funds that belong, in part, to the lawyer, may habituate the lawyer to draw funds from the account for personal use even when it does not contain funds belonging to the lawyer. A lawyer's use of client funds for his personal benefit is a criminal act. See, section VI, infra.

(d) Maintenance of a trust account is a public declaration that the funds in the account do not belong to the lawyer in his or her personal capacity. By placing or retaining his or her own funds in the trust account, the lawyer acts inconsistently with the established purpose of the account and, in effect, engages in misrepresentation to the world about the true purpose and function of the account.

(e) The lawyer who deposits or retains his or her own funds in a trust account invites the accusation that he is using the account to shield his personal assets from his own creditors. It may not be that every lawyer who commingles personal funds in a trust account intends to defraud creditors, but such an improper use is not without precedent.

(f) Especially by retaining earned fees in a trust account, a lawyer may be tempted to improperly use the trust account to shield income from recognition in the tax year received. Thus, the trust account is misused as a vehicle for defrauding the taxing authorities.

(g) Importance of promptly disbursing funds earned by the lawyer. When funds are paid into trust and the lawyer is entitled to a portion of those funds as a fee after there has been a division of interests as between the client and the lawyer, the lawyer should promptly withdraw his earned fees. If the lawyer delays withdrawing fees after they are earned, the retention of the earned fees in the trust account constitutes improper commingling.

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[4]The very nature of a fiduciary account is that it does not contain funds belonging to the fiduciary in any non-fiduciary capacity. It is certainly possible that a persistent personal creditor of a lawyer could discover the fact that the lawyer maintains personal funds in his trust account and argue persuasively that the account's fiduciary character should be disregarded because of the lawyer's failure to honor the obligation to segregate funds held in a fiduciary capacity from personal funds. In any event, there is the even greater risk, under these circumstances, that client funds will be frozen and unavailable to clients until there has been a full accounting and separation of the funds belonging to the lawyer from funds belonging to clients.

3. Risks of Lawyer Commingling Client Funds in Lawyer's Personal or Business Account

(a) Client funds become available to the lawyer's personal creditors in the event of an attachment of those funds pursuant to proceedings supplementary to execution or otherwise under the Depository Financial Institutions Adverse Claims Act. IC 28-9-1-1, et seq. Even if the identity of the funds is later clarified, the client funds may be frozen for up to ninety (90) days by virtue of the automatic hold provision of IC 28-9-4-2.

(b) Upon bankruptcy, dissolution of marriage or death of the lawyer, client funds may become a part of the lawyer's bankruptcy, marital or probate estate. Once again, there may eventually be a separation of interests in the funds, but in the meantime, client funds will be unavailable to their true owners.

(c) Client funds are available to cover checks written for the personal benefit of the lawyer, resulting in conversion of client funds. See, section VI, infra.

D. Pooled trust accounts versus separate trust accounts.

Generally, funds held for clients that are small in amount or not being held for a substantial period of time will be combined into a pooled trust account. The administrative burden and costs of opening and maintaining a separate interest-bearing account for each client or sub-accounting for interest earned on a pooled account is generally not justified by the small amount of interest that could be earned on the funds. Notwithstanding the fact that the account is pooled, there must be sub-accounting methods in place (discussed below) that accurately account for each individual client's funds. When the lawyer is handling large amounts of client funds, especially for significant periods of time, the lawyer should consult with the client concerning whether or not that client's funds should be segregated into a separate trust account that earns interest. Any interest earned on trust funds belongs to the client, not to the lawyer. *Prof. Cond. R.* 1.15(f)(1); In re Pub. Law No. 154-1990, 561 N.E.2d 791 (Ind. 1990).

E. IOLTA Accounts.

Effective February 1, 1998, the Indiana Supreme Court promulgated rules creating an Interest on Lawyers Trust Account (IOLTA) program in Indiana. Prof. Cond. R. 1.15(f) through (i). Whereas previously lawyers generally pooled their trust funds in non-interest bearing accounts, under the IOLTA program lawyers are allowed to have their pooled trust accounts draw interest. The interest on trust funds in an IOLTA account does not belong to the lawyer, nor does it belong to the clients. Instead, by opening an IOLTA account, the bank is directed to pay the interest on the account over to the Indiana Bar Foundation to be used to fund law-related programs that are in the public interest. The IOLTA program has been designed in such a way as to make participation by lawyers very simple. More information is available on the IOLTA program by contacting the Indiana Bar Foundation or visiting its website at: www.inbf.org.

In late 2004, the Supreme Court announced a change to the Interest on Lawyers Trust Account (IOLTA) program to require that all lawyers who maintain pooled trust accounts participate in the IOLTA program. Press release, "Legal Aid to the Poor Gets Boost from Supreme Court: Court to Adopt Universal IOLTA Plan" (Nov. 23, 2004), archived at www.in.gov/judiciary/files/media-press-releases-2004.pdf (last visited February 28, 2012). On February 5, 2005, the Court ordered amendments to Prof. Cond. R. 1.15 implementing mandatory IOLTA participation, effective July 1, 2005.

F. Lawyers in Other Fiduciary Roles

When the lawyer holds funds in some capacity other than as an attorney acting in a representative capacity, e.g., as trustee of a trust or as personal representative of an estate, the lawyer should maintain a separate trust or escrow account for each such fiduciary role and should not intermingle those funds with client trust funds or with other similar fiduciary accounts.

G. Signatory Authority over Trust Accounts

Only lawyers admitted in Indiana should have signatory authority over a trust account. Prof. Cond. R. 23, §29(a)(6), contemplates that a lawyer may designate an agent as a trust account signatory. It should only be in limited and highly controlled situations that a lawyer delegates signature authority over a trust account to a non-lawyer. In the event there is such a delegation, the lawyer must institute and maintain thorough internal controls to insure against the mishandling of funds. The lawyer must receive the monthly bank statement directly from the bank without it passing through the hands of the non-lawyer who is responsible for the day-to-day management of the trust account and carefully review the bank statement. Also, someone who has no signatory authority over the account must be responsible for periodic account reconciliations. See Rule 7(B)(2), Trust Account Overdraft Reporting Rules. Surety bonding for all employees who have control over the trust account should be obtained. Comprehensive staff training for all staff having functions relating to the management of a trust or other fiduciary account is essential.

H. Where Should Lawyers Maintain Client Trust Accounts?

The trust account must be at a financial institution located within the state of Indiana unless there is specific consent from all account beneficiaries to hold funds in an out-of-state bank. Prof. Cond. R. 1.15(a).

A lawyer must maintain his or her trust account only in a financial institution approved by the Disciplinary Commission. Approval is contingent upon the institution agreeing to provide notice to the Disciplinary Commission of all overdrafts on lawyer trust accounts. Admis. Disc. R. 23, § 29(b) through (g).

IV. Whose funds are these?

A good rule of thumb is to ask the question: "At this point in time, who owns these funds?" If the answer to that question is that the client or a third party owns the funds, the funds belong in trust. If the answer is the lawyer owns the funds, the funds do not belong in trust.

A. What funds must go into the trust account?

1. Advanced Expenses: Funds paid by the client to the lawyer to defray anticipated costs that will arise during the course of representation, e.g., filing fees, deposition costs, expert witness fees, belong in trust until disbursed to pay for those costs. *Prof. Cond. R.* 1.15(c).

2. Advanced Fees: "An 'advance fee' is a payment made at the beginning of a representation against which charges for the representation are credited as they accrue, usually on an hourly basis." *In re O'Farrell*, 942 N.E.2d 799, 803 (Ind. 2011). Fee advances that are deposits to secure payment of fees to be earned by the lawyer in the future on an hourly

basis must be deposited into the trust account, not the operating account. *Matter of Kendall*, 804 N.E.2d 1152, 1158 (Ind. 2004). See also, Prof. Cond. R. 1.15(c). These funds should be held in trust until fees are earned through hourly work or by whatever method is agreed upon with the client and the client is billed. Sufficient funds to satisfy the bill may be issued from the trust account to the lawyer or law firm by way of a properly documented trust check once the client has received a proper billing and the bill is shown to have been satisfied by a transfer from trust. In the event the client disputes the charges, the disputed fees should be immediately returned to trust until the dispute is resolved.

By contrast, a flat fee, as is common in many criminal representations, need not be deposited into the trust account. *Kendall* at 1157. Flat fees are, generally, deemed to be earned when paid, and so flat fees should be deposited into the operating account. However, this does not relieve the lawyer of an obligation to promptly refund unearned fees and expenses upon being discharged by the client before the completion of the legal matter. See Prof. Cond. R. 1.16(d); *Matter of Stanton*, 504 N.E.2d 1 (Ind. 1987). Upon being discharged before representation is complete, the lawyer's entitlement to fees is not pursuant to the fee contract, but is to be determined on a *quantum meruit* basis. *Galanis v. Lyons & Truitt*, 715 N.E.2d 858 (Ind. 1999); *Estate of Forrester v. Dawalt*, 562 N.E.2d 1315 (Ind.App. 1990). Nonrefundable or general retainers, while permitted under certain very narrow circumstances, are intended to compensate an attorney for their availability, and are fully earned once the attorney receives payment. *O'Farrell* at 803. General retainers are similar to options on an attorney's future services, typically on a priority basis, and prevent the attorney from accepting conflicting representations. *O'Farrell* at 804. "Regardless of the term used to describe a client's initial payment, its type is determined by its purpose, i.e., what it is intended to purchase." *O'Farrell* at 805.

For a more thorough discussion of flat fees, advance fees, general retainers, and "nonfundability language" in attorney fee agreements, see *O'Farrell*.

3. Funds Belonging to Lawyer and Client: All funds in which the client, the lawyer, or third parties each claim an interest must be initially deposited into trust until such time as there is a division of interests in the funds. A good example is a personal injury settlement in the form of a check or insurance company draft made payable to the joint order of the client and the lawyer. These funds should be deposited to and held in trust until such time as a written disbursement statement is presented to and approved by the client showing all proposed disbursements and the net proceeds payable to the client. See Prof. Cond. R. 1.5(c).

4. Receipt of Aggregated Non-Trust and Trust Funds: Funds paid to the lawyer by a client in a single check or credit card transaction some of which belong in trust and some of which do not belong in trust should be initially deposited in trust and a trust account check written to promptly disburse the non-trust monies. Initial deposit of such a check or credit card transaction into an operating account should be avoided as it places those funds at risk, even if for a brief period of time.

5. Disputed Funds: All funds in which more than one person (including the lawyer) claim an interest should be held in trust until such time as there is a division of interests between or among the claimants. When a lawyer holds funds against which there is a valid security interest by a third party (e.g., subrogation lien, properly executed medical letter of protection), the lawyer should not issue the funds to the client, even though the client demands it, unless the competing, third party claim against the funds has been resolved.

See, e.g., *In the Matters of Allen and Young*, 802 N.E.2d 922 (Ind. 2004). The lawyer may need to obtain assistance to mediate the dispute between the client and the third party or file an interpleader action to determine the respective rights and interests of the client and the third party. On the other hand, if there is not a properly perfected security interest against the settlement, the lawyer should not disburse settlement funds to the client's creditors absent the express consent of the client.

6. Handling of Cash Belonging in Trust: Cash properly belonging in trust must not be held in a safe deposit box, a safe or any other supposedly "secure" place. A lawyer may not hold client funds in the form of cash without depositing them into trust. There is no audit trail or documented accountability for cash. Payments of cash to a lawyer for deposit into trust should be documented through the issuance of a receipt to the payor, with a copy retained by the lawyer, and promptly deposited.

B. What funds may go into the trust account?

Money to Defray Bank Service Charges: The lawyer may be able to arrange with a financial institution to not charge administration fees on a trust account. Even under this circumstance, it may be necessary for the lawyer to maintain $1.00 of personal funds in the account in order to keep it from being closed out during times when the account would otherwise have a zero balance. For non-IOLTA accounts, if there are monthly bank charges against a trust account holding pooled client funds, the lawyer should not allow them to be debited against the client funds that happen to be in the trust account on the day when the charges are debited. The bank may be willing to debit the trust account bank charges from another account containing the lawyer's personal or business funds. If such arrangements are not available, this is one exception to the general rule that the lawyer's own funds should never be held in trust. Prof. Cond. R. 1.15(b) recognizes this by allowing a lawyer to "deposit his or her own funds reasonably sufficient to maintain a nominal balance in a client trust account." In order to honor the proscription against maintaining a balance of lawyer funds that is not nominal, we recommend not holding in the trust account at any given time more than the estimated amount of funds necessary to defray bank charges for a three-month period. The balance of lawyer funds should be replenished approximately once every three months.

If a trust account is an IOLTA account, bank charges will usually be set off against interest. In the event the bank charges exceed the amount of interest earned on the account, those excess charges are not to be debited from the trust account principal, but are to be billed to the Indiana Bar Foundation.

There should be a subsidiary ledger reflecting the fact that the trust account contains funds belonging to the lawyer and that the purpose is to cover bank fees and charges or to maintain a nominal balance in order to keep the account open. Bank charges that are assessed against the account should be deducted from the balance on the lawyer's subsidiary ledger. Those funds should be replenished when they run too low to cover anticipated bank charges.

C. What funds must not go into the trust account?

1. Funds Belonging Exclusively to the Lawyer: Funds owned by the lawyer in which clients or third parties own no interest must not go into the lawyer's client trust account. The lawyer

should never maintain a "cushion" of the lawyer's own funds in order to avoid overdrafts. Absent bank error, for which the lawyer has no responsibility, a properly managed trust account should never result in an overdraft.

2. Withdrawing Earned Fees from Trust Account: When there has been a division of interests in funds as among the lawyer, the client and any third parties, the lawyer's earned fees should be promptly withdrawn from trust. Maintaining earned fees in trust constitutes improper commingling. Generally, the best time to disburse earned fees is contemporaneously with disbursing net proceeds to the client.

3. Employee Payroll Taxes: Withheld employee payroll taxes must not be put into an attorney trust account. These are not funds being held in the lawyer's capacity as an attorney, but rather are being held pursuant to an employer-employee relationship. For business reasons, a lawyer/employer may wish to hold withheld taxes in a separate account, but it should not be the client trust account.

V. Handling Disbursements from Trust

A. Trust account disbursements should only be done by way of a fully documented transaction, i.e., a check made payable to a named payee or a bank wire transfer. See Attachments F and G for a discussion on the treatment of credit and debit card transactions.

B. A trust check should never be made payable to cash or bearer.

C. Withdrawals from a trust account should never be made by way of a cash withdrawal from an automated teller machine.

D. Cash should never be received back at the time of making a trust account deposit. Rather, the entire check should be deposited into trust, and checks should be written for authorized disbursements.

E. Earned attorney fees should be paid out of trust in the form of a trust check written payable to the order of the lawyer or law firm and documented as being for earned fees. A trust check should never be issued directly to one of the lawyer's or law firm's personal creditors, even if it constitutes the disbursement of funds from trust that the lawyer has earned as fees. Rather, the entire amount of earned fees should be disbursed by check out of the trust account, deposited into the operating account, and checks written from the operating account to the lawyer's creditors.

F. Similarly, costs incurred by the lawyer on behalf of the client should be paid directly out of the trust account with a trust check payable to the order of the vendor of the goods or services. If the lawyer advances costs on behalf of the client, the check should be written out of the operating account because the advance is being made with the lawyer's funds.

VI. Conversion and Theft of Client and Third Party Funds

A. A lawyer's unauthorized use of client and/or third party funds will lead to serious disciplinary problems. A lawyer who is holding client or third party funds in his or her trust account must not invade those funds for any unauthorized purpose. A lawyer's unauthorized use of client or third party funds is a crime.

B. Ind. Professional Conduct Rule 8.4 (b) prohibits a lawyer from committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law. I.C. 35-43-4-3 defines the crime of conversion as: "A person who knowingly or intentionally exerts unauthorized control over property of another commits criminal conversion . . . ." I.C. 35-43-4-2 defines the crime of theft as: "A person who knowingly or intentionally exerts unauthorized control over property of another person, with the intent to deprive the other person of any part of its value or use, commits theft . . . ." A lawyer who commits the crime of theft or conversion commits an act of dishonesty in violation of Ind. Professional Conduct Rule 8.4(c). *See*, e.g., *Matter of Towell*, 699 N.E.2d 1138, 1141 (Ind. 1998); *Matter of Wilson*, 715 N.E.2d 838, 841 (Ind. 1999).

C. Remember that a lawyer in possession of money belonging to a client or third party should never use those funds for his or her own benefit, for the benefit of another client, or for the benefit of anyone else. If a lawyer uses money belonging to a client or a third party for his own benefit, the benefit of another client, or anyone else, that lawyer commits the crime of conversion or theft. When a lawyer has possession of money belonging to a client or third party, he or she should never treat the money as his or her own. This money belongs in trust or should be paid to the appropriate party. Any other use of these funds, without authorization of the party who owns the funds, is a criminal act.

VII. Fundamental Concepts in Trust Account Management

A. Although client funds are often maintained in a pooled trust account, they must be treated as though each client's funds are held in a separate account.

1. The funds of one client can **never** be used to cover disbursements out of trust on behalf of another client.

2. The tool for maintaining the separate identity of each individual client's funds is a subsidiary ledger for each client who has funds in the trust account. Each client's subsidiary ledger must reflect all receipts and disbursements from the trust account on behalf of that client. It will indicate at all times the balance of funds held in the trust account on behalf of that client. Receipts to trust should not be recorded on the client ledger until they have been actually deposited. Disbursements from trust should not be made unless the client ledger has been checked to confirm that funds are available to support the disbursement. Some software accounting programs will not allow a disbursement from a client sub-account, even though there are sufficient funds to cover the disbursement in the trust account, unless there are sufficient funds on deposit attributable to that client sub-account. This is an excellent safeguard to avoid "robbing Peter to pay Paul."

B. Funds should never be paid out of trust on behalf of a client until the funds on which a trust check is written have been collected through banking channels. In other words, at the time funds are disbursed there should be minimal risk of a charge back to the trust account in the event a deposited instrument is not honored by the payor bank. Most banks will make deposited funds available for withdrawal on the first business day following the business day[5] on which the funds are deposited. This, of course, does not mean that a credited

[5]Typically, business transacted after a defined point in time in the afternoon (typically 2:30 p.m.) will be considered a next business-day transaction by the bank.

deposit will not be charged back to the account in the event the depository bank receives notice from the payor bank that the instrument has not been honored. Should a disbursement be made from the trust account in reliance on the deposit of funds that may yet be dishonored, the lawyer runs the risk that, upon a dishonored deposit being charged back to the trust account, other clients' funds will have been used to cover the disbursement. If there are not enough funds belonging to other clients in the trust account to cover the charge back, the account will go into overdraft status.[6] The best way to minimize the risks of a deposited item being dishonored and charged back to the trust account is to wait a prudent period of time before disbursing funds in reliance upon the deposited funds being good. An appropriate waiting period would be to follow the waiting periods defined by the Federal Reserve Board in Regulation CC for availability of funds. These waiting periods are set out below, but questions should be resolved by the lawyer consulting his or her banker or Regulation CC, 12 C.F.R. Part 229.

1. Funds available on the same business day as the business day of deposit:

   (a) Electronic direct deposits.

2. Funds available on the first business day after the business day of deposit:

   (a) U.S. Treasury checks payable to depositor.

   (b) Wire transfers.

   (c) Checks drawn on the depository bank.

   (d) Cash deposited in person with a bank employee.

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[6]It is not always possible to be 100% certain that deposited funds have been collected. One reason for this is that the banking system works in such a way that a depository bank is not notified when a deposited item has been honored by the payor bank. Rather, the depository bank will only receive notice from the payor bank if the instrument has been dishonored, which must be provided expeditiously, usually within two to four days depending on region of the payor's bank. Thus, the lawyer cannot contact his or her own bank and confirm that a deposited item has been collected. The only thing the depository bank will be able to report is that there has not been a notice of dishonor up to that point in time. The lawyer can always contact the payor bank and ask to confirm whether the item has been paid. For a more detailed discussion of the collection of bank deposits. See 12 CFR Part 229 (2004) (known generally as "Regulation CC--Availability of Funds and Collection of Checks"). In the end, there is always some unavoidable, but miniscule degree of risk associated with the disbursement of funds upon the deposit of a check into a trust account. Use of conservative and prudent trust account management practices by the lawyer will minimize such risks. In the event a dishonor occurs that could not have been reasonably anticipated, resulting in the charge back of a deposit to a trust account, the lawyer will be faced with a confusing situation that will need to be promptly rectified in order to assure that other clients' funds have not been put at risk; however, culpability through the lawyer discipline system should not be one of the problems facing the lawyer at that point. Failure to use prudent trust account management practices, however, may be treated differently.

(e) State and local government checks payable to the depositor and deposited in person with a bank employee.

(f) Cashier's, certified, and teller's checks payable to the depositor and deposited in person with a bank employee.

(g) Federal Reserve Bank checks, Federal Loan Bank checks, and U.S. postal money orders payable to the depositor and deposited in person with a bank employee.

3. Funds available on the second business day after the business day of deposit:

(a) All instruments listed in paragraph 2(d) through (g) above that were deposited by some method other than delivery in person to an employee of the depository bank, e.g., deposit through an ATM or overnight deposit drop.

(b) All other local checks. A local check is a check written on a paying bank that is located in the same Federal Reserve check-processing region as the bank branch where the check is deposited. Your banker will be able to assist you in identifying local checks.

4. Funds available on the fifth business day after the business day of deposit:

(a) All other non-local checks. A non-local check is a check written on a paying bank that is located in a different check-processing region from the bank branch where the check is deposited.

5. Exceptions. The foregoing are general guidelines, and certain exceptions are applicable. The lawyer should check with his or her banker if there is any doubt about what availability period applies. Exceptional circumstances include:

(a) When your bank believes a deposited check will not be paid.

(b) When the lawyer deposits checks totaling more than $5,000 on any one day.

(c) When the lawyer re-deposits a check that has previously been returned unpaid.

(d) When the lawyer has overdrawn his or her account repeatedly in the previous six months.

(e) The bank has an emergency, such as failure of communications or computer equipment.

C. The lawyer should never issue a post-dated trust check on the assumption that it will be presented on a future date after deposited funds have been collected. The reason for this is that the deposited instrument might be dishonored and the deposit not credited to the trust account or charged back against the trust account balance. Thus, unless the lawyer can get the post-dated trust check returned or is able to stop payment on it, it may be debited against other clients' funds in the trust account or may be dishonored due to insufficient funds in the trust account.

D. New Jersey has recognized a very narrow exception to the prohibition against disbursing deposited funds from trust until they are collected in cases where the deposited instrument is in the form of a certified, bank or cashier's check and the funds are received in connection with a real estate or commercial property closing. See New Jersey Advisory Opinion 454, 105 N.J.L.J. 441 (May 15, 1980), as amended at 114 N.J.L.J. 110 (August 2, 1984). New Jersey Advisory Opinion 454 was cited favorably by the New Jersey Supreme Court in *In re Moras*, 131 N.J. 164 (1993). See also 65 A.L.R.4th 24. Indiana has no direct authority on point.

E. Always maintain an audit trail.

1. An audit trail consists of source documents that reflect all transactions into and out of a trust account. Source documents include:

   (a) Copy of the deposit ticket, deposit receipt or bank credit memorandum;

   (b) Bank statement showing the credit of deposited funds;

   (c) Checkbook stub or checkbook register;

   (d) Check or bank debit memorandum;

   (e) Bank statement showing the debit of disbursed funds.

2. Deposit tickets should be annotated to identify each deposited item (whether cash or instrument), the client's name (or file number) and the source of the funds. No unidentified cash deposits should be made into trust.

3. Checks should be annotated to identify the client's name (or file number) and the purpose of the check. No check should ever be written on a trust account without the memorandum line being filled out to clearly identify the purpose of the check.

4. The deposit ticket and the check should be annotated well enough to direct the lawyer to the client matter file corresponding to the receipt or disbursement. In turn, the client matter file or other accounting files should contain adequate documentation to fully explain all deposits or disbursements.

F. Records pertaining to the handling of client trust funds must be maintained for a period of five years following termination of representation. Prof. Cond. R. 1.15(a); Admis. Disc. R. 23, sec. 29(a)(2) (effective January 1, 2011).

VIII. Mechanics of Trust Account Maintenance

The following is an outline of the steps lawyers should take to maintain their client trust account. This outline is not a comprehensive discussion on the law of client trust accounts; it is intended as a guide for how a lawyer should handle trust account transactions.

A. Handling Deposits: When a lawyer receives funds in which a client or third party have an interest, the lawyer should immediately contact the client or third party to obtain the necessary endorsements. Then, the lawyer should deposit the client or third party funds into

his trust account. The lawyer should make an entry in the checkbook registry, the trust receipt book, and the client's subsidiary ledger. The lawyer should keep the following documents to record this transaction: deposit ticket (keep a copy), checkbook register, entry in trust receipts book, and entry in client's subsidiary ledger.

1. Receipt of funds.

2. Promptly notify client and obtain necessary endorsements.

3. Deposit into trust account.

   (a) Deposit slip prepared.

   (b) Funds deposited.

   (c) Checkbook register entry is made.

   (d) Duplicate deposit slip is maintained.

4. Entry is made into trust receipts book (see example at ATTACHMENT **A**).

5. Entry is made into client's subsidiary ledger (see example at ATTACHMENT **B**).

B. Handling Disbursements: After the funds have been collected by the bank (See, section VII (B) supra), the lawyer should promptly disburse the funds to the client and/or third party with the consent of the client. If the client refuses to consent to disburse funds owed to a third party, the lawyer should hold these funds in trust until the dispute between the client and the third party has been resolved. The lawyer should have the client consent to disburse the funds in writing. In case of a disbursement of funds from a contingent fee matter, the lawyer is required to provide the client with a written settlement statement showing the remittance to the client (See, Admission and Discipline Rule 23, Section 29(a)(2) After obtaining the consent of the client, the lawyer should prepare, sign, and issue the appropriate check(s). The lawyer should make an entry in the checkbook registry, trust disbursements book, and the client's subsidiary ledger. The lawyer should keep the following documents to record this transaction: check(s) (keep a copy), checkbook register, entry in trust disbursements book, and entry in client's subsidiary ledger.

1. Documentation supporting disbursement is received or created.

2. Disbursement is made promptly after receipt of funds, once deposited funds are collected and the client has consented to the same.

   (a) Check is prepared and signed by lawyer.

   (b) Check is issued.

   (c) Checkbook register entry is made.

3. Entry is made into trust disbursements book (see example at ATTACHMENT **C**).

4. Entry is made into client's subsidiary ledger (see example at ATTACHMENT **B**).

C. Monthly Reconciliation and Trial Balances: Lawyers should do a monthly reconciliation of their trust account records. This monthly reconciliation is a three-way check to verify the accuracy of trust account records (See ATTACHMENTS **D** and **E** for examples).

1. Step 1: The balance of all trust receipts and disbursements is reconciled to the total of all individual client ledger balances.

2. Step 2: The total of all individual client ledger balances is reconciled to the checkbook register balance.

3. Step 3: The checkbook register balance (as adjusted for outstanding checks and deposits in transit) is reconciled to the balance on the monthly trust account bank statement.

IX. Other Issues in Trust Account Management

A. Trust Account Overdraft Reporting

1. Effective July 1, 1997, all Indiana lawyer trust accounts were required to be maintained in financial institutions that have been approved by the Disciplinary Commission for that purpose. Admis. Disc. R. 23, §29(a)(1). A bank will be approved as a depository for lawyer trust accounts upon entering into an agreement with the Disciplinary Commission to report to the Commission all overdrafts on any trust account. An overdraft occurs whenever any properly payable instrument is presented against a trust account containing insufficient funds, irrespective of whether or not the instrument is honored. Admis. Disc. R. 23, §29(b). Thus, if the lawyer maintains a line-of-credit or some other back-up source of funds to cover overdrafts (a practice that should not be followed), there will still be an overdraft that will be reported to the Disciplinary Commission if the line of credit needs to be accessed to cover a shortfall. There will also be an overdraft report even though the bank exercises the business judgment to honor a check and allow the account to have a negative balance.

2. It is not the bank's obligation to guess whether or not an account is subject to overdraft reporting. Rather, it is the lawyer's obligation to provide notice to the bank of any accounts that are properly subject to overdraft reporting. Each lawyer associated in practice who shares a trust account has a joint and several responsibility to see to it that the bank receives the proper notice. See, *Matter of Anonymous*, 734 N.E.2d 583 (Ind. 2000). An account is subject to overdraft reporting if it includes funds held in any fiduciary capacity in connection with a representation, whether as trustee, agent, guardian, executor or otherwise. Admis. Disc. R. 23, §29(a)(1). Thus, if a lawyer is acting purely in a fiduciary capacity that is not related to a legal representation, the fiduciary account is not subject to overdraft reporting. However, if the lawyer is acting in a legal representation capacity and also serves in another fiduciary capacity, the account is subject to overdraft reporting.

3. Upon receipt of a notice of overdraft, the Disciplinary Commission will send notice to the lawyer that a written and documented explanation of the overdraft is required within a period of ten (10) business days. After review of the explanation and such other materials as may be requested by the Commission, the inquiry will either be closed with a notice to the lawyer providing the reason for closure, or the inquiry will be referred to

the members of the Disciplinary Commission to consider whether or not the circumstances of the overdraft should result in a formal investigation into possible lawyer misconduct.

B. Unclaimed Trust Funds

1. Every effort should be made to promptly forward trust funds to their rightful owner. If a lawyer does not have a good reason to keep funds in trust, those funds should be promptly disbursed to their rightful owners so that the lawyer is relieved of the obligation to safeguard and account for the funds. It may happen occasionally that the lawyer loses track of a client and cannot pay funds from the trust account to the client. In these instances, the lawyer should proceed pursuant to the terms of IC 32-34-1-1, *et seq.*, the Unclaimed Property Act.

TRUST FUNDS RECEIPTS JOURNAL						
MONTH OF: September 2011						
DATE		SOURCE OF FUNDS	MATTER	FILE #	AMOUNT	DEPOSIT
SEP	1	Fred's Insurance Co. (Settlement)	Hurt vs. Poor	94-217	$30,000.00	$30,000.00
	2	John and Mary Doe (Deposit)	Doe to Jones	95-312	$5,000.00	
	2	Debtors-R-Us, Inc. (Collection)	Acme vs. Debtors	95-256	$1,500.00	$6,500.00
	19	Hoosier National Bank (cert. ck.)	Buyer from Seller	95-314	$60,000.00	
	19	Earls Mortgage Co. (Cert.Ck.)	Buyer from Seller	95-314	$40,000.00	
	19	Susan Buyer (Cert. Ck.)	Buyer from Seller	95-314	$10,000.00	$110,000.00
	30	John Spouse (Retainer)	Spouse vs. Spouse	95-163	$2,000.00	$2,000.00
		TOTALS			$148,500.00	$148,500.00

ATTACHMENT A

CLIENT TRUST LEDGER						
Client:		Susan Buyer		File #:	88-314	
Address:		125 East Maple Street		Matter Type:	Real Estate	
		Hoosiertown, IN 46555				
Bs. Phn:		(317) 555-5555				
Hm. Phn:		(317) 555-1234				
DATE						
2011		EXPLANATION OF TRANSACTION	CK #	CHARGES	RECEIPTS	BALANCE
SEP	19	Hoosier National Bank (cert. ck.)			$60,000.00	$60,000.00
	19	Earls Mortgage Co. (cert. ck.)			$40,000.00	$100,000.00
	19	Susan Buyer (cert. ck.)			$10,000.00	$110,000.00
	20	White River Savings & Loan - Mtg. Payoff	815	$50,000.00		$60,000.00
	20	Jack and Jill Seller - Proceeds	816	$52,400.00		$7,600.00
	20	Hill and Dale Realty Co. - Commission	817	$7,000.00		$600.00
	20	Joe Lawyer – Fee	818	$600.00		$0.00

ATTACHMENT B

TRUST FUNDS DISBURSEMENTS JOURNAL							
MONTH OF: September 2011							
DATE		CK #	PAYEE	PURPOSE	MATTER	FILE #	AMOUNT
SEP	12	806	John Hurt	Settlement	Hurt vs. Poor	94-217	$20,000.00
	12	810	Joe Lawyer	Fee	Hurt vs. Poor	94-217	$10,000.00
	13	811	-VOID-				---------
	14	812	Acme Office Supply	Proceeds	Debtors-R-Us, Inc.	95-256	$1,050.00
	14	813	Joe Lawyer	Fee	Debtors-R-Us, Inc.	95-256	$450.00
	15	------	Void Check #507 (2/12/88)		Maya Co.	94-322	($400.00)
	16	814	Aztec Corp.	Replace Ck.#507	Maya Co.	94-322	$400.00
	20	815	White River Svngs & Ln	Mortgage Payoff	Buyer from Seller	95-314	$50,000.00
	20	816	Jack and Jill Seller	Proceeds	Buyer from Seller	95-314	$52,400.00
	20	817	Hill and Dale Realty	Commission	Buyer from Seller	95-314	$7,000.00
	20	818	Joe Lawyer	Fee	Buyer from Seller	95-314	$600.00
	30	------	Bank Svc. Charges		Attorney Funds		$50.00
		TOTALS					$141,550.00

ATTACHMENT C

TRUST LEDGER CONTROL SHEET			
CONTROL			
2011			
TRUST FUNDS			
MONTH	RECEIVED	DISBURSED	BALANCE
Balance Forward			$45,200.00
JAN	$87,000.00	$126,500.00	$5,700.00
FEB	$322,000.00	$290,000.00	$37,700.00
MAR	$95,500.00	$121,500.00	$11,700.00
APR	$52,500.00	$55,650.00	$8,550.00
MAY	$78,900.00	$75,050.00	$12,400.00
JUN	$45,000.00	$50,550.00	$6,850.00
JUL	$125,000.00	$130,050.00	$1,800.00
AUG	$57,000.00	$55,750.00	$3,050.00
SEP	$148,500.00	$141,550.00	$10,000.00
OCT			
NOV			
DEC			

ATTACHMENT D

SCHEDULE OF CLIENTS' TRUST BALANCES	
REFLECTED IN CLIENTS' TRUST LEDGER	
AS OF THE MONTH ENDED	
SEPTEMBER 30, 2011	
AND RECONCILIATION WITH TRUST	
FUNDS ON DEPOSIT PER BANK STATEMENT	
NAME OF CLIENT	BALANCE
Smithville Credit Association	$450.00
Frederick Client	$1,995.00
John and Mary Doe	$5,000.00
Acme Office Supply	$455.00
John Spouse	$2,000.00
Attorney Funds (bank charges)	$100.00
*Total Per Clients' Ledgers	$10,000.00
Add: Outstanding Checks	$500.00
Less: Deposits in Transit	$2,000.00
Balance Per Bank Statement	$8,500.00
*This amount should agree with the checkbook balance and trust ledger control sheet	

ATTACHMENT E

DONALD R. LUNDBERG, *WHAT'S IN YOUR TRUST ACCOUNT? WHEN CLIENTS PAY BY CREDIT CARD*, VOL. 52, NO. 8 RES GESTAE 26 (APRIL 2009)

ETHICS CURBSTONE

WHAT'S IN YOUR TRUST ACCOUNT? WHEN CLIENTS PAY BY CREDIT CARD

With on-line bill paying and near-universal acceptance of credit cards, it seems like I rarely write a paper check any more. At this rate my current supply of "old school" checks should last until mid-century. It will be great if I'm still around to use them.

