

# SURVEY OF THE LAW OF PROFESSIONAL RESPONSIBILITY

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## INTRODUCTION

The law governing attorneys has a pervasive quality that weaves tightly into American jurisprudence. It is the one body of law all members of the bench and bar have in common, irrespective of the area of substantive law in which an individual concentrates his or her practice.<sup>1</sup> Just as rules, rulings, and statutes change, the ways in which attorneys operate their practices and handle their clients' matters change. At one time, for example, the use of a contingent fee agreement with a client was considered only marginally ethical. It was thought unseemly for a lawyer to take a "cut" of a client's recovery.<sup>2</sup> Views on the subject changed, however, and the widespread use of contingent fee agreements opened the door for many clients who otherwise could not have afforded the costs of expensive, protracted litigation.<sup>3</sup> The developing role of contingency fees represented a clear change in the fabric of American law in that, by changing the way in which lawyers practiced, the way in which client matters were handled changed as well.

This article highlights a number of legal developments that have had a direct bearing on the law of professional responsibility. In subtle as well as in overt ways, regulating lawyer behavior has a noticeable impact on the ways client matters are handled. New rules and rulings have made it very important that lawyers keep abreast of changes in the area of professional responsibility to ensure that their behavior conforms to standards expected of every lawyer.

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1. See IND. PROFESSIONAL CONDUCT RULE Preamble (2000).

2. See CANONS OF PROFESSIONAL ETHICS OF THE ABA Canon 13 (1908); see also ABA Comm. On Prof'l Ethics and Grievances, Formal Op. 246 (1942).

The purchase of shares of stock in the corporation by the lawyer is a purchase by the lawyer of an interest in the subject matter of litigation to be instituted and conducted by the lawyer for the purpose of putting an end to the alleged appropriation by the officers and directors to their own use of income and assets of the corporation. A successful suit would better the value of the stock to the advantage of its holders and so the lawyer would profit from his purchase, as well as from compensation for his services.

*Id.*

3. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 35, cmt. b (2000).

## I. RECENT RULE CHANGES

*A. The Background of the Admission and Discipline Rules*

One of the state's primary sources of the law governing lawyer conduct is Indiana's Rules of Professional Conduct. During the relevant survey period, there were no changes to the text of this body of law from the prior survey period. However, significant developments occurred in the procedural rules governing lawyer disciplinary action, which are important for all members of the bar to understand.<sup>4</sup>

Like other rules promulgated by the Indiana Supreme Court, the Indiana Rules for Admission to the Bar and the Discipline of Attorneys ("Indiana Rules for Admission") assist the court in executing its constitutional grant of authority to govern the admission of lawyers to the bar and regulate their conduct once they are admitted.<sup>5</sup> The Indiana Rules for Admission govern all facets of an individual lawyer's continued good standing at least as it relates to their membership in the bar of the Indiana Supreme Court.

For more than thirty years, the procedures used for investigating and prosecuting lawyer disciplinary actions have been contained in Indiana Rules for Admission 23.<sup>6</sup> This rule covers all the features related to the disciplinary process and includes, *inter alia*, the "enabling statute" creating the Disciplinary Commission,<sup>7</sup> the remedies available in cases of lawyer misconduct<sup>8</sup> and the procedures employed to investigate and prosecute disciplinary actions before the Indiana Supreme Court.<sup>9</sup>

Parts of rule 23 have many features akin to the Indiana Trial Rules. However, because lawyer disciplinary actions are *sui generis*,<sup>10</sup> the rule outlines all the steps from the creation of the Disciplinary Commission through the conclusion of disciplinary action, and beyond.<sup>11</sup> Changes to this rule and the procedures by

4. See IND. ADMISSION AND DISCIPLINE RULES (amended 2001).

5. See IND. CONST. art. VII, § 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.

*Id.*

6. See ADMIS. DISC. R. 23.

7. See *id.* § 6.

8. See *id.* § 3.

9. See *id.* § 10.

10. See IND. CONST. art. VII, § 4.

11. Disbarred and suspended lawyers have an obligation to see that the client matters under their control are distributed to other lawyers and turned back over to their clients at the time they leave the bar. See ADMIN. DISC. R. 23, § 27. In addition, suspended lawyers who eventually seek reinstatement to the bar must comply with the appropriate provisions of the rule as well. See *id.*

which lawyer discipline cases are adjudicated can have a tremendous impact on the manner and speed with which lawyer discipline takes place. The full text of the latest round of amendments to this rule follows this article in Appendix A. The rule has been changed in relevant areas, which deserve a relatively detailed examination by all members of the bar. One change involves an alteration to the investigatory procedure for grievances,<sup>12</sup> while the other change relates to the way in which formal disciplinary action is prosecuted.<sup>13</sup>

### *B. Cooperating with an Investigation*

During 1998, the Disciplinary Commission's investigatory procedures were changed to require that lawyers respond to a grievance when such a response was requested by the Commission's Executive Secretary.<sup>14</sup> Characteristically, most complaints against lawyers are dismissed at the beginning of the process as matters which do not raise any substantial question of lawyer misconduct.<sup>15</sup> However, for those grievances that were opened for investigation, the Executive Secretary's request for a response became a demand for information.<sup>16</sup> Under the 1998 rule changes, if a lawyer failed to respond to a grievance when such a response was required, the lawyer's failure to respond was a violation of Indiana Professional Conduct Rule 8.1(b), which required a lawyer to respond to a lawful demand for information from the Disciplinary Commission.<sup>17</sup> Therefore, an otherwise meritless grievance from a client might result in disciplinary action against a lawyer solely based upon the lawyer's failure (or refusal) to answer the grievance.<sup>18</sup>

Effective January 1, 2001, Admission and Discipline Rule 23 was changed to require all lawyers "to cooperate with the Commission's investigation, accept service, comply with the provisions of these rules," and claim their certified mail in person or by agent.<sup>19</sup> Although there is no reported decision in which a lawyer

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§§ 4, 18.

12. *See id.* §10.

13. *See id.* §14.

14. *See id.* §10(a)(2).

15. *See, e.g.*, INDIANA SUPREME COURT DISCIPLINARY COMMISSION, 1999-2000 ANNUAL REPORT OF THE DISCIPLINARY COMMISSION OF THE SUPREME COURT OF INDIANA. For example, during the most recent annual report for FY 1999-2000, 1,599 grievances were filed against Indiana attorneys. Of those grievances, 947 were dismissed without further investigation upon a determination that, on their face, they presented no substantial question of misconduct. *See id.*

16. *See* ADMIS. DISC. R. 23, § 10(a)(2). This section provides, "[i]f the Executive Secretary determines that it [the grievance] does raise a substantial question of misconduct, [he shall] send a copy of the grievance by certified mail to the attorney against whom the grievance is filed . . . and shall demand a written response." *Id.*

17. *See* IND. PROFESSIONAL CONDUCT RULE 8.1 (1998).

18. *See, e.g., In re Puterbaugh*, 716 N.E.2d 1287 (Ind. 1999) (applying the response requirement in connection with the initial grievance); *In re Cable*, 715 N.E.2d 396 (Ind. 1999).