Because clients follow a similar pattern, lawyers have adapted by accepting credit card payments. Not only does this increase client convenience, it also gives another payment option to clients who may not have cash on hand to pay their lawyers.

Before wading further into this topic—a disclaimer: My relationship with credit cards is limited to trying to wear one out before its expiration date. I am not a banking lawyer, nor do I play one on TV. You should turn elsewhere for technical guidance on being a credit card merchant.

SOME VOCABULARY

As in most specialized fields, credit card processing has its own terminology. A vendor, like a lawyer, who accepts credit cards is known as a "merchant," and the account into which the credit card payments are deposited is called a "merchant account." The bank where the merchant has the merchant account is called the "acquiring bank." The bank that issues a credit card to a customer is known, logically, as the "issuing bank."

CREDIT CARD PAYMENTS FOR RECEIVABLES—NO PROBLEM

No ethical concern is presented when a lawyer accepts a credit card payment in an operating account for fees already earned because the trust account is not implicated. Also, our Supreme Court has held that a fixed fee is deemed earned upon receipt and need not be deposited into trust. So a client's payment of a fixed fee can readily be handled as a credit card transaction, with the fee going directly into an operating account. See *Matter of Kendall*, 804 N.E.2d 1152, 1157 (Ind. 2004). As we will see, ethical questions do arise when credit card transactions are linked directly to lawyer trust accounts.

CREDIT CARD PAYMENTS FOR FUNDS BELONGING IN TRUST—A PROBLEM

May lawyers accept credit card payments if those payments must go into trust? Generally, no. There may be an exception, which I will describe at the end. But first, I'll explain why this is a problem.

Lawyers often receive payments from clients that must go into trust, not the operating account. For instance clients often advance funds to be used in the future to pay for expenses associated

with the representation, like filing fees, expert witness fees or deposition costs. Another example is when the client gives the lawyer a deposit against attorney fees to be earned in the future, usually on an hourly basis. Until earned, these funds belong in the trust account. *Kendall* at 1160.

GO DIRECTLY TO TRUST, DO NOT PASS GO

Let's dispose of one tempting solution right off the bat. If a client payment is destined to be placed in trust, the credit card payment may not be initially deposited in an operating account—even if the lawyer plans to promptly transfer the funds into trust. Rule of Professional Conduct 1.15(a) requires client or third party funds to be held separate from the lawyer's own funds. For the brief period of time that the would-be trust funds occupy the same account as the lawyer's own funds, they are at risk. For example, the client funds can be removed from the account if there is a tax levy on it; the account will be frozen if a judgment creditor serves interrogatories on the bank incident to proceedings supplemental; they could be subjected to a bank set-off if the lawyer is in default of a credit obligation to the bank. This is not an acceptable solution.

So what about Plan B: may the lawyer arrange with the credit card company for deposits to go directly into the trust account? In other words, may a lawyer designate a trust account as the merchant account associated with credit card transactions? If doing so means non-trust funds will be deposited into trust before being transferred elsewhere, this would constitute improper commingling in violation of Rule 1.15(a).

THE MERCHANT FEES PROBLEM

Even if the lawyer sets it up so that only trust funds go into the trust account, this approach is seriously flawed. First, there is the problem of the credit card company's fees. The merchant agreement will authorize the acquiring bank to deduct various fees related to credit card transactions from the merchant account. Authorizing any third party to invade your trust account should give you pause.

Merchant fees include annual and monthly fees and a variety of service fees, some of which are based on a percent of each transaction and others as a flat fee per transaction. Some fees vary with the merchant's credit card volume and whether a transaction is in-person or remote. Figuring out the fees associated with a particular transaction can be complicated and time consuming.

The credit card company will deduct its fees from the merchant account into which the credit card payments are deposited. In our example, this would be the trust account. If the lawyer doesn't have enough of his or her own funds in the account to offset those fees, they will be deducted from other funds on hand—meaning funds held in trust for clients. That is a very bad thing. Permitting it breaches the fiduciary duty to safeguard trust funds. It could even be criminal conversion if the lawyer knows of the unauthorized use.

A "NOMINAL" BALANCE

Maybe the solution lies in the lawyer keeping enough of his or her own money in the trust account to defray credit card merchant fees as they are assessed. Depending on the level of trust account activity, this could mean keeping hundreds of dollars of the lawyer's own money in the trust account, especially given how hard it is to accurately predict what the fees will be. Rule 1.15(b) states that, "A lawyer may deposit his or her own funds reasonably sufficient to maintain a nominal balance in a client trust account." In 2005, the Indiana Supreme Court rejected the ABA's Model Rule 1.15(b) language, which states: "A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose." I suggest that under Indiana's rule keeping hundreds of dollars in trust to offset credit card service charges exceeds a "nominal" balance.

THE CHARGEBACK PROBLEM

Here's another problem—the chargeback. All credit card companies have a mechanism for cardholders to challenge charges they believe were not authorized or are disputed for some other reason. There are time limits for challenging a charge—normally a fixed number of days after the date of the monthly statement on which the charge appears. If the cardholder complies with the dispute procedures, the issuing bank will forward the dispute to the acquiring bank. Without giving advance notice to the merchant, the acquiring bank will reverse the credit to the merchant's account and hold the funds pending resolution of the dispute. The merchant (in our case, the lawyer) may dispute the chargeback, but in the meantime, the funds have been deducted from the account and are being held in limbo.

UNAVAILABLE FUNDS

There's the rub. If the merchant account is a trust account, the lawyer can't be certain the funds are available to be disbursed for a long time. This leaves the lawyer in the untenable position of holding the credited funds in trust for at least as long as the client has to dispute a charge before disbursing them for a filing fee, earned attorney fees or the like. This could easily be ninety days after the original charge—well in excess of the typical waiting period for deposited checks to be collected through banking channels.

If the lawyer removes the funds from trust before the dispute period elapses, there is a risk that the credit will be reversed pending resolution of a client-initiated dispute. That chargeback will be debited against the balance in the account. If the credit card customer's funds are no longer in the account, the chargeback will be debited from other funds in trust—meaning other clients' funds. This would be serious misconduct because other clients did not authorize use of their funds for this purpose.

A NIFTY SOLUTION

What's the solution? Not taking credit cards for payments that must go into trust is one solution, but that can place the lawyer at a business disadvantage and may work a hardship on some clients.

At the risk of sounding like a shill for the nice people who agree to publish these periodic musings about legal ethics, you should know that the Indiana State Bar Association makes available to its members a law firm merchant account program that solves the two problems outlined above. The key to the solution is that client credit card payments that belong in trust are credited entirely to the trust account and any fees associated with the transaction are deducted from a designated non-trust account—an operating or business account. The chargeback problem is addressed in the same way. In the rare event a client timely disputes a charge, the disputed funds will not be deducted from the trust account. Instead, the disputed charge will be deducted from the same non-trust account as is used to pay merchant fees. The broader concern about having authorized a third party to invade your trust account disappears.

Consequently, credit card payments become fully available for disbursement from trust when earned upon being credited to the account by the acquiring bank; and more importantly, there is no risk that fees and chargebacks will be debited against other client funds held in trust. Another benefit is that the merchant may direct credit card payments to either the trust account or the operating account, depending where they belong.

FOR FURTHER INFORMATION

This credit card program is operated by a company called Affiniscape Merchant Solutions. More details are available under the "Members Benefits" section of the ISBA's website: www.inbar.org. Scroll down to "Law Firm Merchant Account" and follow the link. There may be other similar programs out there, but I'm not aware of them.

DONALD R. LUNDBERG, *TRUST ACCOUNT DEBIT CARDS AND A FOOTNOTE ON CLIENT CONFIDENTIALITY*, VOL. 49, NO. 6 RES GESTAE 36 (JANUARY/FEBRUARY 2006).

ETHICS CURBSTONE

TRUST ACCOUNT DEBIT CARDS AND A FOOTNOTE ON CLIENT CONFIDENTIALITY

Electronic case filing and on-line payment of filing fees has arrived and is well entrenched in the federal court system. We'll likely see this expanding into the state courts soon. Lawyers need to keep abreast of the interrelationship between these developments and traditional ethical duties relating to safekeeping client funds.

Debit Card Transactions on Trust Accounts: The federal bankruptcy courts now require electronic filing of bankruptcy cases and on-line payment of all filing fees via credit or debit card. The same is true with civil filings in Indiana's U.S. District Courts.

Lawyers are permitted to advance filing fees for their clients out of operating funds, see, Ind. Prof. Cond. R. 1.8(e). In that event, no trust account questions arise from the use of a debit card that draws funds from an operating account. But what about the majority of lawyers whose clients pay filing fees in advance? The clients' pre-paid filing fees must be held in trust until applied. See, Ind. Prof. Cond. R. 1.15(c).

May lawyers use debit cards to pay client funds for filing fees directly out of trust? The answer has two parts. First, current rules appear to prohibit it. Second, even if the rules were not an impediment, many banks refuse to issue debit cards on trust accounts.

Ind. Admis. Disc. R. 23(29)(a)(5) covers this point. It states: "Withdrawals [from trust] shall be based upon a written withdrawal authorization stating the amount of the withdrawal, the purpose of the withdrawal, and the payee. The authorization shall contain the signed approval of an attorney. Withdrawals shall be made only by check payable to a named payee and not to 'cash', or by wire transfer. Wire transfers shall be authorized by written withdrawal authorization and evidence[d] by a document from the financial institution indicating the date of transfer, the payee and the amount."

Debit card transactions, being neither checks nor wire transfers, are not an authorized means of withdrawing funds from a trust account. Moreover, a debit card disbursement may be accomplished without any signed authorization by an attorney. The practice appears to be prohibited under current rules.

In light of the increasing prevalence of on-line filing fee payments, should Rule 23(29)(a)(5) be amended to permit debit card transactions on trust accounts? One can argue that it should. When a filing fee is paid on-line to the bankruptcy court clerk, an on-line receipt is generated that provides a unique transaction number and provides the cause number of the case associated with the debit card payment. All of the necessary information is provided to tie the transaction to

a specific client matter. On the other hand, debit cards can be used for other purposes, including ATM transactions, and lawyers should be legitimately concerned that a debit card falling into the wrong hands could result in unauthorized use of client funds. Even if for an otherwise legitimate purpose, a withdrawal of cash from an ATM is a prohibited cash transaction. On top of that, debit or credit cards are never as readily distinguishable as paper checks on different accounts can and should be. The risk of confusion is greater. In an informal survey of my colleagues from other jurisdictions, a clear majority of them prohibit the use of debit cards to directly access funds in a trust account.

Perhaps the prudence of amending the rule should also be assessed in light of the common bank policy to refuse use of debit cards with trust accounts. I interviewed a banker for one of the major banks that maintains a significant presence in Indiana. There apparently is no statute or banking regulation that prohibits banks from issuing debit cards on trust accounts. Still, this bank believes that debit card access to funds in a trust account imposes imprudent and unnecessary risks and will not provide one.

Even if debit card transactions on trust accounts were not prohibited by rule, what should a lawyer to do if his or her bank will not provide a trust account debit card? There are two options. One is for the law firm to use a firm credit card to make filing fee payments. The bankruptcy court clerk's office does not charge an additional transaction fee for credit card payments. When the monthly credit card bill arrives, it can be paid with a check from the trust account, with the appropriate internal documentation created to reflect the identity of the clients whose funds are being debited to reimburse the credit card account.

The second option is to obtain a debit card on the law firm's operating account and pay on-line filing fees using operating funds via the debit card. Upon payment, the operating account can be promptly reimbursed by way of a trust check, payable to the law firm, written on client funds already on deposit. Neither approach runs afoul of any ethical standards.

[Section on client confidentiality omitted.]

Section Nine

LAWYER ADVERTISING IN INDIANA[1]

Charles M. Kidd, Staff Attorney
Indiana Supreme Court Disciplinary Commission

The "modern" age of lawyer advertising nationally was the direct result of the newspaper ad in *Bates v. State Bar of Arizona,* 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977). In *Bates,* two Phoenix, Arizona lawyers opened a "legal clinic" to offer certain "routine" legal services at modest rates. Their "sin" was in placing an otherwise truthful advertisement in the local newspaper that included, *inter alia,* a listing of certain services and fees offered by the clinic. The Court held that commercial speech by lawyers is protected under the First Amendment to the Constitution as long as it is not false, misleading or deceptive. Conversely, advertising that is false or deceptive is still subject to regulation by the states as unprotected speech.

Jumping ahead to the 21st century, the regulation of lawyer advertising has been through a number of iterations nationally and in Indiana specifically. After *Bates*, the Indiana Code of Professional Responsibility was amended to include rules regulating lawyer advertising and, in 1987, many of those provisions were carried through into Indiana's Rules of Professional Conduct. That version of the rules remained largely intact until the latest round of revisions. A new version of rules governing lawyer advertising in Indiana came into being on January 1, 2011. That version of the rules is attached to this article.

The vast majority of advertising is created and used for dissemination to the general public…hence the term "general dissemination" advertising. We commonly think of those as being on the internet, on one of the social media sites, in the phone book, on television or in the newspaper. The content of general dissemination advertising is most appropriately reviewed first under Rule 7.1 of the current *Rules of Professional Conduct.* Rule 7.1 prohibits a lawyer from making a false or misleading communication about the lawyer or the lawyer's services. This language is intended to parallel the language in *Bates* to the extent that content-based regulation of lawyer advertising must center on a determination as to whether the ad is "false, misleading or deceptive."

Some of the provisions in the new rules deserve specific note and consideration for lawyers who advertise or who are considering advertising. For example, this is the first time that Indiana's lawyer advertising rules have had Commentary included. This Commentary is intended to provide some additional guidance to the practicing lawyer to help in the construction of their ads. For example, Comment [2] of rule 7.2 contains a list of facts that lawyers are specifically permitted to include in their ads like the fact that a lawyer may have formerly served in the military or may have experience as a teacher. This list is not exhaustive, of course, but is intended to give some kind of positive guidance for statements that are already considered appropriate for use in soliciting clients.

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[1] This is by no means a comprehensive examination of this subject matter. Any opinions expressed herein are only those of this author and cannot bind the Indiana Supreme Court or its Disciplinary Commission.

Another new provision is one that calls for a 30 day ban on targeted solicitation of clients for cases involving personal injury, wrongful death or accident related litigation. This provision is found in rule 7.3(b)(3) of the rules. It follows the practices of many states that have created this "cooling off period" to limit solicitation from people who might otherwise be in a vulnerable state. Note, the clients are still free to contact the lawyer of their choosing and enter into a representation agreement with that lawyer during that time, but the rule prohibits lawyers from engaging in a direct mail solicitation during the specified period.

There is another type of advertising known as "targeted" solicitation that is the subject of Indiana's Prof.Cond.R. 7.3(c). In essence, a targeted solicitation is one in which the lawyer has reason to believe that the recipient needs a lawyer *in a particular matter.* The archetype of these kinds of solicitations includes personal injury plaintiff's lawyers and lawyers who troll the judgment dockets for people who might be ready to take personal bankruptcy. Targeted solicitation regulation grew out of the U.S. Supreme Court's case of *Shapero v. Kentucky Bar Association, infra*. Although there is a specific requirement for the form of a targeted solicitation, the same rules regarding false and misleading advertising still apply. Although this provision has been in the rules for a considerable amount of time, it still might confuse lawyers who believe that all direct mail solicitations must be submitted to the Disciplinary Commission before transmission to prospective clients. This is not so. Only those direct mail solicitations to people who might need a lawyer "in a particular matter" are subject to the filing and filing fee requirements of rule 7.3(c).

There are also a couple of noteworthy changes to the law governing the naming of law firms and the use of trade names. In the new rule 7.5, the use of trade names is broadened slightly to permit law firms now to include information in their names to include geographical locations, areas of practice or language proficiencies. As the cases following this narrative point out, the use of a trade name has been strictly forbidden for Indiana lawyers for many years.

Another new provision prohibits lawyers who practice in the form of associations to present themselves as appearing to practice in the form of a law firm. This provision in rule 7.5 is entirely new to the regulation of lawyers and, as of the publication of this article has not been tested through a disciplinary action or been the subject of an opinion by the bar association's ethics' committee. So-called "space sharing" arrangements among lawyers are prolific throughout the state so there may be considerable attention paid to this rule by the practicing bar in the future.

Good taste is not a criterion for analysis under any current regulatory scheme in Indiana. This is not to suggest that the Disciplinary Commission's ambit is so narrow that consumer fraud is ignored. The Commission staff will review questioned ads under many different sources of law. The primary focus of this type of marketing should revolve around the free flow of accurate, truthful and useful information for the potential consumer of legal services. Advertising schemes that obfuscate or foster a mystique about legal services create immediate suspicion that their creators are not being forthright in their search for prospective clients. *Bates* and its progeny focus on the free flow of truthful information. The *Rules of Professional Conduct* cited above are structured to implement that intention and provide a regulatory framework to spot violations.

What is NOT included is any sort of comprehensive treatment of internet based methodologies for soliciting prospective clients. Twitter, Facebook, Linked-In and newer forms of communication or social networking systems are, generally, subject to the *Bates* standard and the standard under rule 7.1 regarding misleading representations by law firms. Beyond that, there is no specific rule governing or limiting the use of these technologies as of this writing. Regulation, alas, always lags behind progress in these areas and so lawyers who seek to be in the vanguard of users of this technology would be well advised to do their due diligence and seek the advice of expert counsel before diving into that water.

What follows is a catalog (but not an exclusive list) of many Indiana cases involving lawyer advertising from the last several years. Note that many involve the lawyer's improper use of the term "specialist" and, on deeper review of the actual opinions themselves, a discovery that the lawyers were lackadaisical about reviewing the ads before they ran. Still further in the materials is a list of the most important lawyer advertising cases from the U.S. Supreme Court. There are two *caveats* appropriate here. First, the U.S. Supreme Court views lawyer advertising cases in a different way than it views advertising or marketing cases in other contexts. Second, (as noted earlier) Indiana's rules regarding lawyer advertising are unique. This is true of the lawyer advertising regulations in many states. Lawyers who are researching the law in this area would be well advised to remember that Indiana does not use the ABA's Model Rules of Professional Conduct in this area. Relying on cases from states other than Indiana is a perilous practice.

INDIANA ADVERTISING CASES

This area of the law of ethics 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. So it is that states create regulation in this area and run the risk of having that regulation overturned by the United States Supreme Court at some point years in the future.

Matter of Joshua S. Parilman, 947 N.E. 2d 915 (Ind. 2011)

The Respondent practices law in Arizona and is not licensed in Indiana. In spring of 2010, he caused radio stations broadcasting in Indiana to air an advertisement inviting listeners involved in traffic accidents to call him. At least two Indiana residents responded to the advertisement. His only office is in Phoenix and he is not certified as a specialist in any field of practice by either Indiana or Arizona. Neither Indiana nor Arizona certify lawyers in the area of "automobile accidents." The parties agree that Respondent violated Professional Conduct Rules 5.5(b)(2), 7.2(b), 7.2(c)(4), 7.2(c)(6), and 7.4. The Indiana Supreme Court bars Respondent indefinitely from acts constituting the practice of law in this state, including temporary admission and solicitation of clients, until further order of the Court.

Matter of Patrick K. Rocchio, 943 N.E.2d 797 (Ind. 2011)

The Respondent engaged in attorney misconduct that, standing alone, would warrant a sanction in the lowest range. However, his conduct during the disciplinary process demonstrates his inability to recognize his clear violations of this state's disciplinary rules, his contempt for

those rules and this disciplinary process, and his lack of appreciation for the role of this Court's hearing officer and Disciplinary Commission members and staff. The Respondent, a Michigan resident, sent a letter to an Indiana resident who had recently been in a motor vehicle accident. Respondent is licensed to practice law in Michigan but registered his Indiana law license as inactive in 2009. The Commission charged Respondent with violating rules 7.2(c)(3) and 5.5(b)(2) of the Indiana Professional Conduct Rules (pre-2011 revisions).

Rocchio's brief to the Court attacked the Commission's former executive secretary ("a first-class ass"), the Commission ("soft and lazy"), the disciplinary process ("a modern day version of the Star Chamber, a Salem witch hunt, or a Spanish Inquisition"), and the Court's disciplinary rules ("frivolous and antiquated," "rules of behavior conceived over a cigar and brandy . . . during the late Victorian Era by a group of self-impressed lawyers"), as well as his repeated use of caustic terminology (e.g., "despicable," "deceptive and ridiculous," "naked stupidity," "cutesy and evasive"). For Respondent's professional misconduct, the Court suspended Respondent from the practice of law in this state for a period of not less than 180 days, without automatic reinstatement, effective on the date of the opinion.

Matter of Loomis, Grubbs, and Wray, 905 N.E.2d 406 (Ind. 2009),

In this trade name case, the respondents formed "Attorneys of Aboite, LLC." Note: that is not a law firm. Aboite is a township in Allen County, where the respondents maintained law offices. The respondents did not practice as a firm, and they used "Attorneys of Aboite, LLC" and "Attorneys of Aboite" in professional documents, communications, signage, telephone directory listings, numerous advertisements, and an internet website without revealing that they did not practice law as a firm. [In Indiana, for a law firm to practice in the form of a PC or limited liability entity, the State Board of Law Examiners must issue a certificate of registration. That was not, and could not be done for "Attorneys of Aboite, LLC" or "Attorneys of Aboite."] The respondents ceased using "Attorneys of Aboite" in all its forms in October 2008. The court found that the respondents violated Prof. Cond. R. 7.2(b), which prohibits the use of an advertisement that contains a false or misleading statement or claim; Prof. Cond. R. 7.5(a), which prohibits the use of professional documents and communications containing a false or misleading statement; and Prof. Cond. R. 7.5(b), which prohibits practicing under a name that is misleading as to the identity, responsibility, or status of those practicing there under, or is otherwise false, fraudulent, misleading, deceptive, self-laudatory or unfair. This includes practicing under a trade name. Respondents also violated Admis. Disc. R. 27(g) and (i) because they used LLC without meeting the requirements of R. 27 and did not practice law together as a firm, but instead simply shared office space. The court imposed a public reprimand on respondents.

Matter of Benkie and Crawford, 892 N.E.2d 1237 (Ind. 2008),

The Court gave the respondents a public reprimand based on two brochures. They were titled "When You Need a Lawyer" and "We Work for You." In "When You Need a Lawyer," the respondents represented that the firm has a "commitment to obtaining the best possible settlement for you and your family." In "We Work for You," the respondents described several prior successful representations. "Legal Advertisement" appeared on each page of both

brochures through 2004, when it was replaced with "Advertising Material." The Court found that the statement about obtaining the best possible settlement did not violate any ethics rules, but found that the respondents violated Prof. Cond. R. 7.2(b), use of a public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim; Prof. Cond. R. 7.2(d)(2), use of a public communication that contains statistical data or other information based on past performance or prediction of future success; and Prof. Cond. R. 7.3(c), solicitation of professional employment without the words "Advertising Material."

Matter of Doyle, 858 N.E.2d 638 (Ind. 2006)

The attorney's law practice ran advertisements on three different dates in the local newspaper claiming specialization in several fields of law. The attorney lacked certification as a specialist in any of the stated fields of law. The court held that the attorney violated Prof. Cond. R. 7.2(b) for engaging in a form of public communication containing false, fraudulent, misleading, deceptive self-laudatory or unfair statements, and Rule 7.2(e) for failing to review and approve representations made in an advertisement. The court sentenced the attorney with a public reprimand.

Matter of Hughes, 833 N.E.2d 459 (Ind. 2005)

The respondent violated Rule 7.2(d) in failing to ensure that jurisdictional limitations on the privilege to practice law of lawyers in the firm are clearly visible on the firm's letterhead. For that violation, as well an unauthorized practice of law violation for having an associate who was not licensed in Indiana conduct legal work in this state, respondent received a public reprimand.

Matter of Keller and Keller, 792 N.E.2d 865 (Ind. 2003)

Two attorneys were disciplined for their four television advertisements depicting an insurance company strategy session. The attorneys received a public reprimand for their violation of Rule 7.1(d)(4), which prohibits any implication regarding the quality of legal services. The attorneys also violated Rule 7.1(d)(3), which prohibits an attorney from using any form of public communication which contains an endorsement of a lawyer. Even though the advertisement did not contain an express endorsement, an implied endorsement existed so as to warrant discipline.

Matter of Anonymous, 783 N.E.2d 1130 (Ind. 2003)

Also in 2003, the Indiana Supreme Court approved an agreement for discipline wherein an attorney violated Prof. Cond. R. 7.1(b) by using or participating in the use of a form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or a claim. Two attorneys were given a private reprimand for an advertisement which included the words "elder law specialists." In order for an attorney in Indiana to hold himself out to the public as a "specialist," the attorney must be certified as such pursuant to the provisions of Admis. Disc. R. 30. The attorneys were not certified as "elder law specialists" pursuant to the rule, and therefore, committed misconduct. In support of the sanction of private reprimand, the

Court noted that the advertisement appeared in a publication with an extremely limited audience and that the ad generated no legal work for the attorneys.

Matter of Anonymous, 775 N.E.2d 1094 (Ind.2002)

An attorney received a private reprimand for placing a deceptive advertisement for legal services. The attorney placed an advertisement in an Indianapolis newspaper in an effort to solicit bankruptcy clients for his bankruptcy practice. The advertisement stated, "bankruptcy, but keep house and car." The attorney and the Disciplinary Commission stipulated that in bankruptcy practice under Chapters 7 and 13, the debtor has the right to retain possession of the debtor's house and automobile if those obligations are reaffirmed during the course of the bankruptcy proceedings. The debtor, however, must arrange to bring the debts current, unless otherwise agreed to by the debtor and creditor. The debtor who has not reaffirmed these obligations will be subject to foreclosure of these obligations and loss of secured assets, including the house and automobile. The Supreme Court found that upon reading the attorney's ad, an ordinary prudent person, perhaps knowing nothing about the debt reaffirmation provisions of Chapters 7 and 13, would likely believe that during and after bankruptcy proceedings, his house and automobile would be secure in his possession, no matter what. The Court emphasized that Rule 7.1(b) does not require proof that any client or potential client was actually deceived. It is enough that a public communication risks deceiving the public. Accordingly, the lawyer's advertisement violated Rule 7.1(b). The Court did find in mitigation that the attorney had several people review the advertisement before he placed it in the newspaper and had the ad promptly changed once the Commission notified him of their concerns.

Matter of Gerling, 777 N.E.2d 1097 (Ind. 2002)

An attorney received a public reprimand for his violation of Prof. Cond. R. 7.1(b). The attorney contracted with a marketing firm to advertise his law firm. The marketing firm came up with an advertising campaign using the theme, "Expect more from a Gerling attorney." One part of the campaign involved the creation and display of billboards. The billboards promoting the attorney's law firm portrayed either five or seven people. The billboards did not depict every employee of the Gerling law offices. In both versions of the billboard, all of the individuals depicted were lawyers except one person who was not and is not an attorney. In both versions of the billboard, the firm's slogan, "Expect more from a Gerling attorney" appears. The Supreme Court found that the invitation to expect more from a Gerling is juxtaposed adjacent to a photograph of several individuals, all of whom are attorneys except for one. The slogan "Expect more from a Gerling attorney" used in conjunction with the non-attorney's picture suggests that she is a Gerling attorney. The suggestion was strong because she was pictured with (and even in front of) the actual lawyers from the law office. The Court held that by including the non-attorney's picture on the billboards, the lawyer held her out to be a "Gerling attorney" and thereby violated Rule 7.1(b) by engaging in a public communication that was misleading and deceptive.

Matter of Pacior, 770 N.E.2d 273 (Ind. 2002)

The lawyer received a public reprimand, in part, for his misconduct in making a misleading and deceptive public statement in violation of Prof. Cond. R. 7.1(b). After seeing the lawyer's advertisement for a "free appointment" and a "free initial consultation," a woman contacted the lawyer in contemplation of obtaining an emergency protective order. She paid the lawyer a $300 retainer and scheduled an initial appointment. At the conclusion of their meeting, the lawyer mailed his fee agreement for the representation to the woman. Several days later, she contacted the lawyer's office and advised him that she was terminating his representation, and requested a refund of the $300 that she had paid. The next day, the woman received a refund check from the lawyer for $100 along with a written explanation of services which provided that the lawyer was charging the woman $150 for the initial consultation and an additional $50 for legal services provided the day of the consultation. The Supreme Court found that the lawyer committed misconduct by advertising a free initial consultation and later charging the woman for the meeting.

Matter of Allen, 770 N.E.2d 826 (Ind. 2002)

The respondent lawyer received a public reprimand for his solicitation of business. The brother of the lawyer's paralegal witnessed a fatal accident and contacted the lawyer's office. The lawyer videotaped the scene the next day and prepared a letter soliciting the deceased's survivors. The witness hand delivered the letter to the deceased's father at the funeral. The letter did not bear the words "advertising material" and had not been filed with the Commission. In it, the lawyer represented that he specialized in certain traumatic personal injury matters and in wrongful death litigation, although the lawyer had not been certified as a specialist under Admis. Disc. R. 30. The Supreme Court found that the lawyer violated Prof. Cond. R. 7.3(a), which prohibits a lawyer from seeking or recommending by in-person contact the employment as a private practitioner, of himself, his partner, associate, or his firm, to a non-lawyer who has not sought the advice regarding the employment of a lawyer or assist another in so doing. The lawyer also violated Prof. Cond. R. 7.3(c), which prohibits lawyers from soliciting professional employment from a prospective client with whom the lawyer has no family or prior professional relationship without labeling a solicitation as "advertising material" and filing a copy with the Commission. The lawyer further violated Prof. Cond. R.7.4(a), which prohibits a lawyer from expressing or implying any particular expertise except where the lawyer is certified as a specialist under Admis. Disc. R. 30.

Matter of Foos, 770 N.E.2d 335 (Ind. 2002)

This lawyer received a public reprimand for his misleading use of a law firm name. The lawyer practiced law as an employee of Warrior Insurance Group, Inc. with responsibilities that included providing insurance defense representation to individuals or entities insured by Warrior. Despite his exclusive employment arrangement with Warrior, the lawyer utilized letterhead and otherwise held himself out to the public under the name "Conover and Foos," even though Conover and Foos as an entity was indistinguishable from Warrior. The lawyer subsequently changed the name from "Conover and Foos" to "Conover and Foos, Litigation Section of the Warrior Insurance Group, Inc." A lengthy disclaimer appeared at the bottom of the letterhead in small type, stating that the lawyers of Conover and Foos were the exclusive employees of Warrior Insurance Company. The Court found that even though the small type disclaimer

accompanying the designation states that the attorneys are "exclusively employed" by Warrior, the disclaimer appears on the bottom of the letterhead, away from the heading and the location of the designation. The Court further found that the disclaimer language which accompanied the name "Conover and Foos," especially in light of its location on the letter and the smaller type size, was not sufficient to negate the possible misconception of independence. Thus, the lawyers use of the name "Conover and Foos, Litigation Section of the Warrior Insurance Group, Inc." is misleading and violated Prof. Cond. R. 7.2(a) and 7.2(b).

Matter of Sekerez, 458 N.E.2d 229 (Ind. 1984)

Multiple count disciplinary action in which the respondent lawyer used law students and other non-lawyers to staff offices around the state called, for example, the Merrillville Legal Clinic. The Supreme Court held that the prohibition against the use of trade names by attorneys was not an unconstitutional restraint on useful commercial speech or unconstitutionally vague or overbroad. This lawyer was disbarred.

Matter of Miller, 462 N.E.2d 76 (Ind. 1984)

Multiple count disciplinary action in which the lawyer was sanctioned, *inter alia*, for posting a sign saying, "Area Attorneys" on the south side of Indianapolis. The Court held that the sign was misleading as to the identity of the attorney practicing thereunder and was an impermissible use of a trade name. This lawyer received a one-year suspension from practice.

Matter of Anonymous, 630 N.E.2d 212 (Ind. 1994)

This opinion actually disposed of four cases consolidated for purposes of this decision. Sending letters to prospective clients inviting them to ask how to avoid foreclosure, but without labeling the letters as "advertising material" or filing a copy with the Disciplinary Commission and providing audio solicitations (advertised in the telephone directory) with no disclosure that they were advertising materials warranted private reprimands.

Matter of Foster, 630 N.E.2d 562 (Ind. 1994)

The respondent lawyer here identified himself as an "Estate Specialist since 1979" when no such specialty was recognized in Indiana law. For that misleading advertising, the lawyer received a public reprimand.

Matter of Anonymous, 637 N.E.2d 131 (Ind. 1994)

The respondent lawyer sent a letter to a prospective client soliciting business without labeling the letter as "Advertising Material." He did, however, label the letter as a "legal advertisement" that could suggest to the unsophisticated client that the solicitation had somehow been determined to be lawful. For this misconduct, he received a private reprimand by the Supreme Court.

Matter of Skozen, 660 N.E.2d 1377 (Ind. 1996)

The respondent lawyer failed to label solicitation letters as "Advertising Materials" or file them with the Disciplinary Commission and falsely informed the Commission that the letters were sent at the behest of certain family members. The lawyer received a public reprimand.

Matter of Cartmel, 676 N.E.2d 1047 (Ind. 1997)

Multiple count disciplinary action against lawyer who advertised, *inter alia*, "100% results" and the "absolute best company to deal with your personal needs." The Supreme Court held that his ads contained misleading and self-laudatory statements about the quality of the services that were offered. For that and other misconduct, the lawyer settled this disciplinary action for a suspension from the practice of law for sixty days with automatic reinstatement to the bar.

Matter of Anonymous, 689 N.E.2d 434 (Ind. 1997)

Lawyer was disciplined for running a radio advertisement that he "specialized" in personal injury cases when he was not so certified. The Supreme Court held that such conduct violated the advertising rules, but a private reprimand was adequate to sanction such misconduct.

Matter of Anonymous, 689 N.E.2d 442 (Ind. 1997)

Attorneys were disciplined for placing a yellow pages advertisement claiming to be the "premier" personal injury law firm in their area and describing their experience and track record as sufficient to "win" a settlement. The Supreme Court found these statements were misleading and violated Indiana's Rules of Professional Conduct. The lawyers received private reprimands and anonymous publication of their misconduct.

Matter of Schneider, 710 N.E.2d 178 (Ind. 1999)

Lawyer's letterhead was misleading and deceptive by advertising himself as a "professional services group" because he was both an accountant and a lawyer with subordinate accountants working for him. The Court found the name of the group to be misleading and a trade name. There was no group…only the respondent lawyer. He received a 30 day suspension from the practice of law.

Matter of Wamsley, 725 N.E.2d 75 (Ind. 2000)

The respondent lawyer advertised the he would get clients the "best possible settlement…least amount of time." In addition, he claimed his representation, experience and integrity resulted in most of his cases "being settled without filing a complaint or a lengthy trial" without any mention of the merits of the action. This case was settled for a public reprimand.

Matter of Cole, 738 N.E.2d 1035 (Ind. 2000)

These were disciplinary actions against two brothers who, *inter alia*, advertised that one would do criminal defense work and the other indicated he was a Johnson County prosecutor. The Supreme Court found that by holding himself out as a "prosecutor" and not a "deputy prosecutor"

the one brother's advertisement contained a material misrepresentation of fact. One brother received a public reprimand and the other was suspended from the practice of law for thirty days with provision for his automatic reinstatement to the bar.

Matter of Huelskamp, 740 N.E.2d 846 (Ind. 2000)

The respondent lawyer sent a letter to prospective clients seeking employment in their criminal cases that the Supreme Court determined to contain misleading information. Included in the offending statements were testimonials by former clients and a description of the lawyer's experiences that could be misinterpreted as being experiences the respondent had as a lawyer when, in fact, they were not. The lawyer received a public reprimand for his misconduct.

Matter of Murgatroyd, 741 N.E.2d 719 (Ind. 2001)

This is a consolidated opinion involving three out of state lawyers who solicited Indiana residents for personal injury/wrongful death cases after a plane crash. Under this agreed judgment, these lawyers agreed to abide by Indiana's rules in future cases should they have occasion to solicit clients within this state.

Matter of Hear, 755 N.E.2d 579 (Ind. 2001)

This lawyer was suspended for 100 days for using a non-lawyer to solicit potential clients for the lawyer's debt collection business. He shared fees with the non-lawyer and failure to safeguard creditor clients' funds in a trust account.

Matter of Pacior, 770 N.E.2d 273 (Ind. 2002)

This respondent received a public reprimand for, *inter alia*, advertising a free consultation and then billing a client for the consultation. The advertisement was determined to be false and misleading as a result.

Matter of Foos, 770 N.E.2d 335 (Ind. 2002)

This lawyer practiced law using the name "Conover & Foos, Litigation Section of the Warrior Insurance Group, Inc." The Supreme Court found that the firm was merely the law department of Warrior Insurance Company and staffed by Warrior employees. The Court had previously spoken to this practice in *Cincinnati Insurance Company v. Wills*, 717 N.E.2d 151 (Ind. 1999). For this, the lawyers stipulated the facts of the case and the Court determined the appropriate sanction to be a public reprimand.

Matter of Allen, 770 N.E.2d 826 (Ind. 2002)

The brother of the respondent lawyer's paralegal witnessed a fatal accident. The lawyer prepared a solicitation letter to the decedent's family and used the witness/brother to hand deliver the letter to the victim's family at his funeral. The Court determined that this was an impermissible in-

person solicitation under the rules and, at best, an improper targeted solicitation (see rule 7.3(c)). The case was settled for a public reprimand.

Matter of Anonymous, 775 N.E.2d 1094 (Ind. 2002)

After a trial in the disciplinary proceeding, the respondent lawyer received a private reprimand for publishing an advertisement that said only, "Bankruptcy, but keep house & car." This was determined to be false and deceptive because it did not reveal that the debtor had to arrange to bring those debts current to reaffirm those obligations. In mitigation, the Court observed that the lawyer had asked several other lawyers opinions of the ad before allowing it to be published, hence the private sanction.

Matter of Allen, 783 N.E.2d 1118 (Ind. 2002)

For two counts of misconduct, this lawyer received a 90-day suspension from the bar. In the second count, the lawyer published a press release to various members of the media after a plane crash in his part of the state. He indicated that he had been contacted by a family member of one of the victims and then described his prior experiences with that kind of tort litigation. The Superior Court found he violated the advertising rules. He had not been retained to represent anyone from the subject plane crash.

Matter of Anonymous, 783 N.E.2d 1130 (Ind. 2003)

This opinion resolved two cases of lawyer advertising problems by lawyers in the same firm. They advertised that they were elder law specialists when they were not so certified. Because the advertisement was placed in a publication of *very* limited distribution, the Supreme Court believed that a private sanction would be adequate to address their misconduct.

Matter of Keller, 792 N.E.2d 865 (Ind. 2003)

This opinion covered two lawyers who practiced law as the firm of Keller & Keller. They ran television advertisements depicting a dramatized strategy session at an insurance company. In addition, they used a nationally known television actor to promote their firm. The Supreme Court, drawing on the U.S. Supreme Court's decision in *Bates v. State Bar of Arizona, infra*, held that because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising might be found quite inappropriate in legal advertising. These lawyers received public reprimands for their ads.

Relevant U.S. Supreme Court Cases On Advertising By Lawyers

Bates v. State Bar of Arizona
433 U.S. 350, 53 L Ed 2d 810, 97 S Ct 2691 (1977)

Central Hudson Gas & Electric Corporation v. Public Service
447 Us 557, 65 L Ed 2d 341, 100 S Ct 2343 (1980)

Ohralik v. Ohio State Bar Association
436 Us 447, 56 L Ed 2d 444, 98 S Ct. 1912, reh den (US) 58 L Ed 2d 198, 99 S. Ct. 226 (1978)

Matter of R. M. J.
455 US 191, 71 L Ed 2d 64, 102 S Ct 929 (1982)

Philip Q. Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio
471 US 626, 85 L Ed 652, 105 S Ct 2265 (1985)

E. Richard Friedman v. N. Jay Rogers
440 US 1, 59 L Ed 2d 100, 99 S Ct 887, reh den 441 US 917, 60 L Ed 2d 389, 99 S Ct 2018 (1979)

Shapero v. Kentucky Bar Association
486 US 466, 100 L Ed 2d 475, 108 S.Ct. 1916 (1988)

Florida Bar v. Went For It, Inc.
515 U.S. 618, 132 L.Ed.2d 541, 115 S.Ct. 2371 (1995)

Fred H. Edenfield v. Scott Fane
507 U.S. 761, 123 L.Ed.2d 543, 113 S.Ct. 1792 (1993)

Dominic P. Gentile v. State Bar of Nevada
111 S.Ct. 2720 (1991)

Other Non-Indiana Cases of Interest

Matter of Oldtowne Legal Clinic, P.A.
285 Md. 132, 400 A.2d 1111 (1979)

Matter of Zang
741 P.2d 267 (Ariz. 1987)

Matter of Zang
166 Ariz. 426, 803 P.2d 419 (1990)

Iowa State Bar Association v. Mark A. Humphrey
355 N.W.2d 565 (Iowa 1984)

Iowa State Bar Association v. Mark A. Humphrey
377 N.W.2d 643 (Iowa 1985)

Andrew Leoni v. State Bar of California
39 Cal.3d 609, 704 P.2d 183, 217 Cal.Rptr. 423 (1985)

Matter of von Wiegen
63 N.Y.2d 163 (1984

The Advertising Rules as of January 1, 2011

Rule 7.1. Communications Concerning a Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Commentary

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this Rule. In the absence of special circumstances that serve to protect the probable targets of a communication from being misled or deceived, a communication will violate Rule 7.1 if it:

(1) is intended or is likely to result in a legal action or a legal position being asserted merely to harass or maliciously injure another;

(2) contains statistical data or other information based on past performance or an express or implied prediction of future success;

(3) contains a claim about a lawyer, made by a third party, that the lawyer could not personally make consistent with the requirements of this rule;

(4) appeals primarily to a lay person's fear, greed, or desire for revenge;

(5) compares the services provided by the lawyer or a law firm with other lawyers' services, unless the comparison can be factually substantiated;

(6) contains any reference to results obtained that may reasonably create an expectation of similar results in future matters;

(7) contains a dramatization or re-creation of events unless the advertising clearly and conspicuously discloses that a dramatization or re-creation is being presented;

(8) contains a representation, testimonial, or endorsement of a lawyer or other statement that, in light of all the circumstances, is intended or is likely to create an unjustified expectation about a lawyer or law firm or a person's legal rights;

(9) states or implies that a lawyer is a certified or recognized specialist other than as permitted by Rule 7.4;

(10) is prohibited by Rule 7.3.

[3] See also Rule 8.4(e) for the prohibition against stating or implying 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.

Rule 7.2. Advertising

(a) Subject to the requirements of this rule, lawyers and law firms may advertise their professional services and law related services. The term "advertise" as used in these Indiana Rules of Professional Conduct refers to any manner of public communication partly or entirely intended or expected to promote the purchase or use of the professional services of a lawyer, law firm, or any employee of either involving the practice of law or law-related services.

(b) A lawyer shall not give anything of value to a person for recommending or advertising the lawyer's services except that a lawyer may:

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service described in Rule 7.3(d);

(3) pay for a law practice in accordance with Rule 1.17; and

(4) refer clients to another lawyer or a non-lawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement.

(c) Any communication subject to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content. The lawyer or law firm responsible for the content of any communication subject to this rule shall keep a copy or recording of each such communication for six years after its dissemination.

Commentary

[1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising.

[2] Provided that the advertising otherwise complies with the requirements of the Rules of Professional Conduct, permissible subjects of advertising include:

(1) name and contact information, including the name and contact information for an attorney, a law firm, and professional associates;

(2) one or more fields of law in which the lawyer or law firm practices, using commonly accepted and understood definitions and designations;

(3) date and place of birth;

(4) date and place of admission to the bar of state and federal courts;

(5) schools attended, with dates of graduation, degrees, and other scholastic distinctions;

(6) academic, public or quasi-public, military, or professional positions held;

(7) military service;

(8) legal authorship;

(9) legal teaching position;

(10) memberships, offices, and committee assignments, in bar professional, scientific, or technical associations or societies;

(11) memberships and offices in legal fraternities and legal societies;

(12) technical and professional licenses;

(13) memberships in scientific, technical, and professional associations and societies;

(14) foreign language ability;

(15) names and addresses of bank references;

(16) professional liability insurance coverage;

(17) prepaid or group legal services programs in which the lawyer participates as allowed by Rule 7.3(d);

(18) whether credit cards or other credit arrangements are accepted;

(19) office and telephone answering service hours; and

(20) fees charged and other terms of service pursuant to which an attorney is willing to provide legal or law-related services.

[3] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

[4] Lawyers are not permitted to pay others for channeling professional work. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising. A lawyer may compensate employees, agents, and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff, and website designers. See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of non-lawyers who prepare marketing materials for them.

Rule 7.3. Direct Contact with prospective Clients

(a) A lawyer (including the lawyer's employee or agent) shall not by in-person, live telephone, or real–time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a prospective client by in-person or by written, recorded, audio, video, or electronic communication, including the Internet, if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer;

(2) the solicitation involves coercion, duress or harassment;

(3) the solicitation concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the solicitation is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the initiation of the solicitation;

(4) the solicitation concerns a specific matter and the lawyer knows, or reasonably should know, that the person to whom the solicitation is directed is represented by a lawyer in the matter; or

(5) the lawyer knows, or reasonably should know, that the physical, emotional, or mental state of the person makes it unlikely that the person would exercise reasonable judgment in employing a lawyer.

(c) Every written, recorded, or electronic communication from a lawyer soliciting professional employment from a prospective client potentially in need of legal services in a particular matter shall include the words "Advertising Material" conspicuously placed both on the face of any outside envelope and at the beginning of any written communication, and both at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2). A copy of each such communication shall be filed with the Indiana Supreme Court Disciplinary Commission at or prior to its dissemination to the prospective client. A filing fee in the amount of fifty dollars ($50.00) payable to the "Supreme Court Disciplinary Commission Fund" shall accompany each such filing. In the event a written, recorded, or electronic communication is distributed to multiple prospective clients, a single copy of the mailing, less information specific to the intended recipients, such as name, address (including email address) and date of mailing, may be filed with the Commission. Each time any such communication is changed or altered, a copy of the new or modified communication shall be filed with the Disciplinary Commission at or prior to the time of its mailing or distribution. The lawyer shall retain a list containing the names and addresses, including email addresses, of all persons or entities to whom each communication has been mailed or distributed for a period of not less than one (1) year following the last date of mailing or distribution. Communications filed pursuant to this subdivision shall be open to public inspection.

(d) A lawyer shall not accept referrals from, make referrals to, or solicit clients on behalf of any lawyer referral service unless such service falls within clauses (1)-(4) below. A lawyer or any other lawyer affiliated with the lawyer or the lawyer's law firm may be recommended, employed, or paid by, or cooperate with, one of the following offices or organizations that promote the use of the lawyer's services or those of the lawyer's

firm, if there is no interference with the exercise of independent professional judgment on behalf of a client of the lawyer or the lawyer's firm:

(1) A legal office or public defender office:

(A) operated or sponsored on a not-for-profit basis by a law school accredited by the American Bar Association Section on Legal Education and Admissions to the Bar;

(B) operated or sponsored on a not-for-profit basis by a bona fide non-profit community organization;

(C) operated or sponsored on a not-for-profit basis by a governmental agency;

(D) operated, sponsored, or approved in writing by the Indiana State Bar Association, the Indiana Trial Lawyers Association, the Defense Trial Counsel of Indiana, any bona fide county or city bar association within the State of Indiana, or any other bar association whose lawyer referral service has been sanctioned for operation in Indiana by the Indiana Disciplinary Commission; and

(E) operated by a Circuit or Superior Court within the State of Indiana.

(2) A military legal assistance office;

(3) A lawyer referral service operated, sponsored, or approved by any organization listed in clause (1)(D); or

(4) Any other non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only if the following conditions are met:

(A) the primary purposes of such organization do not include the rendition of legal services;

(B) the recommending, furnishing, or paying for legal services to its members is incidental and reasonably related to the primary purposes of such organization;

(C) such organization does not derive a financial benefit from the rendition of legal services by the lawyer; and

(D) the member or beneficiary for whom the legal services are rendered, and not such organization, is recognized as the client of the lawyer in the matter.

(e) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure the lawyer's employment by a client, or as a reward for having made a recommendation resulting in the lawyer's employment by a client, except that the lawyer may pay for public communication permitted by Rule 7.2 and the usual and reasonable fees or dues charged by a lawyer referral service falling within the provisions of paragraph (d) above.

(f) A lawyer shall not accept employment when the lawyer knows, or reasonably should know, that the person who seeks the lawyer's services does so as a result of lawyer conduct prohibited under this Rule 7.3.

Commentary

[1] There is a potential for abuse inherent in direct in-person, live telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[2] This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services.

[3] The use of general advertising and written, recorded, or electronic communications to transmit information from lawyer to prospective client, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone, or real-time electronic conversations between a lawyer and a prospective client can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[4] There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or with whom the lawyer has close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee, or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

[5] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress, or harassment within the meaning of Rule 7.3(b)(2), or which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2, the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b).

[6] This rule allows targeted solicitation of potential plaintiffs or claimants in personal injury and wrongful death causes of action or other causes of action that relate to an accident, disaster, death, or injury, but only if such solicitation is initiated no less than 30 days after the incident. This restriction is reasonably required by the sensitized state of the potential clients, who may be either injured or grieving over the loss of a family member, and the abuses that experience has shown exist in this type of solicitation.

Rule 7.4. Communication of Fields of Practice and Specialization

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.

(d) A lawyer shall not state or imply that the lawyer is a specialist in a particular field of law, unless:

(1) The lawyer has been certified as a specialist by an Independent Certifying Organization accredited by the Indiana Commission for Continuing Legal Education pursuant to Admission and Discipline Rule 30; and,

(2) The certifying organization is identified in the communication.

(e) Pursuant to rule-making powers inherent in its ability and authority to police and regulate the practice of law by attorneys admitted to practice law in the State of Indiana, the Indiana Supreme Court hereby vests exclusive authority for accreditation of Independent Certifying Organizations that certify specialists in legal practice areas and fields in the Indiana Commis-sion for Continuing Legal Education. The Commission shall be the exclusive accrediting body in Indiana, for purposes of Rule 7.4(d)(1), above; and shall promulgate rules and guidelines for accrediting Independent Certifying Organizations that certify specialists in legal practice areas and fields. The rules and guidelines shall include requirements of practice experience, continuing legal education, objective examination; and, peer review and evaluation, with the purpose of providing assurance to the consumers of legal services that the attorneys attaining certification within areas of specialization have demonstrated extraordinary proficiency within those areas of specialization. The Supreme Court shall retain review oversight with respect to the Commission, its requirements, and its rules and guidelines. The Supreme Court retains the power to alter or amend such requirements, rules and guidelines; and, to review the actions of the Commission in respect to this Rule 7.4.

Commentary

[1] Paragraph (a) of this Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate.

[2] Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the Office. Paragraph (c) recognizes that designation of Admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.

Rule 7.5. Firm Names and Letterheads

(a) Firm names, letterheads, and other professional designations are subject to the following requirements:

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

(2) The name of a professional corporation, professional association, limited liability partnership, or limited liability company may contain, "P.C.", "P.A.," "LLP," or "LLC" or similar symbols indicating the nature of the organization.

(3) If otherwise lawful a firm may use as, or continue to include in, its name, the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. See Admission & Discipline Rule 27.

(4) A trade name may be used by a lawyer in private practice subject to the following requirements:

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

(ii) the name shall include the name of a lawyer (or the name of a deceased or retired member of the firm, or of a predecessor firm in a manner that complies with subparagraph (2) above).

(iii) the name shall not include words other than words that comply with clause (ii) above and words that:

(A) identify the field of law in which the firm concentrates its work, or

(B) describe the geographic location of its offices, or

(C) indicate a language fluency.

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in Indiana if the name or other designation does not violate paragraph (a) and the identification of the lawyers in an office of the firm indicates the jurisdictional limitations on those not licensed to practice in Indiana.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm. A member of a part-time legislative body such as the General Assembly, a county or city council, or a school board is not subject to this rule.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when they in fact do so.

Commentary

[1] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity, or by a trade name that complies with the requirements of the Rules of Professional Conduct. A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. The use of a trade name in law practice is acceptable so long as it is not misleading and otherwise complies with the requirements of paragraph (a)(4). A firm name that includes the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a non-lawyer.

[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm.

Section Ten

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About JLAP

Research has shown that lawyers may suffer from substance abuse and depression at a rate higher than the general population. Experience has shown that lawyers may be more reluctant than others to seek help... Learn more >>

Features

Where to Turn

Honorable Tim A. Baker writes about JLAP Saving Lives and Careers in the March 2015 Res Gestae.

Read the article »

JLAP Therapy Dogs Visit McKinney Wellness Fair

JLAP Executive Director Terry Harrell, Deputy Director Loretta Oleksy & Volunteer Tonya Bond visited McKinney School of Law with therapy dogs Gus, Kirby & Gryffin.

See photos from 2014 McKinney School of Law Wellness Fair »

Events

- **Caring for the Caregiver.** *A JLAP support group for attorneys who are caregivers.* This is a virtual group. For more information please contact JLAP at 317-833-0370 OR 1-866-428-5527.
- **Substance Abuse Issues Support Group.** Lake, Porter, and Surrounding Counties; call for specific location: 866-428-5527.
- **Confidential Attorney Depression and Stress Support Group.** Lake, Porter, & Surrounding Counties; call for specific location: 866-428-5527.

Learn more about these and other events »

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Confidentiality

Because of the sensitive nature of addiction and psychological problems, law students, attorneys, or judges who need help—or want to assist someone else who might need help—are often reluctant to seek assistance. Recognizing this concern, and in order to foster early and confidential contact, the Indiana Supreme Court authorized the creation of JLAP with the passage of Rule 31 of the Indiana Rules on Admission to the Bar and Discipline of Attorneys.

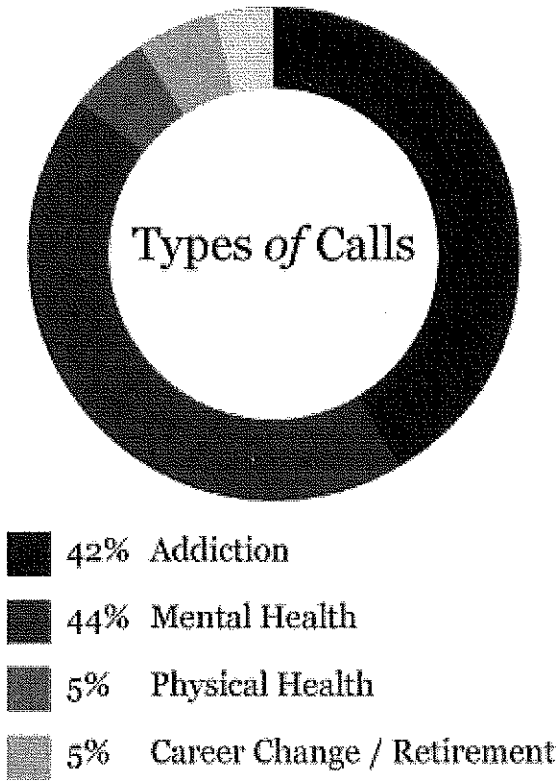
All calls to JLAP are confidential under Admission and Discipline Rule 31 §9 and Rules of Professional Conduct 8.3 (c).

Overview

Research has shown that lawyers may suffer from substance abuse and depression at a rate higher than the general population. Experience has shown that lawyers may be more reluctant than others to seek help for their own problems. The purpose of JLAP is to provide confidential assistance to judges, lawyers, and law students who may encounter these and other issues that could impair their ability to practice in a professional and competent manner.

This website is intended to provide members of the bar and bench with preliminary information about substance abuse, mental health, and other issues that can interfere with the practice of law. If you think you might have a problem, are concerned about someone else, or want to become a JLAP volunteer, please explore this website, read about JLAP's obligation to confidentiality, and then contact JLAP for further assistance or information.

JLAP offers help to judges, attorneys, and law students who experience physical or mental disabilities that result from disease, chemical dependency, mental health problems, or age, which may impair these individuals' ability to practice in a competent and professional manner. Help varies



with an individual's needs or a particular case, but ranges from information and referral to assistance with organization of an intervention. In addition, JLAP provides education to the bench and bar on relevant issues.

Because of the sensitive nature of addiction and psychological problems, law students, attorneys, or judges who need help—or want to assist someone else who might need help—are often reluctant to seek assistance. Recognizing this concern, and in order to foster early and confidential contact, the Indiana Supreme Court authorized the creation of JLAP will the passage of Rule 31 of the Indiana Rules on Admission to the Bar and Discipline of Attorneys.

The creation of JLAP in October 1997 merged two premier volunteer organizations—the Indiana State Bar Association's Lawyers Assistance Committee and the Judicial Assistance Team, an Indiana Supreme Court Pilot Program coordinated through the Judicial Center. Dedicated volunteers—both recovering and non-recovering—provide the crucial statewide network of peer support that enables JLAP to effectively deliver services to judges, attorneys and law students in need throughout Indiana. Volunteer opportunities also exist in a variety of areas in addition to peer support.

For more information about Lawyer Assistance Programs, please visit the ABA Commission on Lawyer Assistance Programs (COLAP) website.

Statistics

Substance Abuse. It is estimated that 10% of the general population is addicted to alcohol and/or other drugs. Attorneys (as well as other professionals) are considered to be more susceptible. Some sources estimate that 12-14%[1] of attorneys are addicted to alcohol and/or other drugs. Other sources estimate that number to be as high as 18-20%[2]. With approximately 17,000 licensed Indiana Attorneys, that means anywhere from 2,040 to 3,400 addicted attorneys.

The Good News: while the general population recovery rate is a mere 40-50%, attorney recovery is as high as 80-90%[3].

Depression. Attorneys have a higher incidence of psychological impairment and a higher suicide rate than the general public. Some sources estimate that as many as 30% of lawyers suffer from depression.

Why?

Denial: Professionals come well equipped with denial. They are more entrenched and better defended through the use of professional skills (advocacy, intelligence, advice-givers not advice-takers, devoted to the care of others).

Resources: Their positions often allow for longer periods for the addiction's progression (finances; support staff; hesitancy of colleagues, judges, office staff to confront them), and misguided loyalty.

1 Talbott
2 LAPs around the country
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Confidential Support for Indiana Judges, Lawyers & Law Students

confidential Supportive
COMPASSIONATE
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Make a Positive Change

With JLAP's help, many Indiana legal professionals have confronted their problems and turned their lives around. Seeking help can make all the difference. You don't have to manage it alone; call now. Our services are completely confidential.

Help is a Phone Call Away

When issues such as addiction, depression, anxiety, or life changes impair your work and strain your relationships, JLAP can help. Our experienced staff and volunteer network will listen, gather information, and help you determine the next steps.

When You Are Ready

The JLAP website contains information about our program, as well as helpful information about substance abuse, mental health, and other issues judges, lawyers, and law students may face in their professional or personal lives.

If you or someone you know needs guidance, contact us.

866.428.5527 | 317.833.0370

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> "I know what it is like to fear making a call to JLAP. If you think you might have a problem, there is no downside to contacting JLAP. Your call is completely confidential; you can talk to staff or to another attorney who is a JLAP volunteer, and they will not report you or tell anyone about your conversation."
>
> - JLAP Participant

Confidentiality is Key

Any contact you have with JLAP is held in the strictest confidence under Rule 31 of the Indiana Rules for Admission to the Bar and the Discipline of Attorneys. Whether you are calling because you need help yourself or because you are concerned for a friend or colleague, no one will know about your call unless you give your permission.

Help Our Profession

Volunteer

JLAP volunteers are judges, lawyers, and law students who are committed to helping their colleagues. Many have overcome their own challenges and now want to give back by helping others. Our volunteers provide a statewide network of confidential support, which can range from one-on-one peer assistance to facilitating referrals for professional help.

Your Expertise Is Needed

If you are a judge, lawyer, or law student who has personal experience with or training in:

- substance abuse issues
- career transitions
- mental health issues
- stress and burnout
- physical impairments
- grief
- other quality of life issues

or if you just have a desire to help others, JLAP invites you to become a volunteer.

JLAP was established by the Indiana Supreme Court in 1997.

Indiana Judges and Lawyers Assistance Program (JLAP) helps judges, lawyers, and law students cope with issues that may diminish the quality of their lives or their ability to practice law. Anyone can call JLAP for help, whether you are the person in need or a concerned friend, family member, or colleague.

JLAP also works to promote quality of life within the legal profession. We work with law schools, law firms, bar associations, and other legal organizations to present programs on specific mental health or addiction issues, how to recognize symptoms in yourself or others, and how concerned individuals can help.

INDIANA JUDGES & LAWYERS ASSISTANCE PROGRAM

320 N MERIDIAN STREET, STE 606, INDIANAPOLIS, INDIANA 46204
317.833.0370 | 866.428.5527 | WWW.COURTS.IN.GOV/IJLAP

jlap

By Hon. Tim A. Baker

WHERE TO TURN

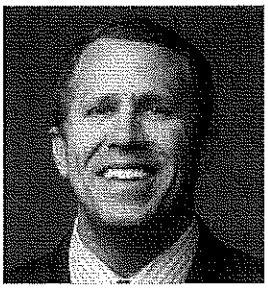
JLAP: saving lives and careers

Judges, lawyers and law students with impairments that threaten to derail their careers, their lives and the lives of others have somewhere to turn for confidential and effective help. Unfortunately, many ignore the early warning signs, sending them down a dangerous and avoidable path.

Steve, a lawyer in northern Indiana, knows this all too well.[1] He ignored the warning signs of substance abuse and depression and found himself in a fetal position, unable to get out of bed. Ultimately, with the help of the Judges & Lawyers Assistance Program, he got his life and his practice back.

After working as in-house counsel, Steve took a job in private practice with a large law firm, doing corporate work and mergers & acquisitions. "I worked a million hours both in-house and in private practice. I burned the candle at both ends," he said. After returning to private practice, Steve found that he did not have many clients, which added to the pressure. "I was just exhausted and beginning to notice some signs of something that I didn't know what it was at the time, but ultimately it was diagnosed as depression."

According to Steve, things began to unravel when his wife threatened to divorce him and take their kids if they didn't buy a bigger house. A bigger house soon followed and so did disaster. Steve collapsed the week after buying the new house. He couldn't get out of bed and stayed in the fetal position. When he finally did manage to get out of bed for work he couldn't actually drive into the law firm's parking garage. "I went around the block probably for 90 minutes because I couldn't turn into the parking garage," Steve said. He used his cell phone to keep in contact with his law firm and his clients, but he didn't tell his wife what he was going through. After three days of this charade, an attorney from the firm called Steve's wife to ask where he was. Steve's wife confronted him, and Steve tried to pull himself together. He talked with the firm but got no solace. Instead, it made matters worse. The firm told Steve there was no guarantee his position at the firm was safe.