19. ADMIS. DISC. R. 23, §10(e) (effective January 1, 2001).

was disciplined for a generalized lack of cooperation, this is a subject that the Indiana Supreme Court has examined in the past.<sup>20</sup> In *In re McClain*,<sup>21</sup> the court was unequivocal in its belief that cooperation by the lawyer being disciplined was essential to the process.

As we have held in the context of attorney discipline cases, the party being investigated has a duty to cooperate in the process. The failure to cooperate may in itself constitute independent grounds for disciplinary charges in some instances. It should not need stating to any judge in this State that the same duty of cooperation exists in judicial disciplinary cases. As the Code of Judicial Conduct makes clear, judges are held to high standards of conduct. Further, our ethical rules make it clear that all judges and attorneys have a duty to cooperate with the investigative process of a disciplinary agency. . . . [T]he duty to cooperate does not require an admission of misconduct nor does it preclude the advocacy of a theory of defense which is contradictory to the allegations of misconduct.

We draw no inference of guilt from Respondent's lack of cooperation with the discovery process. The Court simply takes this opportunity to stress that cooperation with the investigative and discovery processes is expected of any judge under investigation by the Commission and that in the proper case, the failure to cooperate could in itself constitute actionable misconduct. On the other hand, Respondent's uncooperative conduct and delay tactics crossed the line between legitimate discovery dispute and the sort of conduct which is not only antithetical to Respondent's obligations as an attorney and judge, but calls into question the integrity of the judicial disciplinary process.<sup>22</sup>

As an aside, Admission and Discipline Rule 2 has long imposed a duty on lawyers to keep the clerk of the supreme court informed of any change in his or her name and address.<sup>23</sup> Under Admission and Discipline Rule 23, the Clerk (as the keeper of the Roll of Attorneys) is impliedly designated as the agent for service of process for lawyers who fail to update their listing on the Roll.<sup>24</sup> Rule 23 states that a lawyer's failure to provide current information to the Clerk shall be a waiver of service by the lawyer,<sup>25</sup> and the Clerk can create an affidavit of constructive service, if necessary, for the prosecution of disciplinary action

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20. See *In re Crenshaw*, 708 N.E.2d 859 (Ind. 1999) (noting that lawyers have a heightened obligation to comply with demands for information from the Disciplinary Commission that exceeds the obligation imposed upon nonlawyer citizens).

21. 662 N.E.2d 935 (Ind. 1996).

22. *Id.* at 940-41 (internal citations omitted).

23. See ADMIS. DISC. R. 2.

24. See ADMIS. DISC. R. 23, § 12(f).

25. See *id.* §10(e).

against the lawyer.<sup>26</sup>

Also effective January 1, 2001, a lawyer who fails to respond to a grievance can be suspended from the bar until the lawyer submits a response.<sup>27</sup> If the lawyer fails to respond for six months, the lawyer's suspension can be converted into an indefinite suspension from the practice of law.<sup>28</sup> An indefinite suspension requires the lawyer to go through a formal reinstatement proceeding before returning to practice.<sup>29</sup> Such reinstatement requires the lawyer to formally petition the Indiana Supreme Court, take and pass the Multistate Professional Responsibility Examination, and demonstrate his or her fitness to return to practice at a formal hearing.<sup>30</sup> Moreover, the attorney must still submit a response to the initial grievance that began the process.<sup>31</sup>

Except for suspensions based on felony convictions,<sup>32</sup> failing to pay annual registration fees<sup>33</sup> or remaining current on continuing legal education requirements,<sup>34</sup> this rule change represents the first time that a lawyer can be suspended from the practice of law prior to the institution of formal disciplinary action. Obviously, if the misconduct complained of in the grievance is serious enough to warrant disciplinary action in its own right, such a refusal to respond could significantly accelerate the time it currently takes to start and pursue formal disciplinary action. In short, lawyers who engage in misconduct and attempt to stonewall the process will now come to the attention of the supreme court much sooner than they have in the past.

### *C. An Answer Is Required to the Disciplinary Charge*

For the first time in the long history of Admission and Discipline Rule 23, a formal Answer is required to the Verified Complaint for Disciplinary Action.<sup>35</sup> Under the prior version of Admission and Discipline Rule 23, a lawyer facing disciplinary action could decide whether or not to formally answer the Verified Complaint.<sup>36</sup> If a lawyer chose not to file an Answer, that refusal was treated as a general denial of the allegations contained in the Verified Complaint and the

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26. *See id.* § 12(f).

27. *See id.* § 10(f)(2).

28. *See id.* § 10(f)(3).

29. *See id.* § 4(c).

30. *See id.* § 4(a), (b)(1)-(9).

31. *See id.* § 4(b)(4). This section requires the lawyer seeking reinstatement to demonstrate remorse for the conduct which led to his or her suspension. *See id.* It should stand to reason that a lawyer would not be able to make such a demonstration without resolving the matter for which he was suspended in the first place.

32. *See id.* § 11.1.

33. *See id.* § 21(e).

34. *See* ADMIS. DISC. R. 29, § 10.

35. *See* ADMIS DISC. R. 23, § 14(a).

36. *See id.*

Disciplinary Commission was required to prove all the allegations made.<sup>37</sup> Effective January 1, 2001, a formal Answer is now required under similar terms as applied in the Rules of Trial Procedure.<sup>38</sup> The Answer must squarely meet the allegations made in the Verified Complaint with affirmative admissions or denials of the facts alleged therein.<sup>39</sup> Should a lawyer fail to file an Answer, the allegations contained in the Verified Complaint can be deemed admitted and the Disciplinary Commission is then free to apply to the supreme court for a judgment on the Complaint.<sup>40</sup> Again, this amendment is akin to the default provision contained in the Rules of Trial Procedure.<sup>41</sup> As with Rule 23's change requiring a response to the initial grievance against the lawyer, this additional provision should have the effect of speeding up the disciplinary process by forcing a narrowing of the issues very early in the disciplinary process instead of waiting for their development at (or very close to) the trial of the action.

The amendment allows lawyers to file their answer thirty days after service of the Verified Complaint.<sup>42</sup> However, the new rule amendment provides that the lawyer may take one extension of time, as of right, for an additional thirty days, if notice of such an extension is filed with the court in writing within the original thirty day time period.<sup>43</sup> Attorneys who practice in the civil law will recognize these amendments as cognates of the provisions used in the trial rules.

## II. EX PARTE COMMUNICATION BETWEEN LAWYERS AND JUDGES

The lawyer's role as advocate has definite limits and can have an effect on the way in which issues of substantive law are presented to tribunals.<sup>44</sup> These limitations on advocacy are matters falling directly under the heading of professional regulation. During the relevant period, two matters decided by the Indiana Supreme Court illustrate one of the frustrating issues advocates face: communication between an opponent lawyer and the judge presiding over the contested matter.<sup>45</sup> Of course, there are circumstances in the law when *ex parte*

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37. *See id.*

38. *Compare* IND. TRIAL RULE 8(B) (1998).

39. *See* ADMIS. DISC. R. 23, § 14.

40. *See id.* § 14(c).

41. *See* T.R. 55(B).

42. *See* ADMIS. DISC. R. 23, § 14(a).