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Steve avoided getting the help he needed and also began avoiding people. "An impaired lawyer can do a lot of damage to our legal system," said Terry Harrell, JLAP's executive director since 2002. "The best way to avoid this is to get help up front." Harrell, a lawyer and licensed clinical social worker, oversees JLAP's operations.[2]

JLAP has a downtown Indianapolis office, which employs two clinical case managers, who are both trained social workers, a northern Indiana case manager and a deputy director, who is also a social worker and a lawyer. An office manager rounds out JLAP's office staff. In addition, JLAP utilizes about 400 volunteers statewide, who serve as both monitors and mentors. Monitors are responsible for monitoring compliance with an agreement with the Indiana Disciplinary Commission. Mentors are used in a variety of capacities, often even before someone gets into trouble with the Disciplinary Commission. This can range from having a cup of coffee with someone who is feeling particularly stressed to speaking at bar association meetings.

Despite the availability of these resources, like many others Steve failed to seek professional help until it was nearly too late. Steve found himself curled up in bed again unable to go to work. Steve said his wife tried to drag him out of bed, which then made him feel as though he was having a heart attack. He was diagnosed at a local hospital as having a major depressive disorder with suicidal ideation.

But Steve's odyssey was far from over. He separated from his wife, and then his law firm fired him. In the three months that followed, Steve got two DUIs. "I was absolutely suicidal at that point," Steve recounted. "I was so depressed I couldn't find the strength to act on my suicidal ideas. It was a very serious situation."

What happened next may have saved Steve's life. He received a letter from the Disciplinary Commission. He was told that if he wanted to get his law license back he should work with JLAP. Steve vividly remembers something else the Disciplinary Commission told him: "If you don't, that's fine too, but you should at least get some help from JLAP."

JLAP provided Steve with some peace of mind and reassurance. JLAP also helped Steve find a new psychiatrist who listened to his concerns about the side effects of his medications. But more challenges awaited. As Steve's divorce proceedings ramped up, he became suicidal, and he began drinking again. A third DUI soon followed. Steve got back in touch with JLAP, and with JLAP's help and assistance from others, Steve has been sober since April 2007. "I am very grateful to JLAP for helping me get through that," Steve said. "I am quite confident I would have not gotten through that without JLAP."

Despite all of this, Steve was still not out of the woods. A little more than two years after contacting JLAP and getting sober, Steve was diagnosed with Stage 3 rectal

cancer. At that time Steve had almost caught up on his continuing legal education requirements and had nearly gotten his law license back. Steve underwent chemotherapy, radiation and surgery. For a time he could feel himself spiraling downward, but with help from his JLAP counselor he was able to keep a positive attitude. He also received some financial help for his medications from the JLAP treatment fund. Steve's cancer is now in remission, and he is working as a sole practitioner. "It's not like it used to be, and that's okay," he said.

Steve encouraged others who may be experiencing similar issues to seek help early.

"If they can call JLAP that would be great," Steve said. "I know from personal experience I wasn't willing to do that early enough." Steve also encouraged colleagues, friends and family members to reach out to others if they see any early warning signs.

According to Harrell, JLAP received 253 "Calls for Help" in 2014.[3] A Call for Help is a call by someone seeking JLAP's assistance or intervention, either on behalf of him or herself or a third party. About half of those calls are on behalf of the caller, and the other half represent third-party calls seeking help for a family member, friend or colleague. These calls comprise about 85-90 percent of the people who use JLAP services, Harrell said. The remaining 10-15 percent are formal referrals from the Disciplinary Commission or the State Board of Law Examiners. Mental health and addiction issues are by far the most common reasons JLAP is contacted.

All self referrals and third-party referrals to JLAP are completely confidential. The only time JLAP becomes involved with the Disciplinary Commission is when JLAP is asked to provide assistance in recovery. Such a request may be made either by the attorney facing discipline or by the Disciplinary Commission, but in either case JLAP requires the attorney to sign a release before JLAP shares any information with the Disciplinary Commission. The confidentiality of the process is expressly embodied in Indiana Admission & Discipline Rule 31, which governs JLAP.[4]

Don Lundberg, executive secretary of the Disciplinary Commission from 1990 to 2008, said he and former JLAP executive director Susan Eisenhauer quickly

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JLAP *continued from page 23*

"got on the same wavelength" about the vital importance of confidentiality of JLAP's services for lawyers who self-referred or otherwise came to JLAP by some route other than through the Disciplinary Commission. Now a partner at Barnes & Thornburg LLP, Lundberg said he and Eisenhauer had many conversations about how to quash any inaccurate suspicions that there were back-channel communications between the Disciplinary Commission and JLAP. Rather, JLAP gave the Disciplinary Commission a meaningful and trusted resource to create probation conditions that were fair, but demanded accountability.

"It is outside the Disciplinary Commission's skill set to micromanage probation for addiction and mental health issues," Lundberg said. "JLAP filled that void."

Despite JLAP's strict confidentiality, people remain hesitant to contact JLAP when early warning signs arise, only to later wish they had reached out to JLAP sooner. Ricky is one such lawyer. "It would have saved me a lot of pain," said Ricky, who works in central Indiana. Ricky's warning signs first appeared in law school, when he got his first DUI. "I didn't think I had a drinking problem," said Ricky. "I thought I made a bad decision." Another DUI followed after law school.

That's when the Disciplinary Commission became involved, and his law license was suspended for six months. A couple of months of sobriety followed. "If you would have hooked me up to the lie detector at that point I would have passed," Ricky said. "I was not going to drink anymore. And within a couple of weeks I was finished." He began drinking again, and a third DUI followed. Another 6-month law license suspension followed, but this time without automatic reinstatement. Ricky went to treatment, which included a recovery residence. He agreed to have JLAP monitor his compliance. His JLAP counselor, Tim Sudrovech, a licensed clinical social worker, became his savior. "He's such a good friend of mine now," said Ricky, who hopes to get his law license back.

The DUIs forced Ricky to get help. Before doing so, Ricky felt hopeless. But he stressed that life doesn't have to be a "hot mess" before seeking help. "Even if your practice is just a little off balance, JLAP can help," he said, adding that with alcoholics a lot of times their careers are over before they seek help. "JLAP is a resource. It can save lives and careers," Ricky said. February 2015 marked Ricky's sixth year of sobriety. He still laments the lost hugs from his daughter as among the most painful costs of his addiction. Thankfully, today Ricky describes his life as fantastic. "I've been able to be a dad, a husband and a brother. I sit on a handful of boards. All of these things I'm able to do – it's because I am sober."

Harrell stressed that the program is not just for people suffering with substance abuse issues. Harrell said JLAP can help in all types of situations, such as aging, depression and the stress of practicing law. For example, law practices can suffer if a lawyer is going through a nasty divorce or experiences a serious medical illness or a family member requires hospice care. "They are human beings," Harrell said. "When we're going through stressors we drop the ball sometimes."

Indiana State Bar President Jeff Hawkins is an unabashed testament to the varied reasons for seeking

professional help – and the relief that comes from doing so. At last October's Assembly Luncheon during the State Bar's fall meeting, Hawkins shared a very personal story. Three years before that luncheon, Hawkins said, he realized for the first time that he had been living with Attention Deficit Disorder for more than 45 years. Hawkins explained how he had always struggled to read and retain information or to block out a distraction. It wasn't until Hawkins saw a PBS program called "ADD and Loving It" that he realized he needed professional help.

"As the staff of the Judges & Lawyers Assistance Program and the Indiana Disciplinary Commission can tell you, too many seek elusive relief through self-medication with drugs and alcohol. Fear of stigmatization and marginalization often discourages people from seeking and receiving help. Think about it for a moment: Can you imagine how difficult it is for one of our members to admit that they suffer from mental impairment? I can tell you that crossed my mind, but my own liberating experience inspired me to plow the way for others to discover life after impairment."[5]

Soon after getting the medical help he needed, Hawkins' productivity increased dramatically, and his past struggles with the symptoms of ADD ended. Hawkins encouraged others at the luncheon to "reach out and show love and compassion for our fellow lawyers."

That is exactly what Lundberg had in mind when he worked with Eisenhauer after she became the full-time director in November 1999. Lundberg recounted an alcohol-related case that arose not long thereafter in which a lawyer on probation and under JLAP supervision missed a call-in for a random alcohol screening. Lundberg had to determine whether to take a zero-tolerance approach or a more holistic approach. Circumstances of the case made Lundberg understand that the missed screen was not an effort to cover up a return to drinking. "We did a little tweaking, but mostly just let the lawyer return to carrying out the terms of probation," Lundberg said. "This lawyer succeeded, went off probation, and went on to become a JLAP monitor and mentor to many lawyers struggling with alcohol dependency. I see that lawyer today – he is a friend, and it gives me great pleasure to know that we took the right approach by being supportive without enabling."

Harrell laments that not every JLAP case has a happy ending. Fortunately, JLAP success stories abound. While confidentiality rules prevent the public from knowing the extent of how many lives and careers JLAP has helped save, Steve and Ricky can attest to the fact that JLAP is literally a lifesaver. "I felt hopeless," Ricky said. "I didn't think there was a way out." JLAP provided the way.

1. "Steve" is a pseudonym for the actual name of this attorney. Likewise, "Ricky" is a pseudonym for the lawyer referenced later in this article. The author interviewed both lawyers after they agreed to have their stories included in this article.
2. Research shows that lawyers suffer from depression, substance abuse and stress at higher rates than the general population due in large part to social influences in the work environment, heavy workloads, and stress attributed to working with clients. *Attorneys and Substance Abuse*, Hazelden's Butler Center for Research (2012). Some estimates report lawyers are four times more likely than the general population to suffer from depression, and the Centers for Disease Control & Prevention ranks lawyers fourth in proportion of suicides by profession. *See* Rosa Flores and Rose Maries Arce, "Why are lawyers killing themselves?" CNN.com, Jan. 20, 2014, ***www.cnn.com/2014/01/19/us/lawyer-suicides/index.html***; Laura Rothstein, "Law Students and Lawyers with Mental Health and Substance Abuse Problems: Protecting the Public and the Individual," 69 *U. Pitt. L. Rev.* 531 (2008). The rate of alcohol abuse for lawyers is 18 percent compared to 10 percent for the general population. Hazelden's Butler Center for Research, *supra*. Prescription drug abuse and chemical dependency are also higher among legal professionals. *See generally* Commission on Lawyer Assistance Programs, American Bar Association (2013); Rothstein, *supra*.
3. JLAP can be reached by calling 317/833-0370 or toll free at 866/428-5527, or on the Web at ***www.in.gov/judiciary/jlap***.
4. In addition to containing strict confidentiality provisions, Rule 31 explains the purpose of JLAP is "assisting impaired members in recovery; educating the bench and the bar; and reducing the potential harm caused by impairment to the individual, the public, the profession, and the legal system." Rule 31 further explains that the JLAP committee "will provide assistance to judges, lawyers and law students who suffer from physical or mental disabilities that result from disease, chemical dependency, mental health problems or age that impair their ability to practice; and will support other programs designed to increase awareness about the problems of impairment among lawyers and judges."
5. Excerpt of "Adapt & Overcome," *ISBA Prez Blog*, ***https://isbaprezblog.wordpress.com*** (Nov. 12, 2014). Hawkins revisited mental health issues in another *Prez Blog* post, "Let's talk about lawyer mental health," *ISBA Prez Blog*, ***https://isbaprez.wordpress.com*** (Dec. 12, 2014), which also encourages bar members to be JLAP volunteers. Hawkins' predecessor as ISBA president, Jim Dimos, also has trumpeted the compassion and support JLAP provides. See "You've Got a Friend," *ISBA Prez Blog*, ***http://isbaprez.wordpress.com*** (Feb. 4, 2014).

Tim A. Baker is a U.S. magistrate judge in the Southern District of Indiana in Indianapolis. In January 2014, the Indiana Supreme Court appointed him to Indiana's Judges & Lawyers Assistance Program Committee.

Section Eleven

Opinion No. 1 of 2015

Participation in discriminatory organizations – the scope of Rule 8.4(g)

This formal opinion is disseminated in accordance with the charge of the ISBA Legal Ethics Committee and is advisory in nature. It is intended to guide the membership of the Indiana State Bar and does not have the force of law.

Issue

Does an Indiana attorney violate Rule 8.4(g) of the Rules of Professional Conduct by participating as a leader of a nonprofit organization that has gender, religious or racial requirements for membership?

Brief answer

An attorney's active participation in an organization that has gender, religious or racial requirements for membership is not an inherent violation of Rule 8.4(g) of the Indiana Rules of Professional Conduct. But, there may be particular circumstances where an attorney's participation in such organizations may be viewed as misconduct when he or she acts in a "professional capacity." As the Indiana Supreme Court has yet to define the exact scope and meaning of "professional capacity," lawyers should be attentive to the mission and nature of such an organization and the role(s) the lawyer may be asked to fulfill for the organization.

Hypothetical facts

Attorney A is a member of a nonprofit organization that excludes women from membership and admits only white men who practice a certain religion. The attorney is asked to assume a position on the governing board of the organization and to serve as one of its officers.

Analysis

Setting aside constitutional issues involving freedom of association and freedom of speech, the issue presented by this hypothetical calls for an interpretation of Rule 8.4(g) of the Indiana Rules of Professional Conduct, which broadly proscribes various forms of speech and conduct perceived as being antithetical to a lawyer's role in our legal system. Rule 8.4(g) states:

> It is professional misconduct for a lawyer to engage in conduct, in a professional capacity, manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status, or similar factors. Legitimate advocacy respecting the foregoing factors does not violate this subsection. A trial judge's finding that preemptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.

Rule 8.4(g) is part of a rule that prohibits other forms of professional misconduct, including, among other behaviors, criminal activity reflecting on a lawyer's honesty and conduct prejudicial to the administration of justice. (*See* Rule 8.4 (b), (d)). Indiana is one of 10 states[1] that includes a separate anti-discrimination clause in their rules governing misconduct.

There is similar language in Comment [3] to ABA Model Rule 8.4 suggesting that discriminatory speech is "prejudicial to the administration of justice" in violation of Rule 8.4(d), but the ABA comment limits application to actions that occur while "in the course of representing a client." One commentator

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has correctly noted that the distinction between acting "in a professional capacity" and "in the course of representing a client" is not clear.[2] Nevertheless, it seems reasonably obvious that "acting in a professional capacity," as that term is used in Rule 8.4(g) is at least as broad and perhaps broader than "while representing a client."

In Indiana the phrase "in representing a client" goes far beyond representation in the context of litigation or other disputes. The Preamble to the Rules of Professional Conduct indicates that the process of representing a client may include work as an advisor, an advocate, a negotiator, an intermediary and an evaluator.[3] So, it seems fair to conclude that the scope of Rule 8.4(g) is intended to include at least these functions if they take place in the context of an attorney-client relationship. Similarly, a letter written on an attorney's professional letterhead that identifies the author as an attorney and contains discriminatory comments will likely be sufficient to meet the "professional capacity" test. *See Notopoulos v. Statewide Grievance Committee*, 857 A.2d 857 (Conn. App. 2004). But the hypothetical facts presented above do not assume any of those situations.

If Rule 8.4(g) were limited to behavior occurring "in the course of representing a client," as the ABA comment is limited, the Committee's analysis would end with the observation that in the absence of an attorney-client relationship with the organization no violation of Rule 8.4(g) could occur. However, Indiana's version of 8.4(g) is not limited in this way, so it is necessary to consider whether Rule 8.4(g) has any application to situations outside of those that involve representing a client.

There are six Indiana cases that have applied Rule 8.4(g), but the scope of "in a professional capacity" is still not clear. The first case was in 2005 and dealt with racial bias. *In the Matter of Thomsen*, 837 N.E.2d 1011 (Ind. 2005). The second was in 2009 and considered discrimination on the basis of national origin and socioeconomic status. *In the Matter of Campiti*, 905 N.E.2d 408 (Ind. 2009). In both of these cases, the Indiana Supreme Court did not need to discuss the meaning of "professional capacity" since the lawyer's speech occurred while representing clients in open court.

Two cases applied Rule 8.4(g) in 2010: *In the Matter of McCarthy*, 938 N.E.2d 698 (Ind. 2010) and *In the Matter of Kelley*, 925 N.E.2d 1279 (Ind. 2010). The *McCarthy* case involved a lawyer who, in the course of representing a client, sent an email that displayed discrimination on the basis of race. In the *Kelley* case, Respondent began receiving pre-recorded messages from a company seeking to speak with her husband. Respondent and her husband agreed that she would call the company at the toll-free number to remedy the situation. Respondent then spoke to a male representative of the company, identifying herself as a lawyer representing her husband. Noting what she thought was a feminine-sounding voice, Respondent asked the company's representative if he was gay. The company representative commented on the unprofessional nature of this inquiry, and Respondent admitted the violation of Indiana Rule 8.4(g). The Indiana Supreme Court once again did not have to define the scope of "professional capacity" in either of these cases because both attorneys were

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acting while in the course of representing a client.

Two Indiana cases addressed Rule 8.4(g) in 2013: *In the Matter of Dempsey*, 986 N.E.2d 816 (Ind. 2013) and *In the Matter of Usher*, 987 N.E.2d 1080 (Ind. 2013). In *Dempsey*, the Indiana Supreme Court held that Respondent violated Rule 8.4(g) by distributing flyers in downtown Indianapolis, based on his personal bankruptcy case. The flyers "made free-ranging disparaging remarks about Jews generally, from the fall of Jericho, through 1925 Berlin, to their alleged involvement in the 9/11 attacks," which the Court classified as "scurrilous and repugnant attacks." *Id.* 817. The Court said that these violations were not the type of communications that fall within an attorney's broad constitutional right to freedom of speech. *Id.* In *Usher*, a male partner in a law firm sent out a fabricated email about a female intern with whom he was pursuing a romantic relationship. The male attorney was charged with violating Rule 8.4(g), but that charge was rejected, not because the attorney was acting in a non-professional capacity, but because the Court found that his email was motivated by personal anger at the female intern in particular rather than by bias against women in general.

Even though 8.4(g) was deemed inapplicable to the respondent in *Usher* the holding is instructive for our hypothetical because it confirms that Rule 8.4, in general, extends well beyond behavior involved in representing a client. Responding to the attorney's contention that the rules did not apply because "his actions ... were not done in a professional capacity," the Indiana Supreme Court stated: "This Court has imposed discipline on lawyers for speech found to violate their professional duties, as well as for unethical activities outside the professional arena. We conclude that Respondent's actions regarding the email are not beyond this Court's disciplinary authority." The Court made a similar point earlier in *In re Quinn*, 696 N.E.2d 863 (Ind. 1998), which indicated that indifference to legal standards of conduct reflected adversely on one's fitness as an attorney. Examples of disciplinary actions against lawyers for conduct unrelated to the representation of clients are easy to find, both within and outside of Indiana. *See, e.g., In re Conn*, 715 N.E.2d 379 (Ind. 1999) (child pornography conviction); *In re Peterson*, 718 N.W. 2d 849 (Minn. 2006) (tax evasion); *Fla. Bar. v. Bartholf*, 775 So. 2d 957 (Fla. 2000) (lawyer assaulted victim with a golf cart). While the violation in *Dempsey* bore some relationship to a legal proceeding involving the lawyer being disciplined, no such claim can be made based on the facts of *Usher*. In *Usher* no client was involved, so it is clear that the Court intends that Rule 8.4 in general has application beyond the boundaries of an attorney-client relationship. The question is how far those boundaries go in the context of Rule 8.4(g).

Some further information about the scope of Rule 8.4(g) can be found in Comment [2] to Rule 8.4, which states:

> Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, which have no specific connection to fitness for the practice of law. Although a lawyer is personally

> answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust or serious interference with the administration of justice are in that category.

While the Indiana Supreme Court has not clearly defined the scope of "in a professional capacity" as used in Rule 8.4(g), the New Jersey Supreme Court's interpretation of its rule offers some guidance.[4] The New Jersey Disciplinary Rules of Professional Conduct Rule 8.4(g) states:

> It is professional misconduct for a lawyer to: engage, in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or handicap where the conduct is intended or likely to cause harm.

In its comments to the rule, the New Jersey Supreme Court noted that the addition of paragraph (g) was intended "to make discriminatory conduct unethical when engaged in by lawyers in their professional capacity."[5] The comment further notes that the rule covers activities in the courthouse, treatment of court staff, conduct related to litigation, treatment of other attorneys and related staff, bar association activities, and activities sponsored by a lawyer's firm.[6] The comments further state that "purely private activities are not intended to be covered by this rule amendment, although they may possibly constitute a violation of some other ethical rule."[7] Due to numerous suggestions received by the New Jersey Supreme Court following the initial publication of paragraph (g), the Court revised the proposed amendment by making explicit its intent to limit the rule to conduct by attorneys in a professional capacity, to exclude employment discrimination unless adjudicated, and to restrict the scope of the Rule to conduct intended or likely to cause harm. The Court noted that the intent was to cover only discrimination where the attorney intentionally causes harm or inflicts emotional distress. This clarification is more than simply interesting, as it seems to align well with the decision in *Usher* to the extent that for 8.4(g) purposes, the Court looked to the existence or absence of discriminatory intent. Likewise, *Usher* involved "treatment of other attorneys and their staff" – conduct the New Jersey comment expressly

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brings within the ambit of the term "in a professional capacity."

For the sake of comparison, Indiana's Model Code of Judicial Conduct, Rule 3.6 states that "[a] judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation." Further, a judge may not be a member or benefit from an organization if the judge knows or should know that the organization practices "invidious discrimination." Comment [2] to Rule 3.6 defines invidious discrimination as arbitrarily excluding persons from membership who would otherwise be eligible for admission on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation. This will depend not only on how the organization selects members, but "whether the organization is dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members, or whether it is an intimate, purely private organization whose membership limitations could not constitutionally be prohibited."[8] Comment [4] notes that a judge's membership in a religious organization as a lawful exercise of the freedom of religion is not a violation of Rule 3.6.

Since judges must be perceived as impartial, it follows that their personal activities may be more controlled in order to avoid the appearance of impropriety. Lawyers, on the other hand, are not under that same obligation. Whereas the language of the judicial rule explicitly applies to membership in discriminatory organizations, there is no such language in Rule 8.4(g), which perhaps suggests that no restriction was intended. But the distinction between the Rules of Professional Conduct and the Model Code of Judicial Conduct is not conclusive on the question of whether mere membership in a discriminatory organization or performance of a leadership role in such an organization can constitute a violation of Rule 8.4(g).

Unfortunately, there is simply not enough direction from the Indiana Supreme Court to allow any firm conclusions as to precisely how far Rule 8.4(g) may reach. Certainly it touches all activity by an attorney arising out of the broad representative functions describe in the Preamble to the Rules so long as a client is involved while simultaneously allowing an exemption for legitimate advocacy. But when there is no client involved, the Rule still has some application to behavior where the lawyer's status as a lawyer is a relevant part of the picture and the lawyer can be deemed to have intentionally engaged in types of discriminatory behavior proscribed by the Rule, as *Dempsey* and *Usher* show.

As acknowledged above, there are constitutional issues that cannot be avoided in addressing the question presented by this hypothetical. As the Committee has already noted, the character of the organization seeking Attorney A's leadership services is critical in determining the extent to which any constitutional freedom of association may have application to A's situation. In *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984), the Court held that Minnesota human rights law could prevent the exclusion of female members by an organization in order to support important public policies aimed at eliminating invidious discrimination in access to publicly available goods, services and other advantages. *Id.* 628.

The Jaycees' "freedom of association" argument was rejected, in part due to the large and public nature of the organization, in contrast to the sort of smaller, more intimate and selective organization seen as more deserving of constitutional protection. *Id.* 620 -621. Whether Attorney A could claim constitutional protection from Rule 8.4(g) based on freedom of association would seemingly depend, at least in part, on the nature of the organization he is asked to help lead. The Court in the *Jaycees* case also made it clear that a more stringent test would be applied if the goal of the organization involved other recognized freedoms such as freedom to worship, to speak or to petition the government for redress of grievances. *Id.* 622. These pronouncements underscore the Committee's point that Attorney A needs to be sensitive to the nature of the organization in evaluating the scope and effect of Rule 8.4(g). In contrast to the similar New Jersey rule, cited above, the Indiana version of Rule 8.4(g) specifically mentions discriminatory "words or conduct." The decision in *Kelley, supra*, seems to make the point that discriminatory speech alone is enough to create a violation of 8.4(g) if it occurs while the lawyer is representing a client, unless it amounts to legitimate advocacy. Further, *Dempsey, supra*, seems to indicate that statements made by a lawyer about a proceeding that has concluded will fall within the scope of Rule 8.4(g) if the lawyer was involved, even on a *pro se* basis. The Committee notes that "a lawyer's right to free speech is extremely circumscribed in the courtroom" *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1031 (1991), but outside the courtroom the standards are different. *Berry v. Schmitt*, 688 F. 3d 290, 304-305 (6th Cir. 2012), *see also Standing Committee on Discipline of the United States District Court for the Central District of California v. Yagman*, 55 F. 3d 1430 (9th Cir. 1995). Rule 8.4(g) makes no obvious distinction between discriminatory statements inside or outside a courtroom, and this Committee will draw no conclusions concerning the constitutionality of Rule 8.4(g) since doing so is not required by the hypothetical presented to the Committee. But it is clear that Rule 8.4 in general and Rule 8.4(g) in particular as interpreted by the Indiana Supreme Court both have application well beyond any

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remarks made by a lawyer in the middle of a court proceeding.

Conclusion

An attorney who merely participates in his personal capacity in an organization that has gender, religious or racial requirements for membership and does not participate in his or her capacity as a lawyer would not be in violation of Rule 8.4(g) of the Indiana Rules of Professional Conduct simply by virtue of the connection to such an association.

The Committee also does not believe that a lawyer violates Rule 8.4(g) merely by providing legal representation to an organization with discriminatory requirements, policies or beliefs, both because such representation can often be accomplished without the lawyer personally making discriminatory comments or engaging in discriminatory conduct and because the "legitimate advocacy" exception is likely to cover situations where the lawyer cannot avoid such statements or conduct. Gratuitous discriminatory statements or conduct in the course of a representation stand on a different footing.

However, participation is different from representation in this context. So, a lawyer should be mindful of the particular practices of such an organization if the lawyer intends to personally participate in activities that advance any of its discriminatory requirements, policies or beliefs. The lawyer should proceed with particular caution if the lawyer's status as a lawyer is connected to his or her participation in the organization's activities. Accepting a leadership role in such an organization or using one's status as a lawyer in support of the organization creates more ethical risk than mere membership. But in either case, the nature of the organization and the lawyer's role in the organization are critical to the outcome of any ethical analysis. In light of the delicate balance between constitutional rights and the necessity of fairness in the administration of justice, it is the Committee's hope that the Indiana Supreme Court may offer further clarification on the scope of "professional capacity" by way of an official Comment to Rule 8.4(g).

1. Other states include Colorado, Florida, Illinois, Missouri, Nebraska, New Jersey, North Dakota, Ohio and Washington.
2. Lundberg, Donald R., "Of Telephonic Homophobia and Pigeon-Hunting Misogyny: Some Thoughts on Lawyer Speech," 53 *Res Gestae* 164 (June, 2010).
3. Indiana Rules of Professional Conduct, Preamble, para. [2].
4. Out of the 10 states with anti-discrimination clauses in their rules governing misconduct, just four use the phrase "in a professional capacity" (Indiana, Nebraska, New Jersey and Ohio). Only the comments to New Jersey's rule address the interpretation of professional capacity.
5. Official Comment by New Jersey Supreme Court (May 3, 1994). Available at *http://www.law.cornell.edu/ethics/nj/code/CRule_8.4.htm.*
6. *Id.*
7. *Id.*
8. Indiana Model Code of Judicial Conduct, Rule 3.6, Comment [2].

Opinion No. 2 of 2015

Lawyer's duty to report child abuse and Rule 1.6 duty of confidentiality

This formal opinion is disseminated in accordance with the charge of the ISBA Legal Ethics Committee and is advisory in nature. It is intended to guide the membership of the Indiana State Bar Association and does not have the force of law.

Issue

If a lawyer learns, while representing a client, that a child is a victim of abuse or neglect, must the lawyer make a report to the Indiana Department of Child Services or local law enforcement?

Brief answer

Lawyers *must* report information relating to child abuse or neglect if they believe it necessary "to prevent reasonably certain death or substantial bodily harm," regardless of the client's wishes. However, a lawyer *may not* report information of lesser harm absent the client's consent.

Analysis

The conflict between Indiana's mandatory reporting statute and the duty of confidentiality

Lawyers, particularly those who practice in the family law arena, may encounter information relating to child abuse and neglect, from the trivial to the horrifying, and allegedly perpetrated both by their clients and others. In ordinary circumstances, of course, a lawyer generally may not "reveal information relating to representation of a client . . . ."[1]

But the Indiana Code broadly requires any "individual who has reason to believe that a child is a victim of child abuse or neglect" to "immediately make an oral report to (1) the department [of Child Services] or (2) the local law enforcement agency."[2] Failure to do so is a Class B misdemeanor.[3]

The statute is broad and, unlike some other states, does not except lawyers from the reporting requirement.[4]

At least some aspects of this broad command seem intentional. The General Assembly could reasonably conclude that the costs of over-reporting child abuse and neglect are less than those of under-reporting, particularly given the nightmare scenario – a child suffering harm merely because someone "didn't want to get involved." But for the vast majority of allegations of untoward parenting that become known to a lawyer, the reporting statute conflicts with a lawyer's duty of confidentiality.

It is no answer to say that a lawyer should prevail on her client to report the abuse or neglect. First, the mandatory reporting statute requires the report to occur "immediately," and the Supreme Court has held that a four-hour delay in reporting, for purposes of conducting an "investigation" into an allegation's veracity, violated the statute.[5] Second, as is discussed more fully below, a client's reluctance to report abuse, even that apparently perpetrated by others, might be legitimate.

It is likewise no answer to say that the lawyer is not subject to the mandatory reporting statute because the lawyer has no direct or firsthand knowledge of the abuse or neglect, so that even if the client has an obligation to report, the lawyer does not. A "reason to believe" abuse or neglect has occurred

is defined only as "evidence that, if presented to individuals of similar background and training, would cause the individuals to believe that a child was abused or neglected."[6] Indeed, in *Gilliand v. State*,[7] female high school volleyball players told their parents that an older male coach had given them "foot rubs" and also reported instances of "lotion being rubbed on backs; some textings; [and] hanging out with the girls."[8] The parents in turn reported the allegations to the athletic director, who did not make a report to the Department of Child Services or local law enforcement. The Court of Appeals affirmed the trial court's denial of the athletic director's Motion to Dismiss the criminal failure to report charge against him. *Gilliand* seems to make clear, therefore, that there is no "hearsay" exception to the mandatory reporting law.

There is, then, a conflict between the lawyer's ethical duty to keep silent and the apparent statutory duty to speak,[9] one the Committee, consistent with its mission, addresses here. However, despite its substantial agreement with every other state bar ethics committee facing this topic, the ISBA Legal Ethics Committee notes, as have others,[10] that the question is a difficult one on which reasonable, conscientious lawyers can disagree. The Committee cautions the reader that the Indiana Supreme Court is the final authority on both Indiana law and the professional conduct of Indiana lawyers.

For the following constitutional, pragmatic and statutory reasons, the Committee believes the lawyer's duty of confidentiality is generally paramount over the general duty to report.

Initially, the Committee notes that, given the Supreme Court's authority over the legal profession, its Rules of Professional Conduct control over conflicting legislation.

Article III of the Indiana Constitution provides that "[t]he powers of the Government are divided into three separate departments; the Legislative, the Executive including the Administrative, and the Judicial: and no person, charged with official duties under one of these departments, shall exercise any of the functions of another." The Constitution further provides that the Indiana Supreme Court has jurisdiction over attorney "discipline or disbarment."[11] It is this authority that gives the Supreme Court the power to regulate the attorney-client relationship through its Rules of Professional Conduct.[12]

As above, those Rules delineate both a general principle of confidentiality, with an exception when necessary "to prevent reasonably certain death or substantial bodily harm." The Committee agrees with the Kentucky Bar Association's similar constitutional analysis: "... the Court, in Rule 1.6, has given lawyers discretion in these scenarios ... a holding that the [mandatory reporting] statute overrides this grant of discretion would violate the separation of powers."[13]

Indeed, requiring lawyers to protect their client's confidences likewise protects the attorney-client relationship – at a time when it is most needed. Comment [2] to Rule 1.6 broadly states:

> 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. ... This contributes to the trust that is the hallmark of the client-lawyer relationship. The client

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> is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. ...