43. *See id.*

44. *See* IND. PROFESSIONAL CONDUCT RULE 3.3 (1998). For example, Rule 3.3 requires a lawyer to disclose facts to a tribunal when necessary to prevent a crime or fraud on the court. The same rule requires a lawyer to advise the court of controlling authority in a controversy whether or not that authority is favorable to the client. *See id.*

45. *See* PROF. COND. R. 3.5. This rule provides "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 except as permitted by law; or (c) engage in conduct intended to disrupt a tribunal." *Id.*

communication between the judge and a lawyer are permitted.<sup>46</sup> These allowed *ex parte* communications usually involve issues where time is of the essence, and unless immediate judicial intervention is given, some irreparable harm may result to one of the litigants.<sup>47</sup> It is also essential in such situations that the party against whom relief is sought be given notice when practicable.<sup>48</sup> As temporary restraining orders law has developed, the adequacy of notice to an opponent is a fact that should be carefully scrutinized by the presiding judge before rendering a decision affecting an absent party's interests.<sup>49</sup> Cases finding *ex parte* communications violations can be classified into two categories: cases in which the *ex parte* communication is prohibited generally,<sup>50</sup> and cases in which the *ex parte* communication may be otherwise proper, but it is done in such a way to deprive the opposing party of their opportunity to be heard, while also providing the presiding judge with inadequate or false information, resulting in a flawed or needlessly injurious decision.<sup>51</sup>

Two rulings issued during the survey period highlight this second category of improper communication. First, in *In re Warrum*<sup>52</sup> the respondent, an Evansville lawyer, represented a woman who was divorced from her husband in Utah in 1985. The Utah court entered orders regarding custody, visitation and child support, providing that the father, a Utah resident, was ordered to pay child support of fifty dollars per month. He remained in Utah and the mother and child moved to Evansville. After the father failed to pay support, the mother received Assistance for Dependent Children payments and enlisted the Vanderburgh County Prosecutor's office to assist in collecting the unpaid support payments. In 1991, she petitioned the Utah trial court for an increase in the fifty-dollar per month child support award. In 1992, while the Utah matter was pending, the mother hired the respondent to secure additional support and restrict her ex-husband's visitation with the child.<sup>53</sup>

The respondent filed a complaint in the Vanderburgh Superior Court seeking orders on child support, child custody and visitation "or a modification thereof."<sup>54</sup> The complaint did not mention the Utah case or any of the orders from the Utah court governing custody, visitation, and child support. It likewise failed to mention that the Utah court was considering a modification at the time

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46. One of the best known examples is the application for a temporary restraining order under Trial Rule 65(B).

47. *See id.*

48. *See id.*

49. *See id.*

50. *See In re Terry*, 394 N.E.2d 94 (Ind. 1979) (finding attorney contact with prospective jurors violates *ex parte* rules).

51. *See In re LaCava*, 615 N.E.2d 93 (Ind. 1993) (finding attorney contacted physician member of medical review panel in medical malpractice action and influenced physician's determination before panel officially rendered decision).

52. 724 N.E.2d 1097 (Ind. 2000).

53. *See id.* at 1098.

54. *Id.*

the Indiana action was filed. Although the respondent knew of the Utah decree and orders, he took no action to familiarize himself with the details or status of the Utah case.<sup>55</sup>

When the father learned of the Indiana action, he contacted the respondent by phone and provided information about his employment and income. The father's Utah lawyer also contacted the respondent inquiring as to why there was an Indiana proceeding. The respondent did not reply, and when the Indiana case came to a hearing, the respondent and the mother appeared but the father did not. The respondent did not mention to the Vanderburgh County judge the existence of the Utah case or its status, and, as a result, the Indiana court adopted the respondent's proposed entry computed in accordance with Indiana's child support guidelines. The Indiana order commanded the father to pay \$77.40 per week for the child and restricted his visitation rights to exclusively supervised visits with his child. At that point, the father had two judgments governing child support and visitation with his child.<sup>56</sup>

No one in Indiana notified the Utah authorities about the Indiana decree, and the father continued to pay his fifty dollar per month child support in accord with the prior Utah order. As a result, the father began to accumulate a child support arrearage under the Indiana order. Once the Vanderburgh County Prosecutor's office learned of the Indiana order, it intercepted at least three of the father's federal income tax refund checks to satisfy the Indiana arrearage. The father complained to Utah authorities that he was in compliance with the Utah order and that Indiana authorities were dunning him for additional amounts beyond those he was ordered to pay. An investigation began in both Utah and Indiana with Utah officials inquiring into why the Indiana order had been issued when there had been no change in jurisdiction. Indiana authorities questioned why the Utah support award was so low. As a result of the investigation, the Governor's offices from each state, a United States Senator, and Indiana's Family and Social Services Administration got involved in a dispute over jurisdiction and the accurate amount of child support due. Officials from both states met in Chicago for an unsuccessful mediation session in which both sides claimed the right to govern the dispute. In the end, the Utah court modified its order increasing the amount of support, while Indiana authorities still claimed that a valid Indiana arrearage existed. The Vanderburgh County Prosecutor's office eventually moved to dismiss the Indiana judgment.<sup>57</sup>

In imposing a public reprimand on the respondent, the Indiana Supreme Court described the problems that cascaded from the respondent's failure to simply and clearly inform the court in Vanderburgh County of the Utah proceedings governing the divorce.

The respondent's unfortunate failure to disclose the Utah decree to the Indiana court was completely contrary to the letter and spirit of Indiana's

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55. *See id.*

56. *See id.* at 1098-99.

57. *See id.* at 1099.

Uniform Child Custody Jurisdiction Law, which was to “[a]void litigation of custody decisions of other states and this state so far as feasible,” and to “[f]acilitate the enforcement of custody decrees of other states; and [foster] mutual assistance between the courts of this state and those of other states concerned with the same child.” That the respondent’s actions so thoroughly frustrated the purpose of the UCCJL, wasted judicial resources, and led to an interstate conflict clearly demonstrates that he engaged in conduct prejudicial to the administration of justice. Accordingly, we find that the respondent violated Prof.Cond.R. 8.4(d).

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The evidence clearly and convincingly demonstrates that the respondent knew of the Utah decree at the time he litigated the Indiana case, but neglected to advise the Indiana court of it or its terms. By that failure, the respondent deprived the Indiana judge of the opportunity to apply the provisions set forth in Indiana’s UCCJL, cause unnecessary litigation in this state, and set the stage for an interstate conflict ultimately consuming the resources of high state officials. Because of his insult to the administration of justice and its significant consequences in this case, we conclude that a public reprimand is appropriate.<sup>58</sup>

In another domestic relations matter, a trial judge agreed to an admonition by the Indiana Commission on Judicial Qualifications for his part in a case involving *ex parte* communications. In the *Public Admonition of the Honorable Fredrick R. Spencer, Madison Circuit Court*,<sup>59</sup> the judge presided over some post-dissolution wrangling involving a foreign divorce decree.

In *Spencer*, the mother and father of two children were divorced in Texas with the father being awarded custody of the children. The father eventually moved to Florida and the mother moved to Indiana. In June 1996, the mother filed an emergency petition for custody in a Madison Superior Court with Judge Brinkman presiding. Judge Brinkman initially granted the petition and set the case for hearing. He eventually deferred jurisdiction to Florida who had, by then, asserted jurisdiction over the decree under the Uniform Child Custody Jurisdiction Act (UCCJA). During a July 1998 visit to Florida, the mother and father executed a joint stipulation of permanent custody and visitation. Under that agreement, the mother had summer visitation with the children.<sup>60</sup>

Thereafter, she brought the children back to Indiana and enrolled them in school without the father’s permission. In August of that year, a Florida judge

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58. *Id.* (internal citation omitted).

59. *Public Admonition of the Honorable Fredrick R. Spencer, Madison Circuit Court*, slip op. (Dec. 28, 1999). This ruling is public, but not published in the West’s Reporter Series. Copies can be obtained from the Indiana Commission on Judicial Qualifications.

60. *See id.* at 1-2.

awarded the father permanent custody and gave the wife summer visitation. The mother then filed another emergency petition for change of custody in Judge Spencer's court claiming that the stipulation the mother signed in Florida was made under duress. Unlike the petition in *Warrum*, this petition fully set out the steps by which Florida had accepted jurisdiction and that the children were enrolled in school and lived in Madison County. No real emergency was alleged and Judge Spencer granted relief to the mother without giving the father an opportunity to be heard. Upon learning of the Madison Circuit Court action, the Florida judge attempted to reach Judge Spencer by telephone on more than one occasion. Judge Spencer, however, did not return the messages as he had a duty to do under the UCCJA.<sup>61</sup>

The father, on the strength of the Florida order, came to Indiana, removed the children and returned to Florida with them. The mother, on the strength of the Madison Circuit Court order, went to Florida and surreptitiously took the children from the father's residence and brought them back to Indiana. In December, a hearing was held in the Madison Circuit Court in which Judge Spencer determined he had jurisdiction over the matter despite all the indications of Florida's interest and jurisdiction. It was not until September 1999 when the Indiana Court of Appeals ruled that the Judge erred in not granting the father's motion to dismiss on jurisdictional grounds that the ordeal was resolved.<sup>62</sup>

In the agreed admonition, the Commission relied directly on the dangers associated with receiving *ex parte* information and relying thereon to grant relief.

The Commission admonishes Judge Spencer for entertaining and granting an *ex parte* petition for change of custody, without notice to the custodial father. Although the petition purported to present an emergency not requiring notice and hearing, in the Commission's view the petition merely reflected a standard dispute between divorced parents, one desirous of obtaining a change in the custodial relationship. Therefore, it should have been treated as any civil pleading, where the filing would be noticed and the parties would be given an opportunity to be heard. Judge Spencer is admonished further for failing to communicate with the Florida judge who had assumed jurisdiction and had issued an order granting custody to the father, and whose office attempted to contact Judge Spencer. This communication is required under the Uniform Child Custody Jurisdiction Act, and is a requirement designed to help prevent the very circumstances which occurred here, where a request was made to an Indiana court to grant relief when another state was exercising jurisdiction. Judge Spencer's failure to acknowledge Florida's claim of jurisdiction is exacerbated by his knowledge that, a year earlier, the mother had filed a similar "emergency" petition in another Madison County Court, with Judge Brinkman presiding, and that Judge Brinkman ultimately had deferred

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61. *See id.* at 2.

62. *See id.* (citing *Rios v. Rios*, 717 N.E.2d 187 (Ind. Ct. App. 1999)).

jurisdiction to Florida.<sup>63</sup>

Although both cited cases involve foreign divorce decrees, child support and custody awards, they highlight a problem with *ex parte* communication and relief that go beyond the facts of the recited decisions. The presiding judge *must* rely on the information provided by the lawyer in order to fashion a remedy that is appropriate on the facts of a given case.<sup>64</sup> In *Warrum*, the lawyer was found to have violated Indiana Professional Conduct Rule 8.4(d) which governs conduct prejudicial to the administration of justice.<sup>65</sup> In *Spencer*, the judge was admonished for engaging in conduct contrary to Canon 3(B)(8) of the Code of Judicial Conduct that requires a judge to accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.<sup>66</sup> The rule goes on to state, with limited exceptions, that "[a] judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties, concerning a pending or impending proceeding."<sup>67</sup> Furthermore, the Commentary to the Canon provides:

Certain *ex parte* communication is approved by Section 3B(8) to facilitate scheduling and other administrative purposes and to accommodate emergencies. In general, however, a judge must discourage *ex parte* communication and allow it only if the criteria stated in Section 3B(8) are clearly met. A judge must disclose to all parties all *ex parte* communications . . . regarding a proceeding pending or impending before the judge.<sup>68</sup>

The cases decided during the survey period illustrate the unique and delicately balanced position judges have in our system of adjudication. As arbiters of disputes they are limited under the Code of Judicial Conduct to consider only the evidence that comes before them in rendering a fair and impartial decision.<sup>69</sup> As public officials, judges are community leaders and are expected to take an active involvement in law related issues important to the community they serve.<sup>70</sup> The problem with the *ex parte* communications at issue

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63. *Id.* at 11.

64. *See In re Mullins*, 649 N.E.2d 1024 (Ind. 1995). The respondent lawyer initiated guardianship proceedings in one county without advising the judge that a similar parallel proceeding had been pending for some months in an adjoining county. *See id.*

65. *See* IND. PROFESSIONAL CONDUCT RULE 8.4(d). This rule provides: "It is professional misconduct for a lawyer to . . . engage in conduct prejudicial to the administration of justice." *Id.*

66. *See* IND. JUDICIAL CONDUCT CANON 3(B)(8).

67. *Id.*

68. *Id.* cmt. 3.

69. *See* JUD. CANON 2. The canon provides that, "A judge shall respect and comply with the law and shall act at all times in manner that promotes public confidence in the integrity and impartiality of the judiciary." *Id.*

70. *See* JUD. CANON 2(D). This section of the canon permits a judge to "lend the prestige of

in the survey cases may not be common, but it certainly is nothing new. The court of appeals was forced to comment on the dilemma faced by a judge who, doing otherwise meritorious work for the community, was placed in an untenable position by hearing evidence from a prospective litigant outside the presence of the potential opponent. In *Stivers v. Knox County Department of Public Welfare*,<sup>71</sup> the court of appeals observed:

Although there is evidence which reflects that the juvenile court judge's participation in the meetings was passive, in that he made no recommendations or was limited in discussions, we are of the opinion that his presence at such times was not permissible if he intends to be the judge on the case under discussion.