If attorneys are mandatory reporters, this "fundamental principle" is undermined regardless of when the lawyer discloses the potential for reporting. If the lawyer informs the client that reports of abuse or neglect are subject to disclosure, the client will likely withhold such information, to the detriment of everyone involved. If the lawyer waits for such a disclosure, then reports it over the client's objection, that betrayal, in the client's eyes, will likely result in irreversible harm to the client's relationship with any attorney – to the client's, and potentially the children's, detriment.[14] As before, the Committee agrees with the reasoning of the Kentucky Bar Association in reaching a similar conclusion: "... it would greatly hamper attorneys acting as counsel for accused if all client communications were subject to a superior obligation to disclose."[15]

The harm of disclosure can best be understood by a commonly occurring example: A domestic violence victim with children consults a legal services attorney, detailing the abuse she has endured, in the course of seeking advice on obtaining a protective order.

Instead, the legal services attorney, based on the mandatory reporting statute, immediately notifies the Department of Child Services of Mother's disclosures. As subjecting children to domestic violence indubitably subjects them to harm,[16] DCS would be fully justified, if they questioned Mother's commitment to leaving her batterer, in placing the children in foster care; Mother might even be subject to criminal prosecution for "subjecting" her children to the harm.[17] Such an outcome would certainly discourage future domestic violence victims from seeking protection.

The Rules' approach, on the other hand, would allow the attorney to make a commonsense, reasonable determination of whether the children will be subject to "reasonably certain death or substantial bodily harm," and only disclose to prevent that harm.

As the above scenario suggests, a lawyer's duty to keep confidential information relating to the representation extends not only to information about the client's conduct, but other information relating to the representation, including the conduct of others. The lawyer's duty of confidentiality is much broader than the attorney-client privilege and can even extend to matters that are part of the public record in a case.[18]

Lawyers, of course, are not alone in reconciling their traditional duty of confidentiality with the duty to report child abuse.[19] In the only reported case involving such a scenario, a religious institution terminated a rabbi for disclosing a congregation member's confidences. Unfortunately, the rabbi proceeded *pro se*, and the Court of Appeals, in a decision in which all three judges wrote opinions, did not reach the issue directly.[20] Judge Vaidik, however, in a concurring opinion, noted that "[f]ailure to report child abuse is a criminal offense. ... This law does not exempt spiritual leaders from reporting . ..."[21]

Indeed, it does not; in fact, the General Assembly specifically purported to abrogate numerous common-law privileges as part of the

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mandatory reporting statute.[22] Significantly, however, the lawyer-client privilege is not among them. The Committee again agrees with Kentucky Bar Opinion E-360; noting the attorney-client privilege's similar absence from that state's abrogation statute, the Kentucky Bar Association concluded: "... it would appear the above quoted language was intended to inform us, in a roundabout way, that lawyers are not required to report abuse or neglect if reporting would violate the attorney-client privilege."[23]

Mandatory duty to report in serious cases

Notwithstanding the above, the Committee believes a lawyer *must* report that a child is a victim of abuse or neglect "to prevent reasonably certain death or substantial bodily harm."

Initially, the constitutional conflict mentioned above is no longer present, as the Supreme Court, through the Rules of Professional Conduct, specifically authorizes lawyers to disclose client information in such situations.[24] More significantly, while the prudential concerns (harm to the attorney-client relationship chief among them) remain, Rule 1.6 "recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm."[25] The reasons for "exempting" attorneys from the general reporting rule being, in such situations, either nullified or substantially negated, the general reporting requirement applies, and lawyers must report.

Conclusion

Concurring in *Ballaban v. Bloomington Jewish Community*, Chief Judge Vaidik wrote:

> Children are notoriously reticent to report abuse. When the victims and their loved ones do confide in relatives, teachers, ministers, counselors, medical doctors, or other adults, the legislature has determined that it is a crime for those adults to fail to report the abuse to the authorities. ... This reporting law is designed to, and does, protect children from future abuse.[26]

The Committee agrees; and if disclosure is reasonably necessary "to prevent reasonably certain death or substantial bodily harm," lawyers must comply with the mandatory reporting statute to prevent the overriding harm to children. But in any other situation, the Committee agrees with Prof. Robert P. Mosteller:

> Lawyers are rarely among the first to learn of abuse, and the net loss of information occasioned by the privilege is relatively minimal as it is the privilege's very promise of confidentiality that encourages the initial candid and damaging revelation. Overall, the precedent set for lawyers as reporters of crime and as informants on their clients, although capable of being limited to the child abuse area, will likely have far-reaching, unfortunate consequences that outweigh the beneficial effects of potentially increased reporting in combating the horror of child abuse.[27]

The Committee concludes that, absent taking action "to prevent reasonably certain death or substantial bodily harm," lawyers must maintain their longstanding duty of confidentiality.

1. Indiana Rule of Professional Conduct 1.6(a).
2. Indiana Code §§ 31-33-5-1 and 5.
3. Ind. Code §31-33-22-1(a).
4. *See* U.S. Dept. of Health & Human Svcs., Child Welfare Information Gateway, "Mandatory Reporters of Child Abuse and Neglect" 3, ("Most states expressly require reporting despite a claim of privilege,

but "[t]he attorney-client privilege is most commonly affirmed.") Accessible at *https://www.childwelfare.gov/systemwide/laws_policies/statutes/manda.cfm.*

5. *Smith v. State*, 8 N.E.3d 668 (Ind. 2014).
6. Ind. Code §31-9-2-101.
7. 979 N.E.2d 1049 (Ind. Ct. App. 2012).
8. *Id.* at 1052.
9. *See also Daymude v. State*, 540 N.E.2d 1263, 1265 (Ind. Ct. App. 1989) ("[I]n Indiana '*any individual* who has reason to believe that a child is a victim of child abuse or neglect shall make a report' as required by statute [emphasis added]. Thus, this language and the physician-patient privilege place conflicting duties upon a physician who learns of child abuse during the course of a physician-patient relationship.") (citation omitted) (emphasis, as noted, in original).
10. Donald R. Lundberg, "Mandatory Child Abuse Reporting by Lawyers," *Res Gestae*, Dec. 2011 at 31.
11. Ind. Const. Art. VII, sec. 4 ("The Supreme Court shall have no original jurisdiction except in admission to the practice of law; discipline or disbarment of those admitted; the unauthorized practice of law; discipline, removal and retirement of justices and judges; supervision of the exercise of jurisdiction by the other courts of the State; and issuance of writs necessary or appropriate in aid of its jurisdiction. ...")
12. *See, e.g.*, Order Amending Indiana Rules for Professional Conduct, 92S00-1401-MS-57 (Sep. 2, 2014).
13. Kentucky Bar Ass'n Ethics Opinion KBA E-360 at 2 (1993) (citing Indianapolis Op. 1-1986). *See also Williams v. State*, 681 N.E.2d 195, 200 n. 6 (Ind. 1997) (citation omitted) ("To the extent there are any differences" between evidentiary statutes and the Indiana Rules of Evidence, the Rules of Evidence control); Nebraska Attorney General Op. No. 207 at 5 (1982), child abuse statute's "curtailment of the common law attorney/client privilege ... would be difficult to defend as to constitutionality." For this reason, the Committee does not believe that the exception to confidentiality "to comply with other law," Ind. R. Prof. Cond. 1.6(b)(6), resolves the issue, nor does it believe that Ind. Code §31-33-6-1, which provides that reporters are "immune from any civil or criminal liability that might otherwise be imposed" because of their reporting, would not in and of itself preclude a disciplinary action for violating confidentiality by reporting.
14. Megan M. Smith, "Causing Conflict: Indiana's Mandatory Reporting Laws in the Context of Juvenile Defense," 11 *Ind. Health L. Rev.* 439 (2014).
15. KBA E-360 at 2 (citing Indianapolis Op. 1-1986).
16. *See In re E.M.*, 4 N.E.3d 636 (Ind. 2014).
17. *See* Ind. Code §35-46-1-4(a)(1) (defining criminal Neglect of a Dependent as placing "the dependent in a situation that endangers the dependent's life or health"); *but see Patterson v. State*, 979 N.E.2d 1066 (Ind. Ct. App. 2012) (holding that a protected person cannot be held criminally liable for "aiding" violation of a protective order).
18. *In re Anonymous*, 932 N.E.2d 671, 674 (Ind. 2010).
19. *E.g., State v. I.T.*, 4 N.E.2d 1139 (Ind. Ct. App. 2014) (therapists), *Devore v. State*, 658 N.E.2d 657, 658 (Ind. Ct. App.1995), *reh'g denied, trans. denied* (health care workers).
20. *Ballaban v. Bloomington Jewish Community*, 982 N.E.2d 329 (Ind. Ct. App. 2013).
21. *Id.* at 341-342 (concurring opinion).
22. Ind. Code §31-32-11-1.
23. KBA E-360 at p. 2.
24. Ind. R. Prof. Cond. 1.6(b)(1).
25. Comment [6] to Ind. R. Prof. Cond. 1.6.
26. *Ballaban*, 982 N.E.3d 329, 341-42 (concurring opinion) (citations omitted).
27. "Child Abuse Reporting Law and Attorney-Client Confidences: The Reality and Specter of Lawyer as Informant," 42 *Duke L. J.* 203, 207 (1992).

ISBA Legal Ethics Committee Opinion No. 3 of 2015

Depositing flat fees into the trust account

This formal opinion is disseminated in accordance with the charge of the Indiana State Bar Association's Standing Committee on Legal Ethics (the "Committee") and is advisory in nature. It is intended to guide the membership of the ISBA and does not have the force of law.

Issue

The Committee has been asked whether a lawyer may deposit a "flat fee" into the lawyer's trust account and about the circumstances under which all or part of the flat fee may be removed from the lawyer's trust account and placed in the lawyer's operating account.

Brief answer

The answer to these questions turns on the nature of the fee agreement between the lawyer and client, particularly the terms under which the "flat fee" is received. As a general proposition, the Committee concludes that a lawyer may not deposit into trust any portion of a fee that the lawyer has fully earned and which therefore is no longer the property of the client. Conversely, any fee not earned by a lawyer must be placed in trust. So, a "flat fee" that is not treated as fully earned on receipt must be placed in the lawyer's trust account. Conversely, when the arrangement between the lawyer and the client is that the fee is treated as "earned on receipt," and subject to refund only if the agreed services are not provided, it becomes property of the lawyer and must be deposited into the lawyer's operating account. The corollary to these rules is that lawyers should clearly define the terms upon which they accept a fee from a client so that there is no ambiguity about who owns what portion of funds paid to the lawyer by the client at any given point in the representation.[1]

Analysis

The term "flat fee" refers to a fee paid for the completion of specific legal services to be performed regardless of how much time and effort the lawyer must expend in completing the services. *See Matter of Kendall*, 804 N.E.2d 1152, 1154 (2004); *Matter of Stanton*, 504 N.E.2d 1 (1987). As discussed in greater detail below, such a fee is different in structure from a "general retainer," which is for the purpose of ensuring the lawyer's availability, or an "advance fee," which is a payment made at the beginning of the representation, against which charges are credited as services are performed, on an hourly or other basis. *See Matter of O'Farrell*, 942 N.E.2d 799, 803 (2011).

The relationship between lawyer and client is fundamentally consensual, existing only after both attorney and client have agreed to the formation of the relationship. *Hacker v. Holland,* 570 N.E. 2d 951, 955 (1991). The relationship is generally determined by principles of contract and agency. *Brown v. St. Joseph County*, 148 F.R.D. 246, 250 (N.D. Ind. 1993). The scope of the attorney's representation of the client as well as the basis or rate of the fee must be communicated to the client before or within a reasonable time after commencing the representation unless the client is regularly represented by the lawyer on the same basis or rate. Ind. R. Prof. Cond. 1.5(b). Simply put, the client must consent to the lawyer's representation of the client and the terms of the representation, including the basis of the lawyer's fee. Flat fees implicate a variety of Rules of Professional Conduct, including rules affecting how the fee must be handled when received by the lawyer.

A. Rule 1.15

Guidance on how a lawyer must handle flat fees begins with Ind. R. Prof. Cond. 1.15. While entitled "Safekeeping Property," the Supreme Court has described Rule 1.15 as the "anti-comingling rule." *Matter of Radford*, 698 N.E.2d 310, 313 (Ind. 1998). In relevant part, the Rule states:

(a) A lawyer shall hold property of clients or third persons that [is] in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. 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.

...

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

This rule requires that fees that a lawyer has earned (and any other funds belonging to the lawyer) must be segregated from client funds and that clients' funds be placed in the lawyer's trust account. *Matter of Kendall, supra*, 804 N.E.2d at 1155 (citing *In re McCarty*, 729 N.E.2d 98, 99 (Ind. 2000)); *see also Matter of Knobel*, 699 N.E.2d 1142 (1998) (lawyer violated Ind. R. Prof. Cond. 1.15(a) by failing to hold all client funds, including advance payment of costs and fees, separate from his own). When and if the funds in the trust account are earned by the lawyer, they must be transferred from the trust account to the lawyer's control. *In re Quinn*, 738 N.E.2d 678, 681 (2000) (lawyer found to have violated Rule 1.15(a) by failing to promptly withdraw his fee from trust account).

B. The duty to segregate fees

Without specifically overturning *Stanton*, the *Kendall* Court held that "Prof. Cond. R. 1.15(a) *generally* requires the segregation of advance payments of attorney fees." *Kendall* at 1158 (emphasis added). As applied to the facts in *Kendall* where the fees were intended to be applied to future services on an hourly basis, the Court held that "except in the case of flat fees governed by *Stanton*," which are fees designed to compensate the lawyer for services regardless of length or complexity, "a lawyer's failure to place advance payments of attorney fees in a separate account violates this rule [1.15]." *Id.* at 1156, 1158. So, it seems clear that *Kendall* holds that any fee not fully earned needs to be placed in a trust account, but that flat fees may be treated as fully earned on receipt and deposited into the lawyer's operating account if the lawyer and client agree to such an arrangement. *In re Quinn, supra* at 681, shows that any part of a fee that has been earned needs to be promptly withdrawn from the trust account.

C. The importance of the fee agreement

The mandate of segregating fees a lawyer owns from client-owned funds places a premium on the language in the lawyer's fee agreement. Regardless of the label a lawyer may attach to a fee, such as a "flat fee" or "retainer," it is the substance of the agreement with the client that determines the nature of the fee. *Matter of O'Farrell*, at 803, 805. It seems incumbent upon the lawyer to clearly spell out when and how a fee is earned. *See generally* Ind. R. Prof. Cond. 1.5(b). While Rule 1.5 does not require a written fee agreement except in the case of a contingency fee, Ind. R. Prof. Cond. 1.5(c), prudence ordinarily indicates that the fee agreement should be in writing.

The Indiana Supreme Court has plainly stated that a flat fee is not refundable except for failure to perform the agreed legal services. *Matter of Kendall, supra* at 1162. The language needed for a flat-fee agreement does not need to be complex, as was illustrated in *In re Canada*, 986 N.E.2d 254 (2013). In that case the respondent charged a flat fee for representation of a criminal defendant to the conclusion of the case, with a written fee agreement stating that the fee was nonrefundable "unless there is a failure to perform the agreed legal services." *Id.* at 254. The fee was paid when the client's cash bond was released to the attorney after a plea agreement was negotiated. *Id.* The Court found no infirmity with the fee agreement and specifically noted that "the agreement properly advised Client that a refund was possible in the event of a failure to perform the agreed legal services." *Id.* (citing *Kendall, supra* at 1160).[2]

But lawyers do not have carte blanche to enter into fee agreements allowing them to deposit all forms of prepaid fees into their operating accounts simply by describing them as "nonrefundable." In *Matter of O'Farrell*, the Indiana Supreme Court disciplined a lawyer for using a fee agreement that contained a nonrefundable fee provision. The fee agreement before the Court provided that the fee would be applied against either the lawyer's flat fee or the lawyer's hourly rate charges and that no part of the fee would be refunded even if the agreed upon services were not completed by the lawyer. *Id.* at 805-807.

These facts produced the following holding by the Court:

> The presence of this contract provision, even if unenforceable, could chill the right of a client to terminate Respondent's services, believing the Law Firm would be entitled to keep the entire flat fee regardless of how much or how little work was done and the client would have to pay another attorney to finish the task. We conclude that Respondent violated Rule 1.5(a) by including an improper nonrefundability provision in her flat-fee agreements.

Id. at 806.

Evidently the infirmity in the fee agreement examined in *Matter of O'Farrell* was the absence of the caveat that saved the fee agreement in *In re Canada* – language alerting the client to the fact that a refund would be owed if the lawyer failed to perform the legal services as agreed.

In the course of its opinion in *O'Farrell*, the Court described three common fee arrangements:

> (1) A "flat fee" is a fixed charge for a particular representation, often paid in full at the beginning of the representation; (2) an "advance fee" is a payment made at the beginning of a representation against which charges for the representation are credited as they accrue, usually on an hourly basis; and (3) a "general retainer" is payment for an attorney's availability, which is earned in full when paid before any work is done.

Id.

"[A]dvance fees ... [are] to be earned in the future at an agreed rate ..." whereas fixed or "flat" fees are "advance fees that are agreed to cover specific legal services regardless of length or complexity." *Matter of Kendall*, 804 N.E.2d 1152, 1154 (2004). It is noteworthy that the pivotal question in determining the character of a fee is whether a fee is accepted in return for a commitment to fulfill a defined set of obligations, irrespective of their ease or difficulty, as opposed to security for payment for services of an indeterminate amount and value.

D. The duty to refund unearned fees

Turning to the treatment of flat fees specifically, it is necessary to look at *Matter of Stanton*, 504 N.E.2d 1 (1987). In *Stanton*, the lawyer charged flat fees in advance of work in a criminal case in which the Disciplinary Commission charged the lawyer with failing to deposit the funds in his trust account. *Id.* The Court rejected the Commission's argument, stating "[t]he above noted segregation of funds and accounting requirements are not applicable to attorney fees charged in advance for the performance of legal services." *Id.* Though the *Stanton* Court held that flat fees could be deposited in the lawyer's operating account, it also held "that upon termination of the professional relationship, unearned fees paid in advance must be returned," pursuant to Ind. R. Prof. Cond. 1.16. *Kendall*, 804 N.E.2d at 1155 (citing *Stanton*, 504 N.E.2d at 1).

There are many reasons why a lawyer may innocently fail to provide all of the services envisioned by a flat-fee agreement. An unexpected conflict of interest, an illness, a change of law, a family problem, or other circumstances can abruptly interfere with a lawyer's ability to complete an assignment. The fact that a lawyer may be fully entitled to a flat fee upon receipt does not abrogate the lawyer's separate duty to refund a part of that fee if the lawyer cannot fulfill his contract with the client. *See Stanton, supra* at 1.[3]

If the lawyer and client choose to incorporate a true flat-fee arrangement into the engagement, both the lawyer and the client need to understand that Rule 1.16 has engrafted onto this arrangement an ethical duty on the part of the lawyer to refund any part of the flat fee that the lawyer owns but is subsequently unable to fully earn. And Rule 1.5 requires that the lawyer make clear that a flat fee may not be regarded as nonrefundable. *O'Farrell, supra* at 806. This remains the case even though the refund of a flat fee that was treated as the lawyer's property on receipt would necessarily come from the lawyer's own funds.

E. The importance of client consent

After reviewing cases from other jurisdictions, the Court in *Kendall* noted that a "majority of decisions" hold that client consent is a condition to the lawyer's right to deposit a flat fee into the lawyer's operating account. 804 N.E.2d at 1157-58. The Committee interprets this rule as requiring client consent to a flat-fee arrangement subject to Rule 1.15's anti-comingling requirements. While *Stanton* and *Kendall* stop short of holding that client consent is a requirement, the Committee rejects any suggestion that a lawyer is entitled to unilaterally determine the character of funds received from a client. The Committee believes that whenever a lawyer agrees to accept money from a client the lawyer and the client need to consent to the terms under which control over the money passes to the lawyer. If the payment is made pursuant to the creation of an attorney-client relationship, it is incumbent upon a lawyer to clearly define the financial terms of the lawyer's engagement so that the client understands (a) when funds paid to the lawyer will be considered fully earned by the lawyer, and (b) whether circumstances could create a duty on the lawyer's part to refund a portion of the fee. When this process gives rise to a payment that is considered the lawyer's property upon receipt, as in *Stanton*, the payment must be placed in the lawyer's operating account. Any payment not received as a flat fee that is treated as earned upon receipt must be placed in trust. Inevitably this process requires consent by both the lawyer and the client.

Conclusions

As discussed above, the Committee has reached the following conclusions:

(a) A flat fee, paid in exchange for a commitment by the lawyer to perform a specific task or set of tasks, may not be deposited into a lawyer's client trust account if the client and lawyer have agreed that, upon receipt, it would become the property of the lawyer. Conversely, if an agreement for a flat fee provides that the lawyer has not earned the fee until the work is completed, any advance payment of the fee must be deposited in the lawyer's trust account and may not be withdrawn until earned.

(b) A lawyer must have a clear agreement with a client as to the ownership of fees received by the lawyer so that the fees can be properly allocated between the lawyer's trust account and operating account.

(c) A client must be notified that even a true flat fee that is treated as earned on receipt and deposited to the lawyer's operating account might result in a refund if the agreed-upon legal services are not completed by the lawyer.

1. The opinion of the Committee on this question is limited to the handling of money received by the lawyer as fees and does not apply to money received by the lawyer for advance payment of expenses, or reimbursement of expenses, to which different considerations apply. *See In re Thomas*, 30 N.E.3d 704, 709 (Ind. 2015) (client advance payments for expenses must be deposited into trust account and withdrawn only as the expenses are incurred).

2. The Court separately considered whether the lawyer improperly failed to refund part of the fee in light of the fact that the client discharged the lawyer in favor of another lawyer before the conclusion of the case. Noting that the lawyer spent considerable time on the case and negotiated a plea agreement, which the client initially viewed with favor, the Court found insufficient evidence to support the Disciplinary Commission's argument that the lawyer had not fully earned his fee. *Canada, supra* at 255.

3. If agreed work is not completed, the lawyer may also have duties to refund a portion of the fee or pay damages as a matter of contract law. This opinion does not address the contractual duties of the parties in such a situation.

ADVISORY OPINION

Code of Judicial Conduct #1-01
Canon 3
***Ex Parte* Custody Orders**

The Indiana Commission on Judicial Qualifications issues the following advisory opinion concerning the Code of Judicial Conduct. The views of the Commission are not necessarily those of a majority of the Indiana Supreme Court, the ultimate arbiter of judicial disciplinary issues. Compliance with an opinion of the Commission will be considered by it to be a good faith effort to comply with the Code of Judicial Conduct. The Commission may withdraw any opinion.

ISSUE

The issue in this Advisory Opinion is the appropriate judicial response to an *ex parte* child custody request in which a party seeks a temporary custody order without prior notice or an opportunity for a hearing afforded any other party with a legal interest. It focuses on the application of Trial Rule 65(B), governing temporary restraining orders, and its pertinence in the contexts of legal separations, dissolutions, post-dissolutions, guardianships, or adoptions, when a party requests a custody order without notice or a hearing.1 The Commission concludes that a judge must follow T.R. 65(B) when petitioned for an *ex parte* temporary custody order; otherwise, the judge violates Canon 3B(8) of the Code of Judicial Conduct prohibiting improper *ex parte* contacts, as well as Canons 1 and 2 of the Code, which require judges to uphold the integrity and independence of the judiciary, to respect and comply with the law, and to act at all times in a manner which promotes the public's confidence in the integrity of the court. Lawyers seeking this relief without adherence to the rules may violate Rule 3.5(b) of the Rules of Professional Conduct, which prohibits improper *ex parte* communications by lawyers. *See Matter of Anonymous*, 729 E.2d 566 (Ind. 2000).

ANALYSIS

This opinion does not represent a change or evolution in the Commission's views or in its interpretation of the relevant sections of the Code of Judicial Conduct. Rather, the opinion is generated by a substantial number of ethics complaints reviewed by the Commission in which judges have granted *ex parte* temporary child custody petitions which may state insufficient grounds for extraordinary relief or, in any case, where the judge does not adequately ensure the fairness of the proceedings, which is accomplished by careful adherence to T.R. 65(B).2 *Id.*

Trial Rule 65(B) protects against abuses by requiring the petitioner to state by affidavit specific facts showing that immediate and irreparable injury, loss, or damage will result before an adverse party may be heard in opposition, and by requiring the petitioner to certify in writing any efforts made to give notice and the reasons supporting the claim that notice should not be required. It calls for security in a sum deemed appropriate by the court for the payment of costs and damages which may be incurred by a party wrongfully enjoined or restrained. It requires the judge to define the injury in the order, and to state why it is irreparable and why the order was granted without notice. When a temporary restraining order is granted without notice, the court must set it for a hearing at the earliest possible time, giving precedence to it above all other matters.

The cases the Commission has scrutinized indicate a lack of mindfulness that *ex parte* requests and resultant orders affecting custodial rights are extraordinary, and that the relief depends upon the existence of exigent circumstances – irreparable injury, loss, or damage without immediate relief. A request for emergency relief should not supplant what in reality constitutes a standard invocation of the court's powers through the trial rules, which rules generally are premised on the notion that a fair proceeding involves the commencement of a proceeding, reasonable notice, and a chance to be heard on the merits by any party with a legal interest before judicial action occurs. Judges and lawyers should proceed with meticulous attention to T.R. 65(B) whenever emergency custody is requested, whether upon the commencement of an adoption proceeding, a guardianship of a child, a legal separation or divorce, or a post-dissolution modification. Inattention to the extraordinary nature of the relief, and to the procedural demands the rules impose, undermines judicial fairness and integrity, and the public's trust.

The circumstances leading to the ethics inquiries reviewed by the Commission sometimes involve a noncustodial parent who, instead of returning a child after a visitation period, determines he or she wants custody – a modification – and files for, and obtains, immediate custody. The custodial parent, perhaps out-of-state, discovers only after the fact that an Indiana court has suspended the parent's custodial rights to their children. The parent then is compelled to make arrangements to obtain counsel, travel to Indiana for an immediate hearing, if the judge has expedited the case as required, and, if not, or if a continuance is needed for preparation, the custodial rights are suspended even longer. Of course, many are without the resources to defend the action at all.

Sometimes all the parties are local residents, and, perhaps, both have attorneys. The proceeding may be a new dissolution, or a guardianship or adoption. What is wrong is when an *ex parte* custody decision is made absent truly emergency circumstances and without regard to the details of T.R. 65(B). When this occurs, the perception is that custodial rights have been affected based only upon whether the petitioner has won a "race to the courthouse."

The Commission's intention is not to curtail the proper exercise of broad judicial discretion, nor do the members intend to substitute their judgments for that of a judge who finds on some rational basis that circumstances warrant emergency relief. The Commission members hope to improve and promote the integrity of our judiciary, and to help promote the public's confidence in the judiciary, by alerting judges, and lawyers, to the stringent and imposing ethical duties judicial officers undertake when considering whether to affect custodial rights *ex parte*. In considering a request for emergency custody of a child, or any other request under T.R. 65(B), a judge should be as cautious with the rights of the opposing party as with scrutinizing the merits of the petition.

A petitioner for a temporary restraining order under T.R. 65(B) must establish not only the potential for irreparable harm, but that the harm will occur before an adverse party may be heard; the petitioner must certify also what efforts at notice have been made and why notice is not required. A judge should carefully determine whether these elements are established. While the Commission hesitates to suggest a list of circumstances which the members would not favor, some examples may be helpful.

Many times, of course, these petitions present compelling reasons for an eventual custody order; yet, if the pleading really is a request for custodial rights, whether or not captioned as an emergency, it should

not be treated as an emergency. An *ex parte* custody order is not properly a means to initiate a modification proceeding or to obtain an advantage in a subsequent petition on the merits of modification or other custody issue. Again, the custody request may be in the context of an adoption or guardianship, and not necessarily a dispute between two parents. Those proceedings, like modifications, presumably are not adjudicated without first providing any interested party the right to be heard, including on an interim custody issue. In those cases, too, petitioners for *ex parte* relief must set out a verified claim that irreparable injury will result without the emergency relief.

A claim that the custodial parent has violated an existing order, perhaps concerning visitation, should not alone justify emergency custodial relief. Those issues are addressed through the contempt process, or by injunction pursuant to I.C. 31-14-5-1. Similarly, a claim that the custodial parent has decided to move out of state, or that the child has expressed a desire to reside with the petitioner, does not justify emergency relief. These are issues for a modification hearing and for the application of the appropriate standard supporting a modification order.

Also, for example, the desire to enroll a child in school, if it requires custodial rights, does not in the Commission's view, *in itself*, justify a temporary modification of custody before the parent who currently has the custodial rights to make those arrangements has been heard. The petitioner may allege that harm will result if he or she cannot enroll the child, but the requisite potential harm cannot be only a personal or strategic disadvantage or the fact that existing orders keep the party from his or her objectives. Again, the standard is *irreparable harm or injury*. Some real emergency must exist which changes the complexion of the case from one which simply involves a parent who desires a modification and custodial rights, to one possibly warranting emergency action in the petitioner's favor. Even then, T.R. 65(B) must guide the process, providing the safeguards of the affidavit, detailed findings, and an immediate hearing.

Concerning the absence of notice and a hearing in these proceedings, the rule similarly provides safeguards against abuse. The rule requires a showing that irreparable harm will occur before notice may be given or before an adverse party may be heard. It can mean only that, where those representations indicate that notice and a hearing could be accomplished without harm, they should occur. A judge should insist on notice and a hearing if it is feasible and would not result in the alleged irreparable harm. In other words, there may be no good reason, even under the petitioner's claim, why notice should not be given and a hearing held before a ruling. A simple telephone call to opposing counsel, or to the other parent, and an offer to schedule a hearing before ruling, only promotes the integrity of the process.

In assessing both the sworn statements of the alleged irreparable harm which could result without the order, and the written certifications about notice or reasons for not providing it, if the judge does not insist on an abundance of facts in the pleadings, the judge should be prepared to actively question the petitioner or the petitioner's attorney about these claims. The key inquiries pertain to why the petition is submitted *ex parte*. Where is the other party? What notice has been accomplished? Why should this matter be heard without the opposing party's participation? What exactly is the *irreparable harm* which would result if the case simply is set for a hearing after notice is made? No such potential harm was indicated in the instances investigated by the Commission.

Some judges insist that counsel bring in the petitioner to discuss these aspects of the petition. Other judges have expressed concern that these recommended discussions themselves constitute improper *ex parte* contacts. These concerns are misplaced. After all, the judge properly has entered into an *ex parte* proceeding if T.R. 65(B) is followed. To gather information which helps the judge determine whether the extraordinary relief is warranted only bolsters the fairness of the *ex parte* process which is underway. Nonetheless, the judge should not entertain discussions which go beyond what he or she believes is necessary to adequately entertain the petition. Ideally, the conversation will be recorded.

Surely, many petitions for emergency custody raise issues which appear to require immediate action. Judges often are faced with real emergencies, and they may deem a situation an emergency where other reasonable people would differ. But even in those cases, consideration of the opposing party's rights is required. Again, T.R. 65(B) provides this underpinning of fairness. Of course, judges should be able to trust in the veracity of a sworn petition alleging that harm will result without an *ex parte* order. In reality, some are less than truthful, for which the judge is not accountable. However, T.R. 65(B) imposes important burdens on the petitioner, which likely will reduce the instances of false or unfounded petitions.

The Commission calls on the profession to eliminate the seemingly wide-spread practice in Indiana where lawyers seek, and judges provide, *ex parte* emergency custody where no irreparable harm or injury reasonably is foreseen without notice and a hearing – the fundamentals of our adversarial process. T.R. 65(B) provides the framework for fairness; judges and lawyers must make genuine assessments about whether the circumstances really invoke the rule at all. When this occurs, the Commission expects to review fewer citizen complaints about a lax and unfair procedure which adversely affects their most precious rights.3

CONCLUSION

Ex parte emergency custody orders in dissolution, post-dissolution, guardianship, and adoption proceedings must be considered the rare exceptions to the general premise that a fair proceeding includes reasonable notice and an opportunity to be heard. When the circumstances do warrant emergency *ex parte* relief, petitioners and judges must follow T.R. 65(B).

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1 This opinion does not directly apply to proceedings which may involve custody issues but which properly are *ex parte*, such as protective order cases, or other matters which operate pursuant to their own statutory provisions, such as juvenile detention or CHINS placement proceedings. Generally, it does apply to any petition for a temporary restraining order under T.R. 65(B), whether or not custody issues are involved. *See Matter of Jacobi*, 715 N.E.2d 873 (Ind. 1999).