At the worst, this situation is a classic example of an *ex parte* communication contemplated and prohibited by Canon 3(A)(4); a prospective litigant discussing potential litigation as well as the evidence, admissible or inadmissible, in support of that litigation without the presence of the other party and all done in the presence of the judge who will preside over that litigation when it is filed constitutes an intolerable situation. At the best, which is still unacceptable, the situation is one which has every appearance of impropriety and detracts strongly from a manner which promotes the integrity and the impartiality of the judiciary.<sup>72</sup>

Such prohibitions against *ex parte* communications with a judge have a long history in the law. In the original 1908 Canons of the American Bar Association on which modern codes of professional behavior are based, Canon 3 provided, in part:

A lawyer should not communicate or argue privately with the Judge as to the merits of a pending cause, and he deserves rebuke and denunciation for any device or attempt to gain from a Judge special personal consideration or favor. A self-respecting independence in the discharge of professional duty, without denial or diminution of the courtesy and respect due the Judge's station, is the only proper foundation for cordial personal and official relations between Bench and Bar.<sup>73</sup>

Likewise, the 1908 Canons of Judicial Ethics contained a cognate provision in Judicial Canon 16 that provided:

A judge should discourage *ex parte* hearings of applications for injunctions and receiverships where the order may work detriment to

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the judge's office to advance the public interest in the administration of justice." *Id.*

71. 482 N.E.2d 748 (Ind. Ct. App. 1985).

72. *Id.* at 751.

73. CANONS OF PROFESSIONAL ETHICS OF THE ABA Canon 3 (1908).

absent parties; he should act upon such *ex parte* applications only where the necessity for quick action is clearly shown; if this be demonstrated, then he should endeavor to counteract the effect of the absence of opposing counsel by a scrupulous cross-examination and investigation as to the facts and the principles of law on which the application is based, granting relief only when fully satisfied that the law permits it and the emergency demands it. He should remember that an injunction is a limitation upon the freedom of action of defendants and should not be granted lightly or inadvisedly. One applying for such relief must sustain the burden of showing clearly its necessity and this burden is increased in the absence of the party whose freedom of action is sought to be restrained even though only temporarily.<sup>74</sup>

These constraints on seeking *ex parte* have been universally accepted by every state's bar and remain a regular subject for ethics opinions around the country.<sup>75</sup> An example includes:

[A lawyer in a divorce case may] seek an *ex parte* order to seal a safe deposit box so that items will not be removed pending a hearing. . . . [I]n an *ex parte* proceeding the lawyers shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision whether or not the facts are adverse.<sup>76</sup>

These were the mistakes that led to the respondent lawyer's discipline in *Warrum*.<sup>77</sup> When seeking relief without the presence of the other party, the lawyer must give the presiding judge not only complete information about the case he represents, but also information about the opponent or the opponent's counsel and an indication that they have been served with the necessary papers.<sup>78</sup> Even if such service is unsuccessful, it is incumbent on the lawyer to inform the judge of the efforts made to serve the opposing party with notice.<sup>79</sup> Conversely, the judge must inquire about service on the opposing side and satisfy himself that the relief sought is appropriate and warranted.<sup>80</sup> As the *Warrum* and *Spencer* matters show, profound consequences can flow from the pursuit of *ex parte* relief improperly sought and improvidently granted.

### III. ETHICS AND THE PROSECUTOR'S FUNCTION

During this period, the Indiana Supreme Court once again addressed an important ethics issue in relation to the execution of the duties of a prosecuting

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74. CANONS OF JUDICIAL ETHICS OF THE ABA Canon 16 (1908).

75. See generally ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT § 61:801.

76. Pennsylvania State Bar Association, Ethics opinion 96-153, Nov. 12, 1996.

77. See *In re Warrum*, 724 N.E.2d 1097 (Ind. 2000).

78. See *id.* at 1099-1100; see also IND. PROFESSIONAL CONDUCT RULE 3.3.

79. See PROF. COND. R. 3.3.

80. See *id.*; see also IND. TRIAL RULE 65(B) (governing the standards for obtaining a temporary restraining order without the presence of the opposing party).

attorney and his deputies. In the case of *Johnson v. State*,<sup>81</sup> the court accepted an interlocutory appeal from the Marion Superior Court to address the issue of the limits on a prosecutor's discretion to charge an individual with crimes.<sup>82</sup>

In *Johnson*, the defendant was an adolescent guidance specialist working in alcohol and drug treatment at Fairbanks Hospital in Indianapolis. During a routine room check in 1998, Johnson allegedly had intercourse with a sixteen year old detainee at the facility. About two weeks later, Johnson was charged with sexual misconduct, a class "D" felony. On September 8, 1998, the trial court required the State to give thirty days notice of its intent to use evidence of prior misconduct by Johnson. The State waited until April 23, 1999 when they filed their final witness and exhibit list to identify the Rule 404(b) evidence as four other female Fairbanks Hospital patients.<sup>83</sup>

Johnson filed a motion *in limine* and was successful in getting the testimony of the other four women excluded due to the late identification by the State. The prosecutor then responded with a motion to dismiss the charge, which the trial court also granted. Johnson resisted the dismissal and objected in writing, stating that he was ready for trial and that the State's dismissal should be with prejudice. On May 5, 1999, the State refilled the original charge and added ten more counts. Johnson moved to dismiss all of the charges, and after the trial court denied his motion, took an interlocutory appeal. The trial court was affirmed by memorandum decision by the court of appeals.<sup>84</sup>

In accepting the appeal in *Johnson*, the supreme court faced a situation that was similar, but not identical, to the case of *Davenport v. State*.<sup>85</sup> In *Davenport*, the criminal defendant was charged originally with murder. Four days before his trial, the State filed a motion to amend the original charge to include charges of felony murder, attempted robbery, and auto theft. The trial court denied the motion. The next day, the State dismissed the murder charge and refiled it along with the three new charges. The defendant filed a motion to dismiss and, after a hearing, the trial court denied the motion and allowed Davenport's case to proceed to trial.<sup>86</sup> Davenport was convicted of all the crimes charged, but on transfer, the supreme court reversed all but the original murder charge. In holding that the prosecutor abused his discretion in refiling the charges in another court, the supreme court said:

While courts have allowed the State significant latitude in filing a second information, the State cannot go so far as to abuse its power and prejudice a defendant's substantial rights. In the present case, the State received an adverse ruling in the original trial court on its motion to amend the information. As a result, defendant had to defend against one

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81. 740 N.E.2d 118 (Ind. 2001).

82. *See id.* at 119.

83. *See id.* at 119-20.

84. *See id.* at 120.

85. 689 N.E.2d 1226 (Ind. 1997).

86. *See id.* at 1228-30.

count of murder. In response, the State dismissed the case and filed a second information which contained four counts: the original murder count plus the felony murder, attempted robbery, and auto theft counts. Then, for no apparent reason other than because the State knew that the court had already ruled that the State could not include those additional three counts in the information, the State moved for and was granted transfer to a different court. By doing so, the State not only crossed over the boundary of fair play but also prejudiced the substantial rights of the defendant. Because of a sleight of hand, the State was able to escape the ruling of the original court and pursue the case on the charges the State had sought to add belatedly. This is significantly different than what has been permitted in the past. Therefore, the trial court erred in denying defendant's motion to dismiss the felony murder, attempted robbery, and auto theft charges.<sup>87</sup>

In the end, the supreme court affirmed Davenport's conviction of the single murder charge with which he was originally charged, but reversed the trial court's decision to allow the case to go to trial on the additional charges filed on the eve of trial.<sup>88</sup>

In *Johnson*, an additional issue was present that was not an issue in the *Davenport* decision, filing additional charges in an apparent retaliation for the prior motion *in limine*.<sup>89</sup> With *Davenport* controlling, the supreme court reversed the memorandum affirmation from the court of appeals and held that the latitude permitted prosecutors in making charging decisions had limits and, like *Davenport*, the State in the *Johnson* case had exceeded those boundaries.