2 Black's Law Dictionary describes a temporary restraining order as "an emergency remedy of short duration which may issue only in exceptional circumstances and only until the trial court can hear arguments or evidence, as the circumstances require…A temporary restraining order may be granted without written or oral notice to the adverse party or attorney only if…it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition".

Trial Rule 65(B),(C), (D), and (E) provide as follows:

(B) Temporary restraining order – Notice – Hearing – Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if:

(1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition; and

(2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give notice and the reasons supporting his claim that notice should not be required.

Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed ten [10] days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the whereabouts of the party against whom the order is granted is unknown and cannot be determined by reasonable diligence or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On two (2) days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(C) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of a governmental organization, but such governmental organization shall be responsible for costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

The provisions of Rule 65.1 apply to a surety upon a bond or undertaking under this rule.

(D) Form and scope of injunction or restraining order. Every order granting temporary injunction and every restraining order shall include or be accompanied by findings as required by Rule 52; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(E) Temporary Restraining Orders – Domestic Relations Cases. Subject to the provision set forth in this paragraph, in an action for dissolution of marriage, separation, or child support, the court may issue a Temporary Restraining Order, without hearing or security, if ether party files a verified petition alleging an injury would result to the moving party if no immediate order were issued.

(1) *Joint Order.* If the court finds that an order shall be entered under this paragraph, the court may enjoin both parties from:

(a) transferring, encumbering, concealing, selling or otherwise disposing of any joint property of the parties or asset of the marriage except in the usual course of business or for the necessities of life, without the written consent of the parties or the permission of the court; and/or

(b) removing any child of the parties then residing in the State of Indiana from the State with the intent to deprive the court of jurisdiction over such child without the prior written consent of all parties or the permission of the court.

(2) Separate Order Required. In the event a party seeks to enjoin the non-moving party from abusing, harassing, disturbing the peace, or committing a battery on the petitioning party or any child or step-child of

the parties, or exclude the non-moving party from the family dwelling, the dwelling of the non-moving party, or any other place, and the court determines that an order shall be issued, such order shall be addressed to one person. A joint or mutual restraining or protective order shall not be issued. If both parties allege injury, they shall do so by separate petitions. The trial court shall review each petition separately and grant or deny each petition on its individual merits. In the event the trial court finds cause to grant both petitions, it shall do so by separate orders.

(3) *Effect of Order*. An order entered under this paragraph is automatically effective upon service. Such orders are enforceable by all remedies provided by law including contempt. Once issued, such orders remain in effect until the entry of a decree or final order or until modified or dissolved by the court.

(F) Statutory Provision Unaffected by this Rule. Nothing in this rule shall affect provisions of statutes extending or limiting the power of a court to grant injunctions. By way of example and not by way of limitation, this rule shall not affect the provisions of 1967 Indiana Acts, ch. 357, § § 1-81 relating to public lawsuits, and Indiana Acts, ch. 7, § § 1-152 providing for removal of injunctive and mandamus actions to the Court of Appeals of Indiana, and Indiana Acts, ch. 12 (1933).3

1IC 34-4-17-1 to 34-4-17-8.
2IC 34-4-18-1 to 34-4-18-13 (Repealed).
3IC 22-6-1-1 to 22-6-1-12.

3 The Commission, clearly, cannot contemplate all the potential circumstances which may arise. Judges may find themselves faced with truly unusual or unexpected sets of facts, and they must be able to proceed within their sound discretion. Nonetheless, these are not the circumstances which inspired this opinion.

*827 770 N.E.2d 827

Supreme Court of Indiana.

In the Matter of the Honorable Douglas B. MORTON, Judge of the Fulton Circuit Court.
No. 25S00-0109-JD-435.
July 8, 2002.

In judicial disciplinary proceeding, the Supreme Court held that public reprimand was the appropriate sanction for trial judge who engaged in ex parte communication in child custody case, instigated criminal prosecution of therapist, and refused to disqualify himself.

Discipline imposed.

West Headnotes

[1] Judges ⚖11(4)
227 ----
227I Appointment, Qualification, and Tenure
227k11 Removal or Discipline
227k11(4) Grounds and Sanctions.
Public reprimand was the appropriate sanction for judge who engaged in ex parte communication with father's attorneys in child custody proceeding, instigated criminal investigation of therapist whose report was submitted in the case, and refused to disqualify himself after mother discovered material related to investigation of therapist. Code of Jud.Conduct, Canon 3(B)(8), (E)(1).

[2] Judges ⚖49(1)
227 ----
227IV Disqualification to Act
227k49 Bias and Prejudice
227k49(1) In General.
The standard for a judge to disqualify himself is not whether the judge personally believes himself or herself to be impartial, but whether a reasonable person aware of all the circumstances would question the judge's impartiality. Code of Jud.Conduct, Canon 3(E)(1).

[3] Judges ⚖50
227 ----
227IV Disqualification to Act
227k50 Refusal by Judge to Act.
One purpose of a judge's self-disqualification is to preserve the parties' and the public's faith in the fairness of the system, even when the judge asserts he has no personal bias. Code of Jud.Conduct, Canon 3(E)(1).

Martin E. Risacher, Noblesville, IN, Attorney for Respondent Hon. Douglas B. Morton.

Meg W. Babcock, Indianapolis, IN, Attorney for the Commission on Judicial Qualifications.

*828 JUDICIAL DISCIPLINARY ACTION

PER CURIAM.

INTRODUCTION

This matter comes before the Court as a result of a judicial disciplinary action brought by the Indiana Commission on Judicial Qualifications ("Commission") against the Respondent herein, Douglas B. Morton, Judge of the Fulton Circuit Court. Article 7, Section 4 of the Indiana Constitution and Indiana Admission and Discipline Rule 25 give the Indiana Supreme Court original jurisdiction over this matter.

After the Commission filed formal charges but before the matter could be heard by the judges appointed to take evidence in this proceeding, the parties jointly tendered a Statement of Circumstances and Conditional Agreement for Discipline. The parties have stipulated to the following facts.

FACTS

Respondent was serving as a special judge in a child custody matter that arose in a neighboring county. In 1996, a previous judge had awarded custody of the parties' children to the mother, modifying an earlier custody modification order awarding custody of the children to their father. Prior to the 1996 custody decision, the mother had received counseling from a mental health therapist, and, on a few occasions, she also took the children to counseling sessions with this same therapist.

The mother had filed the motion seeking modification in April 1995. In September 1995, the therapist sent two psychological reports to the court-appointed psychological evaluator of the children, which purported to be reports written by a clinical psychologist. The clinical psychologist was an

independent contractor with the therapist and frequently tested her patients. The psychological reports, dated April 1995, contained information and conclusions not supportive of the father's continued custody.

In preparation for the custody hearing, the court-appointed child custody evaluator conducted his own evaluations of the children and obtained substantial information from various sources about the appropriateness of both parents as custodial parents. He prepared a report for the court. In his report, he outlined all the information available to him and referred to the contents of the psychological reports. The custody evaluator concluded, "Based on information from interviews with all parties, collateral data reviewed, psychological testing, and home visit information, (the mother) clearly presents a more appropriate custodial parent than does (the father)." Ultimately, as noted above, the previous judge determined that custody should be returned to the mother.

After losing custody of the children, the father filed another motion to modify custody. He requested a change of judge, and Respondent assumed jurisdiction as special judge.

On June 18, 1999, the father filed, by counsel, a Trial Rule 60(B) motion seeking to set aside the previous custody decision. In this motion, the father asserted that the previous judge had awarded custody to the mother as a result of a fraud on the court. The allegation of fraud was based on a claim that the signature of the clinical psychologist had been forged on the psychological reports.

Attached to the motion was an affidavit from the clinical psychologist stating that he had no recollection of ever seeing the children, that he did not sign the psychological reports, and that he had not prepared them. Also attached was the affidavit ***829** of the therapist's secretary stating that she had signed the name of the clinical psychologist to the reports at the direction of the therapist who told the secretary that the clinical psychologist had approved doing so because of time constraints. Father asserted that the therapist had created the reports.

In addition to filing the motion with the clerk of the court and serving opposing counsel, the father's attorneys hand-delivered the motion to Respondent. When they presented Respondent with a copy of the motion, the three engaged *ex parte* conversation.

One of the father's attorneys told Respondent that he thought that Respondent would find the motion "very interesting reading," and that it included information that established a "lay down" case of forgery against the therapist. This same attorney urged Respondent to review the motion promptly. He told Respondent that he felt that, pursuant to a protective order relating to documents about the children, he could not refer the alleged forgery to law enforcement himself, but he told the Respondent that he expected Respondent would feel compelled to do so. He also suggested that if Respondent was inclined to refer the case to law enforcement, the attorney was opposed to sending it to a certain named county, and instead preferred another county that he identified. This same attorney also told Respondent that he had concerns for the safety of the woman who had signed the psychologist's name to the psychological reports because he did not trust the therapist.

Respondent contacted a colleague who suggested that Respondent turn the matter over to the State Police for investigation. The Respondent followed this advice. However, when Respondent was unsuccessful in making a referral to the local State Police post, he decided to contact a prosecuting attorney who had previously worked with the State Police. Respondent believed that this prosecutor would be able to advise him of the proper procedure for referral and the identity of the appropriate State Police official to whom the referral should be made.

The prosecuting attorney contacted by Respondent is the brother of the father's local counsel who was present during the *ex parte* communication, although not the attorney who spoke directly with Respondent. The prosecutor subsequently sent a sample letter to Respondent for use in making the State Police referral, gratuitously adding a hand-written note stating, "Good Hunting." At Respondent's request, the prosecuting attorney never advised his brother of this contact.

Thereafter, Respondent forwarded the materials presented to him by the father's lawyers to the State Police. Respondent did not advise either party of the referral to the State Police.

Within a few days after being assigned the matter, the State Police investigator met with Respondent and reviewed the entire file. Respondent declined the invitation by the investigator to be kept informed regarding the progress of the investigation. Thereafter, a county prosecutor authorized an immediate investigation.

The *ex parte* communication occurred on June 18, 1999. On June 29, 1999, Respondent scheduled the hearing on the Trial Rule 60(B) motion for August 17, 1999. On July 7, 1999, the father filed an emergency petition seeking a temporary modification of custody pending the Respondent's decision on the Trial Rule 60(B) motion. The petition alleged no factual basis for the request, nor any emergency grounds.

***830** The referral by Respondent to law enforcement occurred on July 12, 1999. On July 15, Respondent presided over the hearing on the emergency custody issue, during which the father's attorney made references to the alleged crimes by the therapist. Respondent made no disclosure of the *ex parte* communication or the referral to the police at this hearing. Respondent submits that he failed to make any disclosure because he was concerned that his disclosure might jeopardize the investigation and that adequate time for disclosure prior to the hearing still existed.

On July 15, the Respondent granted a motion filed by the father and continued the August 17 hearing, resetting it for August 31. Unknown to Respondent, the State Police investigator interviewed the father's attorneys on July 22, 1999. On August 10, the parties appeared in court on various discovery issues, and Respondent again made no disclosures of the *ex par* conversation or the referral to the police.

Later that day, one of the mother's attorneys was reviewing what he believed to be the court's official file and discovered a sub-file captioned "(case name) Criminal Investigation," which happened to be Respondent's private file. This file included the sample referral letter with the note to Respondent stating, "Good Hunting," and the correspondence to the State Police.

Thereafter, the mother's attorney filed a motion asking Respondent to disqualify himself. At the hearing on this motion, held on August 23, 1999, Respondent and both of the father's attorneys revealed the nature of th *ex parte* communication. Respondent also explained his referral of the alleged forgeries to the State Police by stating that it was his belief that the information warranted prompt reporting and that he was the only person in a position to report it. Respondent did not disqualify himself from the case.

The mother then filed, by her counsel, an original action with the Indiana Supreme Court requesting a writ of mandamus requiring Respondent to disqualify himself. The issues regarding the conversation between the father's lawyers and Respondent and the details of the criminal referral were fully briefed. Respondent declined to file any response to the writ application. Ultimately, this Court issued an order stating:

> The Court has now reviewed the materials of record, and met in conference to discuss the case. The original action is an extraordinary remedy, which is viewed with disfavor, and may not be used as a substitute for appeal. Original Action Rule 2(E). Writs of mandamus will be issued only where the trial court has an absolute duty to act or refrain from acting *State ex rel. Pickard v. Superior Court of Marion County,* 447 N.E.2d 584 (1983). In this instance, the Court cannot say with certainty that relator has met this standard. On that narrow basis, the Court DENIES the writ.

Respondent believed that the Court's ruling meant that no adequate showing of an appearance of impropriety had been made and that he had not violated the Code of Judicial Conduct by refusing to disqualify himself.

By the time the hearing on the father's motion to set aside the custody decision occurred in January 2000, the prosecutor investigating the allegations against the therapist wrote to Respondent and stated, "I am writing to advise you formally of the outcome of the criminal investigation, which arose from the report you made to the Indiana State Police regarding [the child custody case]. Given the assertions made in the affidavits filed in the [child ***831** custody] case, I think this matter certainly needed to be investigated. However, as often proves to be the case, the recollections of the various witnesses did not turn out to be solid and reliable as the affidavits suggested."

Before evidence was presented at the hearing on the father's motion to set aside the prior custody decision, Respondent denied the therapist's motion to intervene in the proceeding. Thereafter, the father presented his case, focusing in large part on the psychological reports alleged to have been forged by the therapist. The clinical psychologist, who had stated in his affidavit that he had no recollection of ever seeing the children, acknowledged at the hearing that his handwriting was on certain testing documents relating to the children, but he insisted he had not created the psychological reports. The therapist testified and denied the forgery.

After three and half days of evidence, Respondent advised the parties that his inclination was to rule against the father's motion to set aside the custody order, having concluded that the father failed to prove that the custody modification order was obtained by fraud, in part because the custody evaluator did not rely upon the psychological reports in recommending that custody go to the mother, and also because the evidence did not establish that the mother was involved in the alleged scheme to defraud the prior court. However, in rendering his decision, Respondent stated that the father had established that the psychological reports were forged and that the therapist was the "leading candidate" in a forgery.

Respondent stated further that he had "high hopes" the criminal investigation would remain active, which statement he submits was made because he believed that the continued investigation of the therapist's psychological reports had significance to the judiciary with respect to the trustworthiness of child custody evaluations. Respondent now understands that his comments further undermined the public faith in his impartiality as well as the faith of those with interests at stake in the custody case.

CONCLUSION

[1] The parties agree, as does this Court, that Respondent violated Canon 3(B)(8) of the Code of Judicial Conduct by engaging in a conversation with the father's attorneys, which included commentary on the strength of the motion, insinuations that the therapist was a threat to a witness, and an expressed desire that the Respondent initiate a criminal investigation of the therapist.

The parties and Court also agree that Respondent violated Canon 3(B)(8) by failing to promptly report the *ex parte* communication.

[2][3] Finally, the parties and Court agree that Respondent should have disqualified himself because of the *ex parte* contact, the criminal investigation he initiated, and the failure to disclose those facts. Judicial Canon 3(E)(1) requires a judge to disqualify if the judge's impartiality might reasonably be questioned. The standard is not whether the judge personally believes himself or herself to be impartial, but whether a reasonable person aware of all the circumstances would question the judge's impartiality. *In re Edwards* 694 N.E.2d 701, 710 (Ind.1998). One purpose of disqualification is to preserve the parties' and the public's faith in the fairness of the system, even when the judge asserts he has no personal bias.

In this case, the combination of all of the facts indicate that a reasonable person would have doubted Respondent's impartiality after his failure to disclose the *ex* *832. *parte* communication and the referral to the State Police, and after the mother's attorney discovered the sample letter with the "Good Hunting" note. These facts, coupled with Respondent's later comments on the record about his continuing suspicions of the therapist after the determination by the prosecuting attorney not to file criminal charges, gave the appearance of partiality. The complaint against Respondent might have been avoided by prompt disclosure o *ex parte* communication and the criminal referral.

In mitigation, Respondent states, in effect, that he sincerely but mistakenly believed that his conduct was appropriate to the situation. The parties also ask the Court to recognize Respondent's long and exemplary judicial service to the citizens of the State.

The parties have further agreed, as does the Court, that the appropriate sanction for this misconduct is a public reprimand. Accordingly, Douglas B. Morton, Judge of the Fulton Circuit Court, is hereby reprimanded. This discipline terminates the disciplinary proceedings relating to the circumstances of this cause. The costs of this proceeding are assessed against Respondent.

All Justices concur.

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(Cite as: 786 N.E.2d 1185)

C

Supreme Court of Indiana.
In the Matter of ANONYMOUS.
No. 20S00-0205-DI-279.

April 25, 2003.

In attorney disciplinary proceeding, the Supreme Court held that attorney's ex parte communication with judge in regard to temporary restraining order in divorce proceeding warranted private reprimand.

Discipline imposed.

West Headnotes

Attorney and Client ⚖**58**
45k58 Most Cited Cases
Attorney's ex parte communication with judge in divorce proceeding, resulting from her failure to allege, in seeking temporary restraining order, the reasons why notice should not be required, warranted private reprimand. Trial Procedure Rule 65(B)(2), (E); Rules of Prof.Conduct, Rule 3.5(b).

***1185** PER CURIAM.

In this attorney discipline case, the Disciplinary Commission contends that the respondent lawyer violated the ethical prohibition ***1186** on *ex parte* communication with a judge when she sought and obtained a temporary restraining order without notice in a marriage dissolution case. While we agree with Respondent that notice is not necessarily required to obtain a temporary restraining order in a domestic relations case, compliance with the trial rules' prerequisites to obtain an order without notice is required, even in domestic relations cases. We also write to detail the lawyer's obligations when seeking a temporary restraining order without notice in a domestic relations matter.

Background

The facts are jointly stipulated by the Commission and the Respondent:

1. [The Respondent] is an attorney in good standing, having been duly admitted to practice law in the State of Indiana....
2. [The Husband] was married to [the Wife], and lived with her and their four children.
3. On June 20, 2001, the Respondent filed divorce proceedings as lawyer for the Wife.
4. Also on June 20, 2001, the Respondent filed two different petitions for restraining orders against the Husband.
5. One of the restraining order petitions alleged that the Husband might sell or dissipate the marital property unless restrained.
6. The petition further alleged that the Husband might remove a child from the family home or the court's jurisdiction, or harm or harass the Wife or children unless restrained.
7. The petition also alleged that the Husband used intimidation and harsh punishments to control the Wife and children, and generally described several such punishments but did not include any allegation that there was a threat of imminent harm to the Wife or children.
8. The other restraining order petition was identical, except that it did not include the allegations concerning the Husband's use of intimidation and punishments.
9. The Respondent did not provide the Husband with notice, either oral or written, that she was seeking a restraining order against him until he was served with the dissolution petition, the restraining order petitions, and the orders granting the restraining orders against him, approximately one week after the restraining order petitions were filed and granted.
10. When she filed the restraining order petitions, the Respondent did not provide oral or written notice to the Husband, she did not make a written showing that immediate and irreparable injury, loss or damage would result to the Wife

before the Husband could be heard in opposition to the petitions, and she did not certify in writing her efforts to give notice to the Husband or reasons why such notice should not be given.

11. When she filed the petitions with the court and outside the presence of the Husband or counsel for the Husband (the Husband had not yet retained counsel), the Respondent orally provided the presiding judge ... with information supplementing the written information in the petitions.

12. [The judge] then issued two restraining orders against the Husband restraining him from transferring or dissipating the marital assets, removing a child from the court's jurisdiction and harassing or harming the Wife or children.

13. One of the restraining orders also granted the Wife temporary possession of the marital residence.

***1187** 14. The restraining order petitions, the restraining orders, the dissolution petition and other papers filed in the case were first served on the Husband at the marital residence on June 27, 2001, by sheriff's deputy.

15. The Husband was compelled to immediately leave the marital residence, pursuant to the restraining orders.

16. The Husband immediately hired counsel and had an emergency hearing scheduled.

17. After that hearing, the Husband was allowed to enter the marital residence to retrieve his clothing and personal effects and was given partial custody of the children.

18. About two weeks later the court held another hearing on custody and the parties' alternating custody of the children was confirmed.

Stipulation of Facts 1-4.

The Commission contends that, by communicating with the judge in connection with the restraining order without notifying the husband, Respondent violated Ind. Professional Conduct Rule 3.5(b) which provides that:

> A lawyer shall not ... communicate ex parte with [a judge] except as permitted by law.

Respondent contends that her *ex parte* communication was permitted by law, to wit, Ind. Trial Rule 65(E) governing the issuance of temporary restraining orders in domestic relations cases. The Commission responds that for Respondent's *ex parte* communication to be permissible, she was required to comply with the notice provisions of T.R. 65(B) governing restraining orders generally, not just the language of T.R. 65(E).

Discussion

The operative provisions of T.R. 65(B) and T.R. 65(E) are obviously critical to the resolution of this case. They read as follows:

> (B) **Temporary restraining order--Notice--Hearing--Duration.** A temporary restraining order may be granted without written or oral notice to the adverse party only if:
>
> (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition; and
>
> (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give notice and the reasons supporting his claim that notice should not be required....
>
> ...
>
> (E) **Temporary Restraining Orders--Domestic Relations Cases.** Subject to the provisions set forth in this paragraph, in an action for dissolution of marriage, separation, or child support, the court may issue a Temporary Restraining Order, without hearing or security, if either party files a verified petition alleging an injury would result to the moving party if no immediate order were issued.
>
> ...

Respondent's legal argument is that T.R. 65(E) is essentially an exception or a carve-out from T.R. 65(B), the general rule governing temporary restraining orders. As the foregoing provisions make clear, T.R. 65(B) requires two showings: (1) a showing regarding "injury, loss, or damage" and (2) a showing regarding notice; T.R. 65(E) requires one showing, a showing ***1188** regarding "injury." As long as she makes the requisite showing of

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injury required by T.R. 65(E), Respondent argues, her ex parte communication is authorized by law and she is not guilty of misconduct.

Even assuming the correctness of Respondent's legal argument, we find Respondent violated Prof. Cond. R. 3.5(b). Trial Rule 65(E) requires "a verified petition alleging an injury would result to the moving party if no immediate order were issued" (emphasis supplied). Our reading of the parties' stipulation is that Respondent and her client made no allegation that "injury would result ... if no immediate order were issued." The allegations were couched in terms of what "might" happen or what had happened in the past. See, e.g., Stipulation no. 6 ("Husband might remove a child...."); no. 7 ("The petition... did not include any allegation that there was a threat of imminent harm to the Wife or children."). Trial Rule 65(E) requires an allegation of more than what "might" happen.

We do not, however, agree with Respondent's legal argument. Trial Rule 65(E) exists for the purpose of setting forth an alternative to the T.R. 65(B)(1) showing regarding "injury, loss, or damage" but it does not replace or modify in any way the T.R. 65(B)(2) showing regarding notice. [FN1] At the time of the conduct at issue in this case, Trial Rule 65(E) set forth the showing regarding injury required to obtain a temporary restraining order in domestic relations cases ("fil[ing] a verified petition alleging an injury would result to the moving party if no immediate order were issued"). But T.R. 65(E) was not an exception or carve-out from the T.R. 65(B)(2) showing regarding notice; restraining orders issued under the provisions of T.R. 65(E) applicable only in domestic relations cases were also subject to the notice provisions of T.R. 65(B)(2) applicable to all temporary restraining orders.

> FN1. Trial Rule 65(E) also sets forth additional provisions for temporary restraining orders in dissolution of marriage, separation, and child custody cases: the behavior that a restraining order in domestic relations cases will cover and when joint restraining orders are permitted and separate restraining orders required. This includes disposing of marital property, harassing or abusing the other party or a child or step-child of the parties, and removing a child of the parties from the state. T.R. 65(E).

This can be seen by reviewing the "legislative history" of T.R. 65(B) and T.R. 65(E). When we first adopted T.R. 65(B), it read essentially as it does today, requiring the two showings for "injury, loss, or damage" and notice; it contained no reference to domestic relations cases. Indiana Rules of Court 90 (West 1970). In 1970, we added language to T.R. 65(B) specifying that the "restrictions as to issuance of temporary restraining orders without notice shall not apply to divorce actions." Indiana Rules of Court 126 (West 1971). Effective January 1, 1990, we deleted the exemption language added in 1970 from T.R. 65(B) and replaced it with entirely new language designated T.R. 65(E). New T.R. 65(E) provided that "a joint preliminary injunction" would be issued "in an action for dissolution of marriage, separation, or child support ... on the verified application of either party alleging the injury would result to the moving party if no immediate order were issued." The preliminary injunction would be issued automatically--"without hearing or security"--and prohibit both parties from disposing of marital assets, harassing or abusing the other, and removing a child of the parties from the state. Indiana Rules of Court 129-30 (West 1990). The use of the term "preliminary injunction" in the 1990 amendment was used to distinguish the ***1189** requirements of T.R. 65(E) from the notice showing required by T.R. 65(B).

But in 1995, we rewrote T.R. 65(E) to provide that a "Temporary Restraining Order" could be (but was not required to be) issued "in an action for dissolution of marriage, separation, or child support ... if either party filed a verified petition alleging an injury would result to the moving party if no immediate order were issued." *Indiana Rules of Court* 65 (West 1995). Our substitution of the term "Temporary Restraining Order" for "preliminary

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injunction" in the 1995 amendment was meant to signify that the requirements of T.R. 65(B)(2) applicable to all temporary restraining orders were henceforth applicable to the restraining orders covered by T.R. 65(E). Put differently, beginning with the 1995 amendment, T.R. 65(E) set forth the injury showing required to obtain temporary restraining orders in dissolution of marriage, separation, and child custody cases; T.R. 65(B)(2) set forth notice requirements for temporary restraining orders generally.

Thus compliance with T.R. 65(B)(2) is required in all situations in which temporary restraining orders are sought, including domestic relations cases. But that is not to say that temporary restraining orders without notice cannot be issued in domestic relations cases. Dissolutions of marriage are among the most contentious matters coming before trial courts. Tempers flare, emotions run high, and resolving divorce-related issues often requires the patience of Job and the wisdom of Solomon. When a marital relationship reaches the point that one of the parties feels compelled to seek a temporary restraining order in many cases, there is a very real possibility that domestic violence has occurred or is likely to occur. Although observing that additional research is needed on the subject, a recent study from the National Institute of Justice and the Centers For Disease Control and Prevention noted, "[i]t is a common belief that the termination of a relationship poses an increased risk for, or escalation of, intimate partner violence." Patricia Tjaden and Nancy Thoennes, *Office of Justice Programs, Extent, Nature and Consequences of Intimate Partner Violence* 37 (2000). This Court has recognized that the issue of domestic violence is an "escalating societal problem." *In re Walker,* 597 N.E.2d 1271, 1272 (Ind.1992). It would be unwise if not dangerous to require a party seeking a restraining order in such a situation to telegraph the party's intentions by giving prior notice to the very person the party fears will cause injury or harm.

But, of course, T.R. 65(B)(2) does not require a party seeking a temporary restraining order to give notice. Indeed, the whole purpose of T.R. 65(B)(2) is to provide an orderly and constitutional procedure for obtaining temporary restraining orders without notice. That procedure requires setting forth "reasons supporting [the] claim that notice should not be required" but most assuredly does not prohibit the issuance of an order without notice. The fact that intimate partner violence has occurred or is likely to occur or escalate is certainly a good and sufficient reason under T.R. 65(B)(2) that notice not be required. But if this is the case, a party can so state under oath. The filing of boilerplate allegations without specific facts is not sufficient to invoke the court's intervention without notice.

In order to engage in the ex parte communication with the judge on the facts of this case, Respondent was required to "file[ ] a verified petition alleging an injury would result to the moving party if no immediate order were issued," T.R. 65(E); and to "[...] certif[y] to the court in writing" that no effort had been made to give ***1190** notice "and the reasons supporting [her] claim that notice should not be required," T.R. 65(B)(2).

As of the time of the conduct at issue in this case, then, requests for temporary restraining orders in domestic relations cases were subject to the provisions of T.R. 65(E) requiring a showing regarding "injury" and to the general provision of T.R. 65(B)(2) requiring a showing regarding notice. In 2002, the Legislature, with the strong support of the Indiana Judicial Center, enacted comprehensive reform of state law regarding protective orders in domestic and family violence situations. Ind.Code § 34-26-5, as amended by 2002 Ind. Acts 133. Among the statutory requirements for a protective order under this legislation is that the petition "must be verified or under oath." Ind.Code § 34-26-5-3(e). Accordingly, we amended T.R. 65(E), effective July 19, 2002, to provide that "[p]arties wishing protection from domestic or family violence in Domestic Relations cases shall petition the court pursuant to IC 34-26-5." *Indiana Rules of Court* 61 (West 2003). Temporary restraining orders in all other domestic relations cases remain subject to the requirements of both T.R. 65(B)(2) and T.R. 65(E).

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In determining the appropriate sanction for Respondent's misconduct, we acknowledge that we have never before explicitly said that temporary restraining orders in domestic relations cases are subject to the requirements of both T.R. 65(B)(2) and T.R. 65(E) and that Respondent's position on this issue is reasonable. As such, we impose no sanction for her failure to provide the court with reasons that notice should not be required. However, as noted above, even if we accepted Respondent's argument that restraining orders in domestic relations cases are subject only to the requirements of T.R. 65(E) and not T.R. 65(B), we would still find her guilty of misconduct for engaging in an ex parte communication with the judge without complying with the requirements of T.R. 65(E) in that she failed to allege that "an injury would result to the moving party if no immediate order were issued." For this misconduct, we find that the appropriate sanction is a private reprimand.

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END OF DOCUMENT

Section Twelve

Indiana Rules of Court
Rules of Professional Conduct

Including Amendments made through July 03, 2019

TABLE OF CONTENTS

PREAMBLE: A LAWYER'S RESPONSIBILITIES

[1] 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.

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some on these Rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., Rules 1.12 and 2.4. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. See Rule 8.4.

[4] In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all

lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

[7] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal professional and to exemplify the legal profession's ideals of public service.

[8] A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be an effective advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

[10] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

[11] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

[12] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

[13] Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

SCOPE

[14] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

[15] The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.

[16] Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

[17] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

[18] Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.

[19] Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

[20] Violation of a Rule should not itself give rise to a cause of action against a lawyer, nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability, but these Rules may be used as non-conclusive evidence that a lawyer has breached a duty owed to a client. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

[21] The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.

Rule 1.0. Terminology

(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (n) for the definition of "writing." See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(g) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(l) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(m) "Tribunal" denotes a court, an arbitrator, or any other neutral body or neutral individual making a decision, based on evidence presented and the law applicable to that evidence, which decision is binding on the parties involved.

(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostatting, photography, audio or videorecording or e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Comment

Confirmed in Writing

[1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

Firm

[2] Whether two or more lawyers constitute a firm within paragraph (c) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.

Fraud

[5] When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses

information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (n) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (n).

Screened

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11, 1.12 or 1.18.

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

Rule 1.1. Competence

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

Legal Knowledge and Skill

[1] 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. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with the technology relevant to the lawyer's practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope and objectives of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Comment

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concerns for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant, unethical, or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

Criminal, Fraudulent and Prohibited Transactions

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

Rule 1.3. Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Comment

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to

act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's workload must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Ind. Admission and Discipline Rule 23, Section 27 (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer).

Rule 1.4. Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law or assistance limited under Rule 1.2(c).

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations -- depending on both the importance of the action under consideration and the feasibility of consulting with the client -- this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform

the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

Rule 1.5. Fees

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the

percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a dissolution or upon the amount of maintenance, support, or property settlement, or obtaining custody of a child; or

(2) a contingent fee for representing a defendant in a criminal case.

This provision does not preclude a contract for a contingent fee for legal representation in a domestic relations post-judgment collection action, provided the attorney clearly advises his or her client in writing of the alternative measures available for the collection of such debt and, in all other particulars, complies with Prof.Cond.R. 1.5(c).

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and

(3) the total fee is reasonable.

Comment

Reasonableness of Fee and Expenses

[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of

services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

Prohibited Contingent Fees

[6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a dissolution or obtaining custody of a child or upon the amount of maintenance or support or property settlement to be obtained.

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

Disputes over Fees

[9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

Rule 1.6. Confidentiality of Information

(a) 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).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or from committing fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

(c) In the event of a lawyer's physical or mental disability or the appointment of a guardian or conservator of an attorney's client files, disclosure of a client's names and files is authorized to the extent necessary to carry out the duties of the person managing the lawyer's files.

Comment

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior

representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] 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. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or from committing fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

[13] 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.

[14] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[15] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Acting Competently to Preserve Confidentiality

[16] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Former Client

[18] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

Disability of an Attorney

[19] Paragraph (c) is intended to operate in conjunction with Ind. Admission and Discipline Rule 23, Section 27, as well as such other arrangements as may be implemented by agreement to deal with the physical or mental disability of a lawyer.

Rule 1.7. Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) 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.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client 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 informed consent, confirmed in writing.

Comment

General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(e) and (b).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [29].

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by or merged with another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in

order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether 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.

Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j).

Interest of Person Paying for a Lawyer's Service

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the

client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).

Informed Consent

[18] 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. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

Consent Confirmed in Writing

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client. In the alternative, the lawyer shall promptly transmit a writing to the client confirming the client's oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the

client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, 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; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long term interests of the clients involved, and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Nonlitigation Conflicts

[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are

entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer may have to withdraw from representing one or more or all of the common clients if one client decides that some matter material to the representation should be kept from the others. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c) and 2.2

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director

might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

Rule 1.8. Conflict of Interest: Current Clients: Specific Rules

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in paragraphs (a) through (i) and (l) that applies to any one of them shall apply to all of them.

(l) A part-time prosecutor or deputy prosecutor authorized by statute to otherwise engage in the practice of law shall refrain from representing a private client in any matter wherein exists an issue upon which said prosecutor has statutory prosecutorial authority or responsibilities. This restriction is not intended to prohibit representation in tort cases in which investigation and any prosecution of infractions has terminated, nor to prohibit representation in family law matters involving no issue subject to prosecutorial authority or responsibilities. Upon a prior, express written limitation of responsibility to exclude prosecutorial authority in matters related to family law, a part-time deputy prosecutor may fully represent private clients in cases involving family law.

Comment

Business Transactions Between Client and Lawyer

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary initial fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. Paragraph (a) applies when a lawyer seeks to renegotiate the terms of the fee arrangement with the client after representation begins in order to reach a new agreement that is more advantageous to the lawyer than the initial fee arrangement. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(e) (definition of informed consent).

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

Use of Information Related to Representation

[5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the

client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.

Gifts to Lawyers

[6] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.

[8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

Literary Rights

[9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraphs (a) and (i).

Financial Assistance

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

Person Paying for a Lawyer's Services

[11] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

[12] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1. 7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

Aggregate Settlements

[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

Limiting Liability and Settling Malpractice Claims

[14] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

Acquiring Proprietary Interest in Litigation

[16] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

Client-Lawyer Sexual Relationships

[17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

[18] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior

to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).

[19] When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters.

Imputation of Prohibitions

[20] Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) and (l) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers.

Part-time prosecutor or deputy prosecutor

[21] Under paragraph (l) special rules are provided for part-time prosecutors and deputy prosecutors.

Rule 1.9. Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1. 6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) 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 these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Comment

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

[2] The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. 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. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. 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.

[3] Matters are "substantially related" for purposes of this Rule 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. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing

environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

Lawyers Moving Between Firms

[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

[6] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9(c).

[8] Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

[9] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). See Rule 1.0(e). With regard to the effectiveness of an advance waiver, see Comment [22] to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

Rule 1.10. Imputation of Conflicts of Interest: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.9, or 2.2 unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:

(1) the personally disqualified lawyer did not have primary responsibility for the matter that causes the disqualification under Rule 1.9;

(2) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(3) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this rule.

(d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

Comment

Definition of "Firm"

[1] For purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(c). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See Rule 1.0, Comments [2]--[4].

Principles of Imputed Disqualification

[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b), and 1.10(b) and 1.10(c).

[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented.

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(k) and 5.3.

[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

[6] Where the conditions of paragraph (c) are met, imputation is removed, and consent to the new representation is not required. Lawyers should be aware, however, that courts may impose more stringent obligations in ruling upon motions to disqualify a lawyer from pending litigation. Requirements for screening procedures are stated in Rule 1.0(k). Paragraph (c)(2) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified. Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[7] Rule 1.10(d) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the

representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(e).

[8] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

[9] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

Rule 1.11. Special Conflicts of Interest for Former and Current Government Officers and Employees

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in the firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person 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. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law 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 which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) 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, except that a lawyer serving as a law clerk to a judge, other adjudicative officer, or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

Comment

[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. Such statutes and

regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0(e) for the definition of informed consent.

[2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

[3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.

[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13 Comment [6].

[6] Paragraphs (b) and (c) contemplate a screening arrangement. See Rule 1.0(k) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

[7] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[8] Paragraph (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

[9] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

[10] For purposes of paragraph (e) of this Rule, a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.

Rule 1.12. Former Judge, Arbitrator, Mediator or Other Third-Party Neutral

(a) Except as stated in paragraph (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.

(b) 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.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multi-member arbitration panel is not prohibited from subsequently representing that party.

Comment

[1] This Rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges. The Indiana Code of Judicial Conduct provides that a part-time judge, judge pro tempore or retired judge recalled to active service, may not "act as a lawyer in any proceeding in which he served as a judge or in any other proceeding related thereto." Although phrased differently from this Rule, those rules correspond in meaning.

[2] Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed consent, confirmed in writing. See Rule 1.0(e) and (b). Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.4.

[3] Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Thus, paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met.

[4] Requirements for screening procedures are stated in Rule 1.0(k). Paragraph (c)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[5] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

Rule 1.13. Organization as Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Comment

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1. 6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

[5] Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

[6] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.8, 1.16, 3.3 or 4.1. Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b)(1)--(6). Under paragraph (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rules 1.6(b)(2) and 1.6(b)(3) may permit the lawyer to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.

[7] Paragraph (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in paragraph (c) does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a claim arising out of an alleged violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

[8] A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of these paragraphs, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

Government Agency

[9] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.

Clarifying the Lawyer's Role

[10] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

[12] Paragraph (g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative Actions

[13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an

organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

Rule 1.14. Client with Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

(d) This Rule is not violated if the lawyer acts in good faith to comply with the Rule.

Comment

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the

known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

Rule 1.15. Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. 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.

(b) A lawyer may deposit his or her own funds reasonably sufficient to maintain a nominal balance in a client trust account.

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(d) Upon receiving funds or other property in which the client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is

resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

(f) Except as provided in paragraph (g) of this rule, a lawyer or law firm shall create and maintain an interest-bearing trust account for clients' funds which are nominal in amount or to be held for a short period of time so that they could not earn income for the client in excess of the costs incurred to secure such income (hereinafter sometimes referred to as an "IOLTA account") in compliance with the following provisions:

(1) Client funds shall be deposited in a lawyer's or law firm's IOLTA account unless the funds can earn income for the client in excess of the costs incurred to secure such income. A lawyer or law firm shall establish a separate interest-bearing trust account for clients' funds which are neither nominal in amount nor to be held for a short period of time and which could earn income for the client in excess of costs for a particular client or client's matter. All of the interest on such account, net of any transaction costs, shall be paid to the client, and no earnings from such account shall be made available to a lawyer or law firm.

(2) No earnings from such an IOLTA account shall be made available to a lawyer or law firm.

(3) The IOLTA account shall include all clients' funds which are nominal in amount or to be held for a short period of time.

(4) An IOLTA account may be established with any financial institution (i) authorized by federal or state law to do business in Indiana, (ii) insured by the Federal Deposit Insurance Corporation or its equivalent, and (iii) approved as a depository for trust accounts pursuant to Indiana Admission and Discipline Rules, Rule 23, Section 29. Funds in each IOLTA account shall be subject to withdrawal upon request and without delay and without risk to principal by reason of said withdrawal.

(5) Participating financial institutions shall maintain IOLTA accounts which pay the highest interest rate or dividend generally available from the institution to its non-IOLTA account customers when IOLTA accounts meet or exceed the same minimum balance or other account eligibility qualifications, if any. In determining the highest interest rate or dividend generally available from the institution to its non-IOLTA accounts, eligible institutions may consider factors, in addition to the IOLTA account balance, customarily considered by the institution when setting interest rates or dividends for its customers, provided that such factors do not discriminate between IOLTA accounts and accounts of non-IOLTA customers, and that these factors do not include that the account is an IOLTA account. All interest earned net of fees or charges shall be remitted to the Indiana Bar Foundation (the "Foundation"), which is designated in paragraph (i) of this rule to organize and administer the IOLTA program, and the depository institution shall submit reports thereon as set forth below.

(6) Lawyers or law firms depositing client funds in an IOLTA account established pursuant to this rule shall, on forms approved by the Foundation, direct the depository institution:

(a) to remit all interest or dividends, net of reasonable service charges or fees, if any, on the average monthly balance in the account, or as otherwise computed in accordance with the institution's standard accounting practice, at least quarterly, solely to the Foundation. The depository institution may remit the interest or dividends on all of its IOLTA accounts in a lump sum; however, the depository institution must provide, for each individual IOLTA account, the information to the lawyer or law firm and to the Foundation required by subparagraphs (f)(6)(B) and (f)(6)(C) of this rule;

(b) to transmit with each remittance to the Foundation a statement showing the name of the lawyer or law firm for whom the remittance is sent, the rate of interest applied, and such other information as is reasonably required by the Foundation;

(c) to transmit to the depositing lawyer or law firm a periodic account statement for the IOLTA account reflecting the amount of interest paid to the Foundation, the rate of interest applied, the average account balance for the period for which the interest was earned, and such other information as is reasonably required by the Foundation; and

(d) to waive any reasonable service charge that exceeds the interest earned on any IOLTA account during a reporting period ("excess charge"), or bill the excess charge to the Foundation.

(7) Any IOLTA account which has or may have the net effect of costing the IOLTA program more in fees than earned in interest over a period of time may, at the discretion of the Foundation, be exempted from and removed from the IOLTA program. Exemption of an IOLTA account from the IOLTA program revokes the permission to use the Foundation's tax identification number for that account. Exemption of such account from the IOLTA program shall not relieve the lawyer and/or law firm from the obligation to maintain the property of clients and third persons separately, as required above, in a non-interest bearing account.

(8) The IOLTA program will issue refunds when interest has been remitted in error, whether the error is the bank's or the lawyer's. Requests for refunds must be submitted in writing by the bank, the lawyer, or the

law firm on a timely basis, accompanied by documentation that confirms the amount of interest paid to the IOLTA program. As needed for auditing purposes, the IOLTA program may request additional documentation to support the request. The refund will be remitted to the appropriate financial institution for transmittal at the lawyer's direction after appropriate accounting and reporting. In no event will the refund exceed the amount of interest actually received by the IOLTA program.

(9) All interest transmitted to the Foundation shall be held, invested and distributed periodically in accordance with a plan of distribution which shall be prepared by the Foundation and approved at least annually by the Supreme Court of Indiana, for the following purposes:

(a) to pay or provide for all costs, expenses and fees associated with the administration of the IOLTA program;

(b) to establish appropriate reserves;

(c) to assist or establish approved pro bono programs as provided in Rule 6.6;

(d) for such other programs for the benefit of the public as are specifically approved by the Supreme Court from time to time.

(10) The information contained in the statements forwarded to the Foundation under subparagraph (f)(6) of this rule shall remain confidential and the provisions of Rule 1.6 (Confidentiality of Information), are not hereby abrogated; therefore the Foundation shall not release any information contained in any such statement other than as a compilation of data from such statements, except as directed in writing by the Supreme Court.

(11) The Foundation shall have full authority to and shall, from time to time, prepare and submit to the Supreme Court for approval, forms, procedures, instructions and guidelines necessary and appropriate to implement the provisions set forth in this rule and, after approval thereof by the Court, shall promulgate same.

(g) Every lawyer admitted to practice in this State shall annually certify to this Court, pursuant to Ind.Admis.Disc.R. 2(f), that all client funds which are nominal in amount or to be held for a short period of time by the lawyer or the lawyer's law firm so that they could not earn income for the client in excess of the costs incurred to secure such income are held in an IOLTA account, or that the lawyer is exempt because:

(1) the lawyer or law firm's client trust account has been exempted and removed from the IOLTA program by the Foundation pursuant to subparagraph (f)(7) of this rule; or

(2) the lawyer:

(a) is not engaged in the private practice of law;

(b) is not engaged in the private practice of law in Indiana that involves holding client or third party funds in trust;

(c) does not have an office within the State of Indiana;

(d) is a judge, attorney general, public defender, U.S. attorney, district attorney, on duty with the armed services or employed by a local, state or federal government, and is not otherwise engaged in the private practice of law;

(e) is a corporate counsel or teacher of law and is not otherwise engaged in the private practice of law;

(f) has been exempted by an order of general or special application of this Court which is cited in the certification; or

(g) compliance with paragraph (f) would work an undue hardship on the lawyer or would be extremely impractical, based either on the geographic distance between the lawyer's principal office and the closest depository institution which is participating in the IOLTA program, or on other compelling and necessitous factors.

(h) In the exercise of a lawyer's good faith judgment in determining whether funds of a client can earn income in excess of costs, a lawyer shall take into consideration the following factors:

(1) the amount of interest which the funds would earn during the period they are expected to be deposited;

(2) the cost of establishing and administering the account, including the cost of the lawyer's services, accounting fees, and tax reporting costs and procedures;

(3) the capability of a financial institution, a lawyer or a law firm to calculate and pay income to individual clients;

(4) any other circumstances that affect the ability of the client's funds to earn a net return for the client; and

(5) the nature of the transaction(s) involved. The determination of whether a client's funds are nominal or short-term so that they could not earn income in excess of costs shall rest in the sound judgment of the lawyer or law firm. No lawyer shall be charged with an ethical impropriety or other breach of professional conduct based on the good faith exercise of such judgment.

(i) The Foundation is hereby designated as the entity to organize and administer the IOLTA program established by paragraph (f) of this rule in accordance with the following provisions:

(1) The Board of Directors of the Foundation (the "Board") shall have general supervisory authority over the administration of the IOLTA program, subject to the continuing jurisdiction of the Supreme Court.

(2) The Board shall receive the net earnings from IOLTA accounts established in accordance with paragraph (f) of this rule and shall make appropriate temporary investments of IOLTA program funds pending disbursement of such funds.

(3) The Board shall, by grants, appropriations and other appropriate measures, make disbursements from the IOLTA program funds, including current and accumulated net earnings, in accordance with the plan of distribution approved by the Supreme Court from time to time referenced in subparagraph (f)(9) of this rule.

(4) The Board shall maintain proper records of all IOLTA program receipts and disbursements, which records shall be audited or reviewed annually by a certified public accountant selected by the Board. The Board shall annually cause to be presented to the Supreme Court a reviewed or audited financial statement of its IOLTA program receipts and expenditures for the prior year. The report shall not identify any clients of lawyers or law firms or reveal confidential information. The statement shall be filed with the Clerk of the Supreme Court and a summary thereof shall be published in the next available issue of one or more state-wide publications for attorneys, such as Res Gestae and The Indiana Lawyer.

(5) The president and other members of the Board shall administer the IOLTA program without compensation, but may be reimbursed for their reasonable and necessary expenses incurred in the performance of their duties, and shall be indemnified by the Foundation against any liability or expense arising directly or indirectly out of the good faith performance of their duties.

(6) The Board shall monitor attorney compliance with the provisions of this rule and periodically report to the Supreme Court those attorneys not in compliance with the provisions of Rule 1.15.

(7) In the event the IOLTA program or its administration by the Foundation is terminated, all assets of the IOLTA program, including any program funds then on hand, shall be transferred in accordance with the Order of the Supreme Court terminating the IOLTA program or its administration by the Foundation; provided, such transfer shall be to an entity which will not violate the requirements the Foundation must observe regarding transfer of its assets in order to retain its tax-exempt status under the Internal Revenue Code of 1986, as amended, or similar future provisions of law.

Comment

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. A lawyer should maintain on a current basis books and records in accordance with generally accepted accounting practice and comply with any recordkeeping rules established by law or court order. See, e.g., ABA Model

Financial Recordkeeping Rule.

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b) provides that it is permissible when necessary to maintain a nominal balance in the account. Accurate records must be kept regarding which part of the funds are the lawyer's.

[3] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client, funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the

lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[4] Paragraph (e) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.

[6] A lawyers' fund for client protection provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer must participate where it is mandatory, and, even when it is voluntary, the lawyer should participate.

Rule 1.16. Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) a client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Comment

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or

withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15.

Rule 1.17. Sale of Law Practice

A lawyer or a law firm may sell or purchase a law practice, or an area of law practice, including goodwill, if the following conditions are satisfied:

(a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, in the geographic area in which the practice has been conducted.

(b) The entire practice, or the entire area of practice, is sold to one or more lawyers or law firms.

(c) The seller gives written notice to each of the seller's clients regarding:

(1) the proposed sale;

(2) the client's right to retain other counsel or to take possession of the file; and

(3) the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.

If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.

(d) The fees charged clients shall not be increased by reason of the sale.

Comment

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice, or ceases to practice in an area of law, and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6.

Termination of Practice by the Seller

[2] The requirement that all of the private practice, or all of an area of practice, be sold is satisfied if the seller in good faith makes the entire practice, or the area of practice, available for sale to the purchasers. The fact that a number of the seller's clients decide not to be represented by the purchasers but take their matters elsewhere, therefore, does not result in a violation. Return to private practice as a result of an unanticipated change in circumstances does not necessarily result in a violation. For example, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice upon being defeated in a contested or a retention election for the office or resigns from a judiciary position.

[3] The requirement that the seller cease to engage in the private practice of law does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity that provides legal services to the poor, or as in-house counsel to a business.

[4] This Rule also permits a lawyer or law firm to sell an area of practice. If an area of practice is sold and the lawyer remains in the active practice of law, the lawyer must cease accepting any matters in the area of practice that has been sold, either as counsel or co-counsel or by assuming joint responsibility for a matter in connection with the division of a fee with another lawyer as would otherwise be permitted by Rule 1.5(e). For example, a lawyer with a substantial number of estate planning matters and a substantial number of probate administration cases may sell the estate planning portion of the practice but remain in the practice of law by concentrating on probate administration; however, that practitioner may not thereafter accept any estate planning matters. Although a lawyer who leaves a jurisdiction or geographical area typically would sell the entire practice, this Rule permits the lawyer to limit the sale to one or more areas of the practice, thereby preserving the lawyer's right to continue practice in the areas of the practice that were not sold.

Sale of Entire Practice or Entire Area of Practice

[5] The Rule requires that the seller's entire practice, or an entire area of practice, be sold. The prohibition against sale of less than an entire practice area protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchasers are required to undertake all client matters in the practice or practice area, subject to client consent. This requirement is satisfied, however, even if a purchaser is unable to undertake a particular client matter because of a conflict of interest.

Client Confidences, Consent and Notice

[6] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Rule 1. 6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific information relating to the representation and to the file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed.

[7] A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the Rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The Court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered in camera.

[8] All elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice or area of practice.

Fee Arrangements Between Client and Purchaser

[9] The sale may not be financed by increases in fees charged the clients of the practice. Existing arrangements between the seller and the client as to fees and the scope of the work must be honored by the purchaser.

Other Applicable Ethical Standards

[10] Lawyers participating in the sale of a law practice or a practice area are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation

to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (see Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure the client's informed consent for those conflicts that can be agreed to (see Rule 1.7 regarding conflicts and Rule 1.0(e) for the definition of informed consent); and the obligation to protect information relating to the representation (see Rules 1.6 and 1.9).

[11] If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale (see Rule 1.16).

Applicability of the Rule

[12] This Rule applies to the sale of a law practice of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a non-lawyer representative not subject to these Rules. Since, however, no lawyer may participate in a sale of a law practice which does not conform to the requirements of this Rule, the representatives of the seller as well as the purchasing lawyer can be expected to see to it that they are met.

[13] Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this Rule.

[14] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice or an area of practice.

Rule 1.18. Duties to Prospective Client

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When a lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

Comment

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a).

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent.

[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Rule 1.0(k) (requirements for screening procedures). Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[8] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.

[10] Paragraph (d) also applies to other lawyers in the firm with whom the receiving lawyer actually shared disqualifying information.

Rule 2.1. Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Comment

Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's

duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

Rule 2.2. Intermediary

(a) A lawyer may act as intermediary between clients if:

(1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's consent to the common representation;

(2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

(3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

Comment

[1] A lawyer acts as intermediary under this rule when the lawyer represents two or more parties with potentially conflicting interests. A key factor in defining the relationship is whether the parties share responsibility for the lawyer's fee, but the common representation may be inferred from other circumstances. Because confusion can arise as to the lawyer's role where each party is not separately represented, it is important that the lawyer make clear the relationship.

[2] The Rule does not apply to a lawyer acting as arbitrator or mediator between or among parties who are not clients of the lawyer, even where the lawyer has been appointed with the concurrence of the parties. In performing such a role the lawyer may be subject to applicable codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint Committee of the American Bar Association and the American Arbitration Association.

[3] A lawyer acts as intermediary in seeking to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest, arranging a property distribution in settlement of an estate or mediating a dispute between clients. The lawyer seeks to resolve potentially conflicting interests by developing the parties' mutual interests. The alternative can be that each party may have to obtain separate representation, with the possibility in some situations of incurring additional cost, complication or even litigation. Given these and other relevant factors, all the clients may prefer that the lawyer act as intermediary.

[4] In considering whether to act as intermediary between clients, a lawyer should be mindful that if the intermediation fails the result can be additional cost, embarrassment and recrimination. In some situations the risk of failure is so great that intermediation is plainly impossible. For example, a lawyer cannot undertake common representation of clients between whom contentious litigation is imminent or who contemplate contentious negotiations. More generally, if the relationship between the parties has already assumed definite antagonism, the possibility that the clients' interests can be adjusted by intermediation ordinarily is not very good.

[5] The appropriateness of intermediation can depend on its form. Forms of intermediation range from informal arbitration, where each client's case is presented by the respective client and the lawyer decides the outcome, to mediation, to common representation where the clients' interests are substantially though not entirely compatible. One form may be appropriate in circumstances where another would not. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating a relationship between the parties or terminating one.

Confidentiality and Privilege

[6] A particularly important factor in determining the appropriateness of intermediation is the effect on client-lawyer confidentiality and the attorney-client privilege. In a common representation, the lawyer is still required both to keep each client adequately informed and to maintain confidentiality of information relating to the representation. See

Rules 1.4 and 1.6. Complying with both requirements while acting as intermediary requires a delicate balance. If the balance cannot be maintained, the common representation is improper. With regard to the attorney-client privilege, the prevailing rule is that as between commonly represented clients the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[7] Since the lawyer is required to be impartial between commonly represented clients, intermediation is improper when that impartiality cannot be maintained. For example, a lawyer who has represented one of the clients for a long period and in a variety of matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced.

Consultation

[8] In acting as intermediary between clients, the lawyer is required to consult with the clients on the implications of doing so, and proceed only upon consent based on such a consultation. The consultation should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances.

[9] Paragraph (b) is an application of the principle expressed in Rule 1.4. Where the lawyer is intermediary, the clients ordinarily must assume greater responsibility for decisions than when each client is independently represented.

Withdrawal

[10] Common representation does not diminish the rights of each client in the client-lawyer relationship. Each has the right to loyal and diligent representation, the right to discharge the lawyer as stated in Rule 1.16, and the protection of Rule 1.9 concerning obligations to a former client.

Rule 2.3. Evaluation for Use by Third Persons

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

(c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

Comment

Definition

[1] An evaluation may be performed at the client's direction or when impliedly authorized in order to carry out the representation. See Rule 1.2. Such an evaluation may be for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

[2] A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor's title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person's affairs by a government lawyer, or by special counsel by a government lawyer, or by special counsel employed by the government, is not an evaluation as that term is used in this Rule. The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

Duties Owed to Third Person and Client

[3] When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this Rule. However, since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the

implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

Access to and Disclosure of Information

[4] The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations that are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances. In no circumstances is the lawyer permitted to knowingly make a false statement of material fact or law in providing an evaluation under this Rule. See Rule 4.1.

Obtaining Client's Informed Consent

[5] Information relating to an evaluation is protected by Rule 1.6. In many situations, providing an evaluation to a third party poses no significant risk to the client; thus, the lawyer may be impliedly authorized to disclose information to carry out the representation. See Rule 1.6(a). Where, however, it is reasonably likely that providing the evaluation will affect the client's interests materially and adversely, the lawyer must first obtain the client's consent after the client has been adequately informed concerning the important possible effects on the client's interests. See Rules 1.6(a) and 1.0(e).

Financial Auditors' Requests for Information

[6] When a question concerning the legal situation of a client arises at the instance of the client's financial auditor and the question is referred to the lawyer, the lawyer's response may be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

Rule 2.4. Lawyer Serving as Third-Party Neutral

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Comment

[1] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decision maker depends on the particular process that is either selected by the parties or mandated by a court.

[2] The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.

[3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client

evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

[4] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.

[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(m)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

Rule 3.1. Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Comment

[1] The advocate has a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

Rule 3.2. Expediting Litigation

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Comment

[1] Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

Rule 3.3. Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comment

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

Remedial Measures

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done -- making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

[15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

Rule 3.4. Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Comment

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter its potential evidentiary value. In such a case, applicable law may require the lawyer to turn the evidence over to the police or prosecuting authority, depending on the circumstances.

[3] With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

[4] Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

Rule 3.5. Impartiality and Decorum of the Tribunal

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment.

(d) engage in conduct intended to disrupt a tribunal.

Comment

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order.

[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[5] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(m).

Rule 3.6. Trial Publicity

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) A statement referred to in paragraph (a) will be rebuttably presumed to have a substantial likelihood of materially prejudicing an adjudicative proceeding when it refers to that proceeding and the statement is related to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

(e) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Comment

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[5] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[6] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

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.

Comment

[1] Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.

Advocate-Witness Rule

[2] The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

[3] To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(1) through (a)(3). Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The conflict of interest principles stated in Rules 1.7, 1.9 and 1.10 have no application to this aspect of the problem.

[5] Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, paragraph (b) permits the lawyer to do so except in situations involving a conflict of interest.

Conflict of Interest

[6] In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that 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. This would be true even though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. 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."

[7] Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the client gives informed consent under the conditions stated in Rule 1.7.

Rule 3.8. Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the

defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b), 3.6(c) or 3.6(d).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

Rule 3.9. Advocate in Nonadjudicative Proceedings

A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.

Comment

[1] In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body must deal with it honestly and in conformity with applicable rules of procedure. See Rules 3.3(a) through (c), 3.4(a) through (c) and 3.5.

[2] Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

[3] This Rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns. Nor does it apply to the representation of a client in connection with an investigation or examination of the client's affairs conducted by government investigators or examiners. Representation in such matters is governed by Rules 4.1 through 4.4.

Rule 4.1. Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Comment

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Statements of Fact

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Crime or Fraud by Client

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.

Rule 4.2. Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law or a court order.

Comment

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounseled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

Rule 4.3. Dealing with Unrepresented Persons

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

Comment

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(d).

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling

a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

Rule 4.4. Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

Comment

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this Rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.

[3] Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

Rule 5.1. Responsibilities of a Partner or Supervisory Lawyer

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possess comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment

[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. See Rule 1.0(c). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

[2] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures may include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic

review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.4(a).

[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the misrepresentation.

[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

[7] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.2(a).

Rule 5.2. Responsibilities of a Subordinate Lawyer

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Comment

[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

Rule 5.3. Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possess comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment

[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, paralegals and other paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they may not have legal training and are not subject to professional discipline.

[2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment [1] to Rule 5.1. Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

Rule 5.4. Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed upon purchase price; and

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit 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.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Comment

[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

[2] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

Rule 5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer who is not admitted to practice in this jurisdiction, but is admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires temporary admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer who is not admitted to practice in this jurisdiction, but is admitted in another United States jurisdiction, or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction if:

(1) the lawyer does not establish an office or other systematic and continuous presence in this jurisdiction for the practice of law and the legal services are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires temporary admission; or

(2) the services are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person.

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paralegals and other paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paralegals and other paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in the State of Indiana violates paragraph (b) if the lawyer establishes an office or other systematic and continuous presence in the State of Indiana for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. For example, advertising in media specifically targeted to Indiana residents or initiating contact with Indiana residents for solicitation purposes could be viewed as systematic and continuous presence. In any event, such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in the State of Indiana. See also Rules 7.1(a) and 7.5(b).

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of his or her clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraph (d)(2), this Rule does not authorize a U.S. or foreign

lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here or licensed pursuant to Admission and Discipline Rule 6.

[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraph (c) applies to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. The word "admitted" in paragraph (c) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status. Paragraph (d) applies to lawyers admitted to practice in a United States jurisdiction and to lawyers admitted in a foreign jurisdiction.

[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission *pro hac vice* or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission *pro hac vice* before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.

[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted *pro hac vice*. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission *pro hac vice* in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally uniform, foreign, or international law.

[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States or a foreign jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as provide legal services on a

temporary basis. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] Paragraph (d)(1) applies to a United States or foreign lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.

[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer shall be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education. See, Ind. Admission and Discipline Rule 6, sections 2 through 5.

[18] Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent.

[19] A lawyer who practices law in the State of Indiana pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of the State of Indiana. See Rule 8.5(a).

[20] In some circumstances, a lawyer who practices law in the State of Indiana pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in the State of Indiana. For example, that may be required when the representation occurs primarily in the State of Indiana and requires knowledge of the law of the State of Indiana. See Rule 1.4(b).

[21] Paragraphs (c) and (d) do not authorize communications advertising legal services to prospective clients in the State of Indiana by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services to prospective clients in the State of Indiana is governed by Rules 7.2 to 7.5.

Rule 5.6. Restrictions on Right to Practice

A lawyer shall not participate in offering or making:

(a) a partnership, shareholder, operating, employment, or other similar type of agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

Comment

[1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

[2] Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

[3] This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

Rule 5.7 Responsibilities Regarding Law-Related Services

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) in other circumstance by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a non-lawyer.

Comment

[1] When a lawyer performs law-related services or controls an organization that does so or uses a law license to promote an organization or otherwise creates a basis for a belief that the client may be dealing with an attorney (such as where a person uses "J.D." on business cards or stationary or hangs framed law degrees or court admissions on office walls), there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.

[2] Rule 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed and whether the law-related services are performed through a law firm or a separate entity. The Rule identifies the circumstances in which all of the Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those Rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, e.g., Rule 8.4.

[3] When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer in providing the law-related services must adhere to the requirements of the Rules of Professional Conduct as provided in paragraph (a)(1). Even when the law-related and legal services are provided in circumstances that are distinct from each other, for example through separate entities or different support staff within the law firm, the Rules of Professional Conduct apply to the lawyer as provided in paragraph (a)(2) unless the lawyer takes reasonable measures to assure that the recipient of the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not apply.

[4] Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations, the Rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.

[5] When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a).

[6] In taking the reasonable measures referred to in paragraph (a)(2) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Rules of Professional Conduct, the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made before entering into an agreement for provision of or providing law-related services, and preferably should be in writing.

[7] The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of law-related services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.

[8] Regardless of the sophistication of potential recipients of law-related services, a lawyer should take special care to keep separate the provision of law-related and legal services in order to minimize the risk that the recipient will assume that the law-related services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph (a)(2) of the Rule cannot be met. In such a case a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3, that of nonlawyer employees in the distinct entity that the lawyer controls complies in all respects with the Rules of Professional Conduct.

[9] A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and medical or environmental consulting.

[10] When a lawyer is obliged to accord the recipients of such services the protections of those Rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the Rules addressing conflict of interest (Rules 1.7 through 1.11, especially Rules 1.7(a)(2) and 1.8(a), (b) and (f)), and to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. Where the provision of law-related services is subject to these Rules, the promotion of the law-related services must also in all respects comply with Rules 7.2, through 7.5, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction's decisional law.

[11] When the full protections of all of the Indiana Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the Rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. See also Rule 8.4 (Misconduct).

Rule 6.1. Pro Bono Publico Service

A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

Comment

[1] The American Bar Association House of Delegates has formally acknowledged "the basic responsibility of each lawyer engaged in the practice of law to provide public interest legal services" without fee, or at a substantially reduced fee, in one or more of the following areas: poverty law, civil rights law, public rights law, charitable organization representation and the administration of justice. The Indiana State Bar Association's House of Delegates has declared that "all Indiana lawyers have an ethical and a social obligation to provide uncompensated legal assistance to poor persons" and adopted an aspirational goal of fifty hours a year, or an equivalent financial contribution, for each member of the bar.

For purposes of this paragraph:

(a) Poverty law means legal representation of a client who does not have the financial resources to compensate counsel.

(b) Civil rights (including civil liberties) law means legal representation involving a right of an individual that society has a special interest in protecting.

(c) Public rights law means legal representation involving an important right belonging to a significant segment of the public.

(d) Charitable organization representation means legal service to or representation of charitable, religious, civic, governmental and educational institutions in matters in furtherance of the organization's purpose, where the payment of customary legal fees would significantly deplete the organization's economic resources or where it would be inappropriate.