Although this case arose from the exclusion of evidence rather than denial of permission to add charges, the reasoning of *Davenport* is pertinent. In each case, the State sought to take some action (i.e. to add charges or to offer evidence of other acts of misconduct) that would require the defendant to revise his defense strategy at the eleventh hour. In each case, the trial court concluded that the State did not have a good reason for the delay or lack of notice. In each case, the court properly forbade the action as taken too late. In each case, the prosecutor sought to dodge the adverse ruling via dismissal and refiling. The equities weigh even more heavily in *Johnson*'s favor than in either *Davenport* or *Klein*. By refiling, the State attempted not only to evade the court's ruling and get a second shot at offering 404(b) evidence, but also to subject *Johnson* to ten additional charges. If the State may circumvent an adverse evidentiary ruling by simply dismissing and refiling the original charge, and also "punish" the defendant for a successful procedural challenge by piling on additional charges, defendants will as a practical matter be unable to avail themselves of legitimate procedural

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87. *Id.* at 1230.

88. *See id.* at 1233.

89. *See Johnson v. State*, 740 N.E.2d 118, 121 (Ind. 2001).

rights. . . . Based on the circumstances presented, we conclude that the State exceeded the boundaries of fair play. The prosecutor impermissibly impinged the defendant's exercise of his substantial procedural rights by dismissing and refileing to evade an adverse trial court ruling and, in the process, piling on additional charges that were unjustified by changed circumstances. Therefore, the trial court abused its discretion when it denied in total Johnson's motion to dismiss the eleven-count information.<sup>90</sup>

The supreme court then used its equitable powers to return the parties to the position they were in *status quo ante* and returned the case to the trial court so that it could proceed on the original single charge of sexual misconduct.<sup>91</sup> In a footnote, the court acknowledged the holding from *Davenport* that substantial rights of a criminal defendant are not *per se* prejudiced when the State dismisses an information in order to avoid an adverse evidentiary ruling and then refiles an information for the same offense.<sup>92</sup> The court quickly followed up by adding that the question of substantial prejudice is a fact-sensitive inquiry and is not readily amenable to a bright-line test.<sup>93</sup> Viewed another way, this could be a signal to astute prosecutors and judges that the court of appeals and supreme court are ready to revisit this subject in future cases and review very carefully how these fact-sensitive inquiries are being handled.

*Johnson* is at least the third case in eighteen months in which the supreme court has published a decision critical of the State's handling of evidentiary matters either on the eve of or during trial. In the late summer of 1999, the court handed down two decisions criticizing prosecutors for their handling of *Brady*<sup>94</sup> material. In the cases, of *Williams v. State*<sup>95</sup> and *Goodner v. State*,<sup>96</sup> the supreme court criticized prosecutors for last minute disclosures of information that could have been beneficial to the defense of a criminal defendant. In *Goodner*, a key prosecution witness received a favorable deal on his own criminal case in exchange for his favorable testimony for the State at trial. The State did not disclose the arrangement to the defense until the witness had left the witness stand. When questioned about the arrangement during the defense's case-in-chief, the witness initially denied the favorable treatment until re-direct examination by the State.<sup>97</sup> The court noted, however, that the evidentiary issue was one that they had dealt with repeatedly and considered stronger action if problems continued.

There may be a valid explanation for the sequence of events at

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90. *Id.*

91. *See id.*

92. *See id.* at 120 n.3 (citing *Davenport*, 689 N.E.2d at 1229).

93. *See id.*

94. *Brady v. Maryland*, 373 U.S. 83 (1963).

95. 714 N.E.2d 644 (Ind. 1999), *cert. denied*, 528 U.S. 1170 (2000).

96. 714 N.E.2d 638 (Ind. 1999).

97. *See id.* at 640.

Goodner's trial, but none is apparent, and none was offered in the trial court. This conduct appears to be a recurring scenario. We cannot continue to tolerate late inning surprises later justified in the name of harmless error. Continued abuses of this sort may require a prophylactic rule requiring reversal. In the meantime, there are other sanctions for prosecutorial misconduct. The Indiana Rules of Professional Conduct require a prosecutor to "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." Rule 8.4(d) also states that it is misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice." Members of the bar and the trial bench should remember their obligation to report such misconduct to the appropriate authorities.<sup>98</sup>

It should be clear, then, that the Indiana Supreme Court is continuously reviewing the matters that come before it with an eye towards not only the conduct of the case below, but also the conduct of the lawyers and judges who represented the parties. As the quoted text from *Goodner* makes clear, the Rules of Professional Conduct and other ethical standards remain at the ready when the supreme court examines the cases on its docket.<sup>99</sup> Although this same analysis is not present on the face of the opinion in *Johnson*,<sup>100</sup> the language used in the decision reveals that the professional conduct of the prosecutors involved in the case was at the heart of the decision.<sup>101</sup> With *Williams*, *Goodner* and now *Johnson* in mind, lawyers representing both the State and the defense in criminal cases should have an unmistakable signal that ethics is as much a part of the criminal justice process as are the facts in the case at bar.

#### CONCLUSION

As noted at the outset, the pervasive quality of professional ethics has a substantial impact on the way in which issues of substantive law are handled. The cases cited herein should serve to illustrate that the advocacy battleground does, indeed, have very definable limits. Lawyers exceeding those bounds, even when it is within their power to do so, proceed at their peril. The cases should also serve to point out that unprofessional behavior is not simply a matter affecting the individual lawyer or judge, but it can have a determinative effect on the substantive underlying case being adjudicated. This year's cases, coupled with the amendments to the rules governing professional discipline, signal a strong effort on the part of the Indiana Supreme Court to maintain very high standards of professional responsibility for all members of the Indiana bar.

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98. *Id.* at 642-43 (citations omitted).

99. *See id.*

100. *Johnson v. State*, 740 N.E.2d 118 (Ind. 2001).

101. *See id.* at 121.

## APPENDIX "A"

## AMENDMENTS TO ADMISSION AND DISCIPLINE 23

EFFECTIVE JANUARY 1, 2001

## Rule 23. Disciplinary Commission and Proceedings

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**Section 8. Powers and Duties of the Disciplinary Commission**

In addition to the powers and duties set forth in this Rule, the Commission shall have the power and duty to:

(a) appoint with the approval of the Supreme Court an Executive Secretary of the Commission who shall be a member of the Bar of this State and who shall serve at the pleasure of the Commission;

(b) prepare and furnish a form of request for investigation to each person who claims that an attorney is guilty of misconduct and to each Bar Association in this State for distribution to such persons;

(c) supervise the investigation of claims of misconduct;

(d) issue subpoenas, including subpoenas duces tecum; the failure to obey such subpoena ~~shall~~ may be punished as contempt of this Court; or, in the case of an attorney under investigation, shall subject the attorney to suspension under the procedures set forth in subsection 10(f) of this Rule;

(e) do all things necessary and proper to carry out its powers and duties under these Rules;

(f) the right to bring an action in the Supreme Court to enjoin or restrain the unauthorized practice of law.