(e) Administration of justice means activity, whether under bar association auspices or otherwise, which is designed to increase the availability of legal representation, or otherwise improve the administration of justice. This may include increasing the availability of legal resources to individuals or groups, improving the judicial system, or reforming legal institutions that significantly affect the lives of disadvantaged individuals and groups.

[2] The rights and responsibilities of individuals and organizations in the United States are increasingly defined in legal terms. As a consequence, legal assistance in coping with the web of statutes, rules and regulations is imperative for persons of modest and limited means, as well as for the relatively well-to-do.

[3] The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged. The provision of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer as well as the profession generally, but the efforts of individual lawyers are often not enough to meet the need. Thus, it has been necessary for the profession and government to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services and other related programs have been developed, and others will be developed by the profession and government. Every lawyer should support all proper efforts to meet this need for legal services.

[4] Typically, to fulfill the aspirational goals in Comment 1, legal services should be performed without the expectation of compensation. If, during the course of representation, a paying client is no longer able to afford a lawyer's

legal services, and the lawyer continues to represent the client at no charge, any work performed with the knowledge and intent of no compensation may be considered pro bono legal service.

The award of attorney's fees in a case originally accepted as pro bono does not disqualify such services from fulfilling the foregoing aspirational goals. However, lawyers who receive attorney's fees in pro bono cases are strongly encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means, or that promote access to justice for persons of limited means.

[5] Typically, the following would not fulfill the aspirational goals in Comment 1:

(a) Legal services written off as bad debts.

(b) Legal services performed for family members.

(c) Legal services performed for political organizations for election purposes.

(d) Activities that do not involve the provision of legal services, such as serving on the board of a charitable organization.

Rule 6.2. Accepting Appointments

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as when:

(a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;

(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

Comment

[1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service. See Rule 6.1. An individual lawyer may fulfill this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.

Appointed Counsel

[2] For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.

[3] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules.

Rule 6.3. Membership in Legal Service Organization

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or

(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

Comment

[1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

[2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.

Rule 6.4. Law Reform Activities Affecting Client Interests

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefited by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

Comment

[1] Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also Rule 1.2(b). For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefited.

Rule 6.5 Nonprofit and Court-Annexed Limited Legal Services Programs

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

Comment

[1] Legal services organizations, courts and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services -- such as advice or the completion of legal forms -- that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9 and 1.10.

[2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. See Rule 1.2(c). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.

[3] Because a lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rules 1.7 or 1. 9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rules 1.7 or 1.9(a) in the matter.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this Rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.

Rule 6.6. The Coalition For Court Access

(a) There is hereby created an organization to be known as the Coalition for Court Access ("Coalition"). The purpose of the Coalition is to act as a legal aid organization that develops and implements a statewide plan to improve the availability and quality of access to civil legal services for persons of limited means. The Coalition has the following goals:

(1) Improvement of the access to and delivery of civil legal services to persons of limited means and low to moderate income.

(2) Integration and coordination availability and provision of services by pro bono organizations and other legal assistance organizations.

(3) Enhancement of the availability of volunteer legal services for persons of limited means, including without limitation incentivizing greater lawyer pro bono services; assessing, utilizing, and making recommendations to the Court to improve the Volunteer Attorney Pro Bono Plan established in Professional Conduct Rule 6.6; and working closely with the Indiana State Bar Association, Indiana Bar Foundation ("Bar Foundation"), and other bar associations to foster the growth of pro bono public service and a public service culture within the Indiana bar.

(4) Consideration and utilization of a wide variety of programs and policies to increase the access to courts, such as strategic use of technology, community education, public libraries, and other similar resources.

(5) Expansion and promotion of opportunities for lawyers to volunteer their time and services for pro bono work in litigation, mediation, and other dispute resolution programs serving persons of limited means.

(6) As may be deemed helpful in the pursuit of the above goals, identification of the current and future needs, outcomes, and trends regarding access to civil legal services by persons of limited means and promotion of ongoing development of financial and other resources for civil legal aid organizations in Indiana.

(b) The Coalition shall be composed of seventeen (17) members appointed by the Supreme Court and the President of the Indiana Bar Foundation. In appointing members to the Coalition, the Supreme Court and the Bar Foundation should seek to ensure that members of the Coalition are representative of the different geographic regions and judicial districts of the state, and that the members possess skills and experience relevant to the needs of the Coalition. The Coalition's membership shall be comprised as follows:

(1) The Supreme Court shall appoint eleven (11) members, preferably reflective of the following balance:

(A) One (1) member who will be the chair of the Coalition;

(B) One (1) trial judge and one (1) appellate judge;

(C) Four (4) members from different pro bono organizations or other civil legal assistance organizations; at least two (2) of these members must be from a statewide civil legal assistance organization or a civil legal assistance organization that provides services in multiple Indiana counties;

(D) Two (2) members from a local or minority bar association; and

(E) Two (2) members from the Indiana law schools accredited by the American Bar Association.

(2) The President of the Bar Foundation shall appoint six (6) members as follows:

(A) Two (2) members of the Indiana State Bar Association;

(B) Two (2) members appointed by the Bar Foundation;

(C) One (1) member of the Indiana State Bar Association Pro Bono Committee; and

(D) One (1) member from a non-governmental organization that serves the non-legal needs of low-income Hoosiers.

(3) The Indiana State Bar Association and the Bar Foundation's immediate past presidents, during their terms as immediate past presidents, shall also serve as ex-officio non-voting members of the Coalition.

(4) The Executive Director of the Indiana State Bar and the Executive Director of the Bar Foundation shall serve as ex-officio non-voting members of the Coalition.

(5) The Coalition shall operate as a program within the Bar Foundation. Each member of the Coalition, except the immediate past presidents of the Indiana State Bar Association and Bar Foundation, shall hold office for a term of three (3) years, except for the initial appointments, which shall be staggered as follows: three (3) members appointed by the Supreme Court shall serve one-year terms, two (2) members appointed by the Bar Foundation president shall serve one-year terms; four (4) members appointed by

the Supreme Court shall serve two-year terms, and two (2) members appointed by the Bar Foundation president shall serve two-year terms; and four (4) members appointed by the Supreme Court shall serve three-year terms, and two (2) members appointed by the Bar Foundation president shall serve three-year terms. A member shall not serve more than two (2) consecutive terms.

(6) Members may resign from the Coalition by delivering a written resignation to the Coalition chair. Members may be removed by the appointing authority. The appointing authority shall fill any vacancy caused by resignation, removal or otherwise, as it occurs, for the remainder of the vacated term. Any Coalition member who fills a vacancy will be eligible to serve an additional two full consecutive terms after completing the term of the previously vacant position they are filling.

(7) Each member is entitled to one (1) vote on all matters before the Coalition. There shall be no voting by proxy. No member shall vote on any issue which may directly or indirectly benefit a member, that member's employer, or another organization affiliated with the member. No member shall participate in any meeting of the Coalition that involves any issue which may directly or indirectly benefit a member, that member's employer, or another organization affiliated with the member. Members are entitled to vote by telephone or videoconference.

(c) The officers of the Coalition shall consist of a chair, vice-chair, and secretary. Officers must be members of the Coalition in good standing. The Coalition chair shall be appointed by the Supreme Court and shall serve a three-year term. The chair shall preside at all meetings of the Coalition and perform such other duties as may be prescribed by the Coalition. The vice-chair and secretary shall be elected to one-year terms by the Coalition at the Coalition's annual meeting. The Coalition may accept nominations for vice-chair and secretary from any member. A vacancy in the office of vice-chair or secretary for any reason other than expiration of term may be filled for the remaining unexpired term at any meeting of the Coalition. The vice-chair shall preside at all meetings where the chair is unavailable and perform such other duties as may be prescribed by the Coalition. The secretary shall keep minutes of the Coalition meetings and perform such other duties as may be prescribed by the Coalition. The Coalition may establish other officers as it deems appropriate. Additional officers so elected shall hold office for such period and shall have such power and duties as authorized by the Coalition.

(d) The Coalition for Court Access shall have the following powers:

(1) Undertake those tasks in collaboration with the Bar Foundation which are reasonable and necessary to the fulfillment of the Coalition's purpose;

(2) Supervise the district committees subject to the approval of the Bar Foundation;

(3) Make funding recommendations to the Bar Foundation in response to district committee plans and funding requests;

(4) Declare the office of a member of the Coalition to be vacant in the event such member shall be absent for three (3) consecutive regular meetings of the Coalition;

(5) Create and dissolve any Coalition committees necessary to assist the Coalition with the accomplishment of its mission and to appoint members to such committees which may include members and non-members of the Coalition;

(6) Make recommendations to the Bar Foundation and the Supreme Court for the disbursement of available funds to civil legal aid organizations, programs, initiatives, and projects throughout the State of Indiana;

(7) Collaborate with state and local bar associations and other organizations, their members and various sections and committees to help identify opportunities for them to help support Indiana's civil legal aid network; and

(8) Provide an annual report of its activities to the Supreme Court by July 1 of each year.

(e) The Bar Foundation's authority and responsibility shall include making funding decisions and disbursing available funds to legal aid projects or organizations upon recommendation of the Coalition.

(f) The members shall have the right to take any action in the absence of a meeting which they could take at a meeting by obtaining the written approval, including via electronic mail, of a majority of the members. Any action so approved shall have the same effect as though taken at a meeting of the Coalition.

(g) No member or officer shall receive compensation for any service rendered to the Coalition. Members and officers may be reimbursed for authorized expenses incurred in the performance of Coalition duties, provided that funds are available and such reimbursement is approved by the Coalition.

(h) There shall be one (1) district committee in each of the twelve (12) districts set forth below:

District A, consisting of the counties of Lake, Porter, Jasper, and Newton;

District B, consisting of the counties of LaPorte, St. Joseph, Elkhart, Marshall, Starke, and Kosciusko;

District C, consisting of the counties of LaGrange, Adams, Allen, DeKalb, Huntington, Noble, Steuben, Wells, and Whitley;

District D, consisting of the counties of Clinton, Fountain, Montgomery, Tippecanoe, Warren, Benton, Carroll, Vermillion, Parke, Boone, and White;

District E, consisting of the counties of Cass, Fulton, Howard, Miami, Tipton, Pulaski, Grant, and Wabash;

District F, consisting of the counties of Blackford, Delaware, Henry, Jay, Madison, Hamilton, Hancock, and Randolph;

District G, consisting of the county of Marion;

District H, consisting of the counties of Greene, Lawrence, Monroe, Sullivan, Vigo, Putnam, Hendricks, Clay, Morgan, and Owen;

District I, consisting of the counties of Bartholomew, Brown, Decatur, Jackson, Johnson, Shelby, Rush, and Jennings;

District J, consisting of the counties of Dearborn, Jefferson, Ohio, Ripley, Franklin, Wayne, Union, Fayette, and Switzerland;

District K, consisting of the counties of Daviess, Dubois, Gibson, Knox, Martin, Perry, Pike, Posey, Spencer, Vanderburgh, and Warrick; and

District L, consisting of the counties of Clark, Crawford, Floyd, Harrison, Orange, Scott, and Washington.

The Coalition has the authority to provisionally alter the number and the composition of districts as it deems appropriate to the Supreme Court no more than annually so the Supreme Court may reflect the alterations in subsection (h) above.

(1) Each district committee shall be composed of:

(A) a judge from the district appointed by the Supreme Court to serve as chair of the committee;

(B) to the extent feasible, one (1) or more representatives from each voluntary bar association in the district, one (1) representative from each pro bono and legal assistance provider in the district, and one representative from each law school in the district; and

(C) to the extent feasible, at least two (2) community-at-large representatives, one of whom shall be a resent or past recipient of pro bono publico legal services.

(2) Governance of each district committee and terms of service of the members thereof shall be determined by each committee. Replacement and succession members shall be appointed by the judge designated by the Supreme Court.

(i) To ensure an active and effective district program, each district committee shall do the following:

(1) after evaluating the needs of the district and the available civil legal aid services, prepare an annual written proposal to address the district's needs;

(2) select and employ, if feasible, a plan administrator to provide the necessary coordination and administrative support for the district committee;

(3) implement the annual district plan and monitor its results;

(4) submit an annual report to the Coalition; and

(5) submit the plan and funding requests for individual civil legal aid organizations/projects to the Coalition.

(j) To encourage more lawyers to participate in pro bono activities, each district plan should endeavor to provide various support and educational services for pro bono attorneys, which, to the extent possible, should include:

(1) providing intake, screening, and referral of prospective clients;

(2) matching cases with individual attorney expertise, including the establishment of specialized panels;

(3) providing resources for litigation and out-of-pocket expenses for pro bono cases;

(4) providing legal education and training for pro bono attorneys in specialized areas of law useful in providing pro bono civil legal service;

(5) providing the availability of consultation with attorneys who have expertise in areas of law with respect to which a volunteer lawyer is providing pro bono civil legal service;

(6) providing malpractice insurance for volunteer pro bono lawyers with respect to their pro bono civil legal service;

(7) establishing procedures to ensure adequate monitoring and follow-up for assigned cases and to measure client satisfaction;

(8) recognizing pro bono civil legal service by lawyers; and

(9) providing other support and assistance to pro bono lawyers.

(k) The district committee plans may include opportunities such as the following:

(1) representing persons of limited means through case referral;

(2) representing persons of limited means through direct contact with a lawyer when the lawyer, before undertaking the representation, first determines client eligibility based on standards substantially similar to those used by legal assistance providers;

(3) representing community groups serving persons of limited means through case referral;

(4) interviewing and determining eligibility of prospective clients of limited means;

(5) acting as co-counsel on cases or matters with civil legal assistance providers and other lawyers serving clients of limited means;

(6) providing consultation services to civil legal assistance providers for case reviews and evaluations;

(7) providing training to the staff of civil legal assistance providers and other volunteer attorneys serving clients of limited means;

(8) making presentations to persons of limited means regarding their rights and obligations under the law;

(9) providing legal research;

(10) providing guardian ad litem services;

(11) serving as a mediator or arbitrator to the client-eligible party; and

(12) providing such other civil legal aid service opportunities as appropriate

Rule 6.7 Requirement for Reporting of Direct Pro Bono Legal Services

(a) Reporting Requirement. To assess the current and future extent of volunteer legal services provided directly to individuals of limited means and to encourage such services, an attorney must report as part of the attorney's annual registration, the following information:

(1) *Pro Bono Hours* - no compensation. During the previous calendar year ending December 31, I have personally provided approximately _____ hours of legal services in Indiana or other states directly to individuals reasonably believed to be of limited means without charge and without any fee expectation when the services were rendered.

(2) *Pro Bono Hours* - substantially reduced compensation. During the previous calendar year ending December 31, I have personally provided approximately _____ hours of legal services directly to individuals reasonably believed to be of limited means at a charge of less than 50% of my normal rate and without expectation of any greater fee when the services were rendered.

(3) *Financial Contribution.* During the previous calendar year ending December 31, I have either (i) made monetary contributions of $_____ to one or more of the following: (A) the Indiana Bar Foundation, (B) IRC 501 (c)(3) bar foundation in Indiana which provides financial support to a qualifying legal service organization or local pro bono district, (C) any IRC 501(c)(3) pro bono district listed in the Indiana Supreme Court website, or (D) a legal service organization located in Indiana that is eligible for fee waiver under I.C. 33-37-3-2(b); or (ii) made an in-kind contribution of tangible property fairly valued at $ _____ to one or more of the foregoing qualifying legal service organizations or local pro bono districts.

(4) *Exempt Persons.* An attorney is exempt from reporting under this Rule who is exempt from the provision of pro bono legal services because he or she (i) is currently serving as a member of the judiciary or judicial staff, (ii) is a government lawyer prohibited by statute, rule, regulation, or agency policy from providing legal services outside his or her employment, (iii) is retired from the practice of law, or (iv) maintains inactive standing with the Clerk of the Indiana Supreme Court.

(b) Reporting Required. By requiring the affirmative reporting of pro bono legal services provided directly to an individual of limited means, this Rule 6.7 requires reporting only for a subset of the public interest legal service encouraged under Rule 6.1.

(c) Public Disclosure of Information Received. Information received pursuant to this Rule is declared confidential and shall not be publically disclosed by the Indiana Supreme Court or any of its agencies, on an individual or firm-wide basis.

Rule 7.1. Communications Concerning a Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Commentary

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this Rule. In the absence of special circumstances that serve to protect the probable targets of a communication from being misled or deceived, a communication will violate Rule 7.1 if it:

(1) is intended or is likely to result in a legal action or a legal position being asserted merely to harass or maliciously injure another;

(2) contains statistical data or other information based on past performance or an express or implied prediction of future success;

(3) contains a claim about a lawyer, made by a third party, that the lawyer could not personally make consistent with the requirements of this rule;

(4) appeals primarily to a lay person's fear, greed, or desire for revenge;

(5) compares the services provided by the lawyer or a law firm with other lawyers' services, unless the comparison can be factually substantiated;

(6) contains any reference to results obtained that may reasonably create an expectation of similar results in future matters;

(7) contains a dramatization or re-creation of events unless the advertising clearly and conspicuously discloses that a dramatization or re-creation is being presented;

(8) contains a representation, testimonial, or endorsement of a lawyer or other statement that, in light of all the circumstances, is intended or is likely to create an unjustified expectation about a lawyer or law firm or a person's legal rights;

(9) states or implies that a lawyer is a certified or recognized specialist other than as permitted by Rule 7.4;

(10) is prohibited by Rule 7.3.

[3] See also Rule 8.4(e) for the prohibition against stating or implying 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.

Rule 7.2. Advertising

(a) Subject to the requirements of this rule, lawyers and law firms may advertise their professional services and law related services. The term "advertise" as used in these Indiana Rules of Professional Conduct refers to any manner of public communication partly or entirely intended or expected to promote the purchase or use of the professional services of a lawyer, law firm, or any employee of either involving the practice of law or law-related services.

(b) A lawyer shall not give anything of value to a person for recommending or advertising the lawyer's services except that a lawyer may:

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service described in Rule 7.3(d);

(3) pay for a law practice in accordance with Rule 1.17; and

(4) refer clients to another lawyer or a non-lawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement.

(c) Any communication subject to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content. The lawyer or law firm responsible for the content of any communication subject to this rule shall keep a copy or recording of each such communication for six years after its dissemination.

Commentary

[1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising.

[2] Provided that the advertising otherwise complies with the requirements of the Rules of Professional Conduct, permissible subjects of advertising include:

(1) name and contact information, including the name and contact information for an attorney, a law firm, and professional associates;

(2) one or more fields of law in which the lawyer or law firm practices, using commonly accepted and understood definitions and designations;

(3) date and place of birth;

(4) date and place of admission to the bar of state and federal courts;

(5) schools attended, with dates of graduation, degrees, and other scholastic distinctions;

(6) academic, public or quasi-public, military, or professional positions held;

(7) military service;

(8) legal authorship;

(9) legal teaching position;

(10) memberships, offices, and committee assignments, in bar professional, scientific, or technical associations or societies;

(11) memberships and offices in legal fraternities and legal societies;

(12) technical and professional licenses;

(13) memberships in scientific, technical, and professional associations and societies;

(14) foreign language ability;

(15) names and addresses of bank references;

(16) professional liability insurance coverage;

(17) prepaid or group legal services programs in which the lawyer participates as allowed by Rule 7.3(d);

(18) whether credit cards or other credit arrangements are accepted;

(19) office and telephone answering service hours; and

(20) fees charged and other terms of service pursuant to which an attorney is willing to provide legal or law-related services.

[3] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

[4] Lawyers are not permitted to pay others for channeling professional work. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising. A lawyer may compensate employees, agents, and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff, and

website designers. See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of non-lawyers who prepare marketing materials for them.

Rule 7.3. Direct Contact with prospective Clients

(a) A lawyer (including the lawyer's employee or agent) shall not by in-person, live telephone, or real–time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a prospective client by in-person or by written, recorded, audio, video, or electronic communication, including the Internet, if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer;

(2) the solicitation involves coercion, duress or harassment;

(3) the solicitation concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the solicitation is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the initiation of the solicitation;

(4) the solicitation concerns a specific matter and the lawyer knows, or reasonably should know, that the person to whom the solicitation is directed is represented by a lawyer in the matter; or

(5) the lawyer knows, or reasonably should know, that the physical, emotional, or mental state of the person makes it unlikely that the person would exercise reasonable judgment in employing a lawyer.

(c) Every written, recorded, or electronic communication from a lawyer soliciting professional employment from a prospective client potentially in need of legal services in a particular matter shall include the words "Advertising Material" conspicuously placed both on the face of any outside envelope and at the beginning of any written communication, and both at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2). A copy of each such communication shall be filed with the Indiana Supreme Court Disciplinary Commission at or prior to its dissemination to the prospective client. A filing fee in the amount of fifty dollars ($50.00) payable to the "Supreme Court Disciplinary Commission Fund" shall accompany each such filing. In the event a written, recorded, or electronic communication is distributed to multiple prospective clients, a single copy of the mailing less information specific to the intended recipients, such as name, address (including email address) and date of mailing, may be filed with the Commission. Each time any such communication is changed or altered, a copy of the new or modified communication shall be filed with the Disciplinary Commission at or prior to the time of its mailing or distribution. The lawyer shall retain a list containing the names and addresses, including email addresses, of all persons or entities to whom each communication has been mailed or distributed for a period of not less than one (1) year following the last date of mailing or distribution. Communications filed pursuant to this subdivision shall be open to public inspection.

(d) A lawyer shall not accept referrals from, make referrals to, or solicit clients on behalf of any lawyer referral service unless such service falls within clauses (1)-(4) below. A lawyer or any other lawyer affiliated with the lawyer or the lawyer's law firm may be recommended, employed, or paid by, or cooperate with, one of the following offices or organizations that promote the use of the lawyer's services or those of the lawyer's firm, if there is no interference with the exercise of independent professional judgment on behalf of a client of the lawyer or the lawyer's firm:

(1) A legal office or public defender office:

(A) operated or sponsored on a not-for-profit basis by a law school accredited by the American Bar Association Section on Legal Education and Admissions to the Bar;

(B) operated or sponsored on a not-for-profit basis by a bona fide non-profit community organization;

(C) operated or sponsored on a not-for-profit basis by a governmental agency;

(D) operated, sponsored, or approved in writing by the Indiana State Bar Association, the Indiana Trial Lawyers Association, the Defense Trial Counsel of Indiana, any bona fide county or city bar association within the State of Indiana, or any other bar association whose lawyer referral service has been sanctioned for operation in Indiana by the Indiana Disciplinary Commission; and

(E) operated by a Circuit or Superior Court within the State of Indiana.

(2) A military legal assistance office;

(3) A lawyer referral service operated, sponsored, or approved by any organization listed in clause (1)(D); or

(4) Any other non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only if the following conditions are met:

(A) the primary purposes of such organization do not include the rendition of legal services;

(B) the recommending, furnishing, or paying for legal services to its members is incidental and reasonably related to the primary purposes of such organization;

(C) such organization does not derive a financial benefit from the rendition of legal services by the lawyer; and

(D) the member or beneficiary for whom the legal services are rendered, and not such organization, is recognized as the client of the lawyer in the matter.

(e) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure the lawyer's employment by a client, or as a reward for having made a recommendation resulting in the lawyer's employment by a client, except that the lawyer may pay for public communication permitted by Rule 7.2 and the usual and reasonable fees or dues charged by a lawyer referral service falling within the provisions of paragraph (d) above.

(f) A lawyer shall not accept employment when the lawyer knows, or reasonably should know, that the person who seeks the lawyer's services does so as a result of lawyer conduct prohibited under this Rule 7.3.

Commentary

[1] There is a potential for abuse inherent in direct in-person, live telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[2] This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services.

[3] The use of general advertising and written, recorded, or electronic communications to transmit information from lawyer to prospective client, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone, or real-time electronic conversations between a lawyer and a prospective client can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[4] There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or with whom the lawyer has close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee, or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

[5] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress, or harassment within the meaning of Rule 7.3(b)(2), or which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2, the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b).

[6] This rule allows targeted solicitation of potential plaintiffs or claimants in personal injury and wrongful death causes of action or other causes of action that relate to an accident, disaster, death, or injury, but only if such solicitation is initiated no less than 30 days after the incident. This restriction is reasonably required by the sensitized state of the

potential clients, who may be either injured or grieving over the loss of a family member, and the abuses that experience has shown exist in this type of solicitation.

Rule 7.4. Communication of Fields of Practice and Specialization

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.

(d) A lawyer shall not state or imply that the lawyer is a specialist in a particular field of law, unless:

(1) The lawyer has been certified as a specialist by an Independent Certifying Organization accredited by the Indiana Commission for Continuing Legal Education pursuant to Admission and Discipline Rule 30; and,

(2) The certifying organization is identified in the communication.

(e) Pursuant to rule-making powers inherent in its ability and authority to police and regulate the practice of law by attorneys admitted to practice law in the State of Indiana, the Indiana Supreme Court hereby vests exclusive authority for accreditation of Independent Certifying Organizations that certify specialists in legal practice areas and fields in the Indiana Commission for Continuing Legal Education. The Commission shall be the exclusive accrediting body in Indiana, for purposes of Rule 7.4(d)(1), above; and shall promulgate rules and guidelines for accrediting Independent Certifying Organizations that certify specialists in legal practice areas and fields. The rules and guidelines shall include requirements of practice experience, continuing legal education, objective examination; and, peer review and evaluation, with the purpose of providing assurance to the consumers of legal services that the attorneys attaining certification within areas of specialization have demonstrated extraordinary proficiency within those areas of specialization. The Supreme Court shall retain review oversight with respect to the Commission, its requirements, and its rules and guidelines. The Supreme Court retains the power to alter or amend such requirements, rules and guidelines; and, to review the actions of the Commission in respect to this Rule 7.4.

Commentary

[1] Paragraph (a) of this Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate.

[2] Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the Office. Paragraph (c) recognizes that designation of Admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.

Rule 7.5. Firm Names and Letterheads

(a) Firm names, letterheads, and other professional designations are subject to the following requirements:

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

(2) The name of a professional corporation, professional association, limited liability partnership, or limited liability company may contain, "P.C.", "P.A.," "LLP," or "LLC" or similar symbols indicating the nature of the organization.

(3) If otherwise lawful a firm may use as, or continue to include in, its name, the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. See Admission & Discipline Rule 27.

(4) A trade name may be used by a lawyer in private practice subject to the following requirements:

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

(ii) the name shall include the name of a lawyer (or the name of a deceased or retired member of the firm, or of a predecessor firm in a manner that complies with subparagraph (2) above).

(iii) the name shall not include words other than words that comply with clause (ii) above and words that:

(A) identify the field of law in which the firm concentrates its work, or

(B) describe the geographic location of its offices, or

(C) indicate a language fluency.

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in Indiana if the name or other designation does not violate paragraph (a) and the identification of the lawyers in an office of the firm indicates the jurisdictional limitations on those not licensed to practice in Indiana.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm. A member of a part-time legislative body such as the General Assembly, a county or city council, or a school board is not subject to this rule.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when they in fact do so.

Commentary

[1] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity, or by a trade name that complies with the requirements of the Rules of Professional Conduct. A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. The use of a trade name in law practice is acceptable so long as it is not misleading and otherwise complies with the requirements of paragraph (a)(4). A firm name that includes the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a non-lawyer.

[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm.

Rule 8.1. Bar Admission and Disciplinary Matters

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6.

Comment

[1] The duty imposed by this Rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. Paragraph (b) of this Rule also requires correction of any prior misstatement in the matter that the applicant or lawyer may have made and affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.

[2] This Rule is subject to the provisions of the Fifth Amendment of the United States Constitution and corresponding provisions of state constitutions. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.

[3] A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship, including Rule 1.6 and, in some cases, Rule 3.3.

Rule 8.2. Judicial and Legal Officials

(a) 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, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

Comment

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

[2] When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

[3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

Rule 8.3. Reporting Professional Misconduct

(a) 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.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This 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, or is gained by a lawyer while providing advisory opinions or telephone advice on legal ethics issues as a member of a bar association committee or similar entity formed for the purposes of providing such opinions or advice and designated by the Indiana Supreme Court.

(d) The relationship between lawyers or judges acting on behalf of a judges or lawyers assistance program approved by the Supreme Court, and lawyers or judges who have agreed to seek assistance from and participate in any such programs, shall be considered one of attorney and client, with its attendant duty of confidentiality and privilege from disclosure.

Comment

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.

Rule 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(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;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) engage in conduct, in a professional capacity, manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status, or similar factors. Legitimate advocacy respecting the foregoing factors does not violate this subsection. A trial judge's finding that preemptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.

Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[4] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

Rule 8.5. Disciplinary Authority: Choice of Law

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct.

Comment

Disciplinary Authority

[1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

Choice of Law

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct and (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions.

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.

[5] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

[6] The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.

USE OF NON-LAWYER ASSISTANTS

Introduction

Subject to the provisions in Rule 5.3, all lawyers may use non-lawyer assistants in accordance with the following guidelines.

Guideline 9.1. Supervision

A non-lawyer assistant shall perform services only under the direct supervision of a lawyer authorized to practice in the State of Indiana. Independent non-lawyer assistants are prohibited from establishing a direct relationship with a client to provide legal services. A lawyer is responsible for all of the professional actions of a non-lawyer assistant performing services at the lawyer's direction and should take reasonable measures to ensure that the non-lawyer assistant's conduct is consistent with the lawyer's obligations under the Rules of Professional Conduct.

Guideline 9.2. Permissible Delegation

Provided the lawyer maintains responsibility for the work product, a lawyer may delegate to a non-lawyer assistant or paralegal any task normally performed by the lawyer; however, any task prohibited by statute, court rule, administrative rule or regulation, controlling authority, or the Indiana Rules of Professional Conduct may not be assigned to a non-lawyer.

Guideline 9.3. Prohibited Delegation

A lawyer may not delegate to a non-lawyer assistant:

(a) responsibility for establishing an attorney-client relationship;

(b) responsibility for establishing the amount of a fee to be charged for a legal service; or

(c) responsibility for a legal opinion rendered to a client.

Guideline 9.4. Duty to Inform

It is the lawyer's responsibility to take reasonable measures to ensure that clients, courts, and other lawyers are aware that a non-lawyer assistant, whose services are utilized by the lawyer in performing legal services, is not licensed to practice law.

Guideline 9.5. Identification on Letterhead

A lawyer may identify non-lawyer assistants by name and title on the lawyer's letterhead and on business cards identifying the lawyer's firm.

Guideline 9.6. Client Confidences

It is the responsibility of a lawyer to take reasonable measures to ensure that all client confidences are preserved by non-lawyer assistants.

Guideline 9.7. Charge for Services

A lawyer may charge for the work performed by non-lawyer assistants.

Guideline 9.8. Compensation

A lawyer may not split legal fees with a non lawyer assistant nor pay a non-lawyer assistant for the referral of legal business. A lawyer may compensate a non-lawyer assistant based on the quantity and quality of the non-lawyer assistant's work and the value of that work to a law practice, but the non-lawyer assistant's compensation may not be contingent, by advance agreement, upon the profitability of the lawyer's practice.

Guideline 9.9. Continuing Legal Education

A lawyer who employs a non-lawyer assistant should facilitate the non-lawyer assistant's participation in appropriate continuing education and pro bono publico activities.

Guideline 9.10. Legal Assistant Ethics

All lawyers who employ non-lawyer assistants in the State of Indiana shall assure that such non-lawyer assistants conform their conduct to be consistent with the following ethical standards:

(a) A non-lawyer assistant may perform any task delegated and supervised by a lawyer so long as the lawyer is responsible to the client, maintains a direct relationship with the client, and assumes full professional responsibility for the work product.

(b) A non-lawyer assistant shall not engage in the unauthorized practice of law.

(c) A non-lawyer assistant shall serve the public interest by contributing to the delivery of quality legal services and the improvement of the legal system.

(d) A non-lawyer assistant shall achieve and maintain a high level of competence, as well as a high level of personal and professional integrity and conduct.

(e) A non-lawyer assistant's title shall be fully disclosed in all business and professional communications.

(f) A non-lawyer assistant shall preserve all confidential information provided by the client or acquired from other sources before, during, and after the course of the professional relationship.

(g) A non-lawyer assistant shall avoid conflicts of interest and shall disclose any possible conflict to the employer or client, as well as to the prospective employers or clients.

(h) A non-lawyer assistant shall act within the bounds of the law, uncompromisingly for the benefit of the client.

(i) A non-lawyer assistant shall do all things incidental, necessary, or expedient for the attainment of the ethics and responsibilities imposed by statute or rule of court.

(j) A non-lawyer assistant shall be governed by the Indiana Rules of Professional Conduct.

(k) For purposes of this Guideline, a non-lawyer assistant includes but shall not be limited to: paralegals, legal assistants, investigators, law students and paraprofessionals.