**Section 9. Powers and Duties of the Executive Secretary**

In addition to the powers and duties set forth in this Rule, the Executive Secretary shall have the power and duty to:

(a) administer the Commission's work;

(b) appoint, with the approval of the Commission, such staff as may be necessary to assist the Commission to carry out its powers and duties under this Rule;

(c) supervise and direct the work of the Commission's staff;

(d) appoint and assign duties to investigators;

(e) supervise the maintenance of the Commission's records;

(f) issue subpoenas in the name of the Commission, including subpoenas duces tecum. The failure to obey such a subpoena shall be punished as a contempt of this Court; or, in the case of an attorney under investigation, shall subject the attorney to suspension under the procedures set forth in subsection 10(f) of this Rule;

(g) enforce the collection of the registration fee provided in Section 15 against delinquent members of the Bar;

(h) notwithstanding Section 22, cooperate with the attorney disciplinary enforcement agencies of other jurisdictions, including, upon written request, the release of any documents or records that are in the control of the Executive Secretary to the chief executive of an attorney disciplinary enforcement agency in any jurisdiction in which an Indiana attorney is also admitted; and

(i) do all things necessary and proper to carry out the Executive Secretary's duties and powers under this Rule.

### **Section 10. Investigatory Procedures**

(a) Upon receipt of a written, verified claim of misconduct (hereinafter referred to as "the grievance"), from a member of the public, a member of this bar, a member of the Commission, or a Bar Association (hereinafter referred to as "the grievant") and completion of such preliminary investigation as may be deemed appropriate, the Executive Secretary shall:

(1) Dismiss the claim, with the approval of the Commission, if the Executive Secretary determines that it raises no substantial question of misconduct; or

(2) If the Executive Secretary determines that it does raise a substantial question of misconduct, send a copy of the grievance by certified mail to the attorney against whom the grievance is filed (hereinafter referred to as "the respondent") and shall demand a written response. The respondent shall respond within twenty (20) days, or within such additional time as the Executive Secretary may allow, after the respondent receives a copy of the grievance. In the event of a dismissal as provided herein, the person filing the grievance and the respondent shall be given written notice of the Executive Secretary's determination. In the event of a determination that a substantial question exists, the matter shall proceed to subsection (b) hereinafter.

(b) Thereafter, if the Executive Secretary, upon consideration of the grievance, any response from the respondent, and any preliminary investigation, determines there is a reasonable cause to believe that the respondent is guilty of misconduct the grievance shall be docketed and investigated. If the Executive Secretary determines that no such reasonable cause exists, the grievance shall be dismissed with the approval of the Commission. In either event, the person filing the grievance (hereinafter referred to as "the grievant") and the respondent shall be given written notice of the Executive Secretary's determination.

(c) If the grievance is docketed for investigation, the Executive Secretary shall conduct an investigation of the grievance. Upon completion of the investigation the Executive Secretary shall promptly make a report of the investigation and a recommendation to the Commission at its next meeting.

(d) In conducting an investigation of any grievance, or in considering the same, the Executive Secretary or the Commission shall not be limited to an investigation or consideration of only matters set forth in the grievance, but shall be permitted to inquire into the professional conduct of the attorney generally. In the event that the Executive Secretary or the Commission should consider any charges of misconduct against an attorney not contained in the grievance, the Executive Secretary shall notify the attorney of the additional charges under consideration, and the attorney shall make a written response to the additional charges under consideration within twenty (20) days after the receipt of such notification, or within such additional time as the Executive Secretary shall allow.

Any additional charges of misconduct against an attorney, after such notice has been given by the Executive Secretary and the attorney has had an opportunity to reply thereto, may be the subject of a count of any complaint filed against the attorney pursuant to Sections 11 and 12 of this Rule.

(e) It shall be the duty of every attorney against whom a grievance is filed under this Section to cooperate with the Commission's investigation, accept service, comply with the provisions of these rules, and when notice is given by registered or certified mail, claim the same in a timely manner either personally or through an authorized agent. Every attorney is obligated under the terms of Admission and Discipline Rule 2 to notify the Clerk of the Supreme Court of any change of address or name within thirty (30) days of such change, and a failure to file the same shall be a waiver of notice involving licenses as attorneys or disciplinary matters.

(f) An attorney who is the subject of an investigation by the Disciplinary Commission may be suspended from the practice of law upon a finding that the attorney has failed to cooperate with the investigation.

(1) Such a finding may be based upon the attorney's failure to submit a written response to pending allegations of professional

misconduct, to accept certified mail from the Disciplinary Commission that is sent to the attorney's official address of record with the Clerk and that requires a written response under this Rule, or to comply with any lawful demand for information made by the Commission or its Executive Secretary in connection with any investigation, including failure to comply with a subpoena issued pursuant to sections 8(d) and 9(f) or unexcused failure to appear at any hearing on the matter under investigation.

(2) Upon the filing with this Court of a petition authorized by the Commission, the Court shall issue an order directing the attorney to respond within ten (10) days of service of the order and show cause why the attorney should not be immediately suspended for failure to cooperate with the disciplinary process. Service upon the attorney shall be made pursuant to sections 12(g) and (h). The suspension shall be ordered upon this Court's finding that the attorney has failed to cooperate, as outlined in subsection (f)(1), above. An attorney suspended from practice under this subsection shall comply with the requirements of sections 26(b) and (c) of this rule.

(3) Such suspension shall continue until such time as (a) the Executive Secretary certifies to the Court that the attorney has cooperated with the investigation; (b) the investigation or any related disciplinary proceeding that may arise from the investigation is disposed; or (c) until further order of the Court.

(4) On motion by the Commission and order of the Court, suspension that lasts for more than six (6) months may be converted into indefinite suspension.

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### **Section 11.1 Summary Suspensions**

(a) Upon finding that an attorney has been found guilty of a crime punishable as a felony, the Supreme Court may suspend such attorney from the practice of law pending further order of the Court or final determination of any resulting disciplinary proceeding.

(1) The judge of any court in this state in which an attorney is found guilty of a crime shall, within ten (10) days after the finding of guilt, transmit a certified copy of proof of the finding of guilt to the Executive Secretary of the Indiana Supreme Court Disciplinary Commission.

(2) An attorney licensed to practice law in the state of Indiana who is found guilty of a crime in any state or of a crime under the laws of the United States shall, within ten (10) days after such finding of guilt, transmit a certified copy of the finding of guilt to the Executive

Secretary of the Indiana Supreme Court Disciplinary Commission.

(3) Upon receipt of information indicating that an attorney has been found guilty of a crime punishable as a felony under the laws of any state or of the United States, the Executive Secretary shall verify the information, and, in addition to any other proceeding initiated pursuant to this Rule, shall file with the Supreme Court a Notice of Finding of Guilt and Request for Suspension, and shall forward notice to the attorney by certified mail. The attorney shall have fifteen (15) days thereafter to file any response to the request for suspension. Thereafter, the Supreme Court may issue an order of suspension upon notice of finding of guilt which order shall be effective until further order of the Court.

~~(b) If after consideration pursuant to Section 11(b), the Commission determines there is reasonable cause to believe the respondent is guilty of misconduct which, if proven, would warrant suspension pending prosecution, it shall file a motion to that effect with this Court, and this Court shall so advise the hearing officer or officers.~~

~~—(1) If there has been a determination of reasonable cause as set forth under Section 11.1(b) above, and if the complaint states facts constituting such reasonable cause, the hearing officer or officers may, upon motion of the Disciplinary Commission, issue a rule against the respondent to show cause why he or she should not be suspended pending final determination of the cause and fixing a time and place certain for hearing thereon, which shall be not less than fifteen (15) days after service of notice thereof, if by personal service, and not less than twenty (20) days after mailing, if by certified or registered mail. Procedure at the hearing upon such rule to show cause shall be the same as provided herein for hearing upon the complaint and answer, except the burden of proof shall be upon the respondent. If the respondent, in the opinion of the hearing officer or officers shall fail to sustain such burden of proof, the hearing officer or officers shall submit to this Court a written recommendation whether or not the respondent be suspended pending final determination of the cause.~~

~~(2) Upon receipt of written recommendation for suspension, pending final determination of the cause, this Court may forthwith enter an order of suspension thereon. Respondent shall have fifteen (15) days thereafter to petition this Court for a review and a dissolution of such order.~~

If it appears to the Disciplinary Commission upon the affirmative vote of two-thirds (2/3) of its membership, that: (i) the continuation of the practice of law by an attorney during the pendency of a disciplinary investigation or proceeding may pose a substantial threat of harm to the public, clients, potential clients, or the administration of justice, and (ii) the alleged conduct, if true,

would subject the respondent to sanctions under this Rule, the Executive Secretary shall petition the Supreme Court for an order of interim suspension from the practice of law or imposition of temporary conditions of probation on the attorney.

(1) A petition to the Supreme Court for interim relief under this subsection shall set forth the specific acts and violations of the Rules of Professional Conduct submitted by the Commission as grounds for the relief requested. The petition shall be verified and may be supported by documents or affidavits. A copy of the petition, along with a notice to answer, shall be served by the Commission on the attorney in the same manner as provided in sections 12(g) and (h) of this rule. The Executive Secretary shall file a return on service, setting forth the method of service and the date on which the respondent was served with the petition and notice to answer. The attorney shall file an answer to the Commission's petition with the Supreme Court within fourteen (14) days of service. The answer shall be verified and may be supported by documents or affidavits. The attorney shall mail a copy of the answer to the Executive Secretary and file proof of mailing with the court.

(2) The failure of the respondent to answer the Commission's petition within the time granted by this rule for an answer shall constitute a waiver of the attorney's right to contest the petition, and the Supreme Court may enter an order of interim suspension or imposition of temporary conditions of probation in conformity with subsection (b)(5) either upon the record before it, or at the discretion of the Court, after a hearing ordered by the Court.

(3) Upon the filing of the respondent's answer and upon consideration of all of the pleadings, the Court may:

(i) order interim suspension or imposition of temporary conditions of probation upon the petition and answer in conformity with subsection (b)(5);

(ii) deny the petition upon the petition and answer; or

(iii) refer the matter to a hearing officer, who shall proceed consistent with the procedures set forth in subsection (b)(4).

(4) Upon referral to a hearing officer of an interim relief matter from the Supreme Court, the hearing officer shall hold a hearing thereon within thirty (30) days of the date of referral and render a report to the Court containing findings of fact and a recommendation within fourteen (14) days of the hearing. The Court shall thereafter act promptly on the hearing officer's report, findings and recommendation.

(5) The Supreme Court, upon the record before it or after receiving a hearing officer's report, shall enter an appropriate order. If the Court finds that the Commission has shown by a preponderance of the evidence that:

(i) the continuation of the practice of law by the respondent during the pendency of a disciplinary investigation or proceeding may pose a substantial threat of harm to the public, clients, potential clients, or the administration of justice; and

(ii) the conduct would subject the respondent to sanctions under this rule;

the Court shall grant the petition and enter an order of interim suspension or imposition of temporary conditions of probation. The order shall set forth an effective date and remain in effect until disposition of any related disciplinary proceeding or further order of the court.

(6) In the event the Court issues an order of interim relief pursuant to subsection (b)(5), the respondent may file a verified motion with the Supreme Court at any time for dissolution or amendment of the interim order by verified motion that sets forth specific facts demonstrating good cause. A copy of the motion shall be served on the Executive Secretary. Successive motions for dissolution or amendment of an interim order may be summarily dismissed by the Supreme Court to the extent they raise issues that were or with due diligence could have been raised in a prior motion. If the motion is in proper form, the Court may refer the matter to a hearing officer, who shall proceed consistent with the procedures set forth in subsection (b)(4).

(7) In the event a verified complaint for disciplinary action has not been filed by the time an order of interim relief is entered, the Disciplinary Commission shall file a formal complaint within sixty (60) days of the interim relief order. When a respondent is subject to an order of interim relief, the hearing officer shall conduct a final hearing of the underlying issues and report thereon to the Court without undue delay.

(8) An attorney suspended from practice under this section shall comply with the requirements of subsections 26(b) and (c) of this rule.

(c) Upon receipt of an order from a court pursuant to IC 31-16-12-8 or IC 31-14-12-5 stating finding that an attorney has been found to be delinquent in the payment of child support as a result of an intentional violation of an order for support, the Executive Secretary shall file with the Supreme Court a Notice of Intentional Violation of Support Order and Request for Suspension, and shall

forward notice to the attorney by certified mail. The attorney shall have fifteen (15) days thereafter to file any response to the request for suspension. Thereafter, the Supreme Court may issue an order of suspension. Such order shall be effective until further order of the Court.

### **Section 12. Prosecution of Grievances**

(a) If the Commission determines that there is reasonable cause to believe respondent is guilty of misconduct and the misconduct would not likely result in a sanction greater than a public reprimand if successfully prosecuted, and if the respondent and the Commission agree to an administrative resolution of the complaint, the Commission may resolve and dispose of minor misconduct by private administrative admonition without filing a verified complaint with the Court. Without limitation, misconduct shall not be regarded as minor if any of the following conditions exist:

- (1) The misconduct involves misappropriation of funds or property;
- (2) The misconduct resulted in or is likely to result in material prejudice (loss of money, legal rights or valuable property rights) to a client or other person;
- (3) The respondent has been publicly disciplined in the past three (3) years;
- (4) The misconduct involved is of the same nature as misconduct for which the respondent has been publicly or privately disciplined in the past five (5) years;
- (5) The misconduct includes dishonesty, misrepresentation, deceit, or fraud on the part of the respondent; or
- (6) The misconduct constitutes the commission of a felony under applicable law.

(b) An administrative admonition shall be issued in the form of a letter from the Executive Secretary to the respondent summarizing the facts and setting out the applicable violations of the Rules of Professional Conduct. A copy of the admonition letter shall first be sent to each Justice of the Supreme Court and to the Division of State Court Administration. The administrative admonition shall be final within thirty (30) days thereafter, unless set aside by the Court. If not set aside by the Court, the admonition shall be sent to the respondent, and notice of the fact that a respondent has received a private administrative admonition shall be given by the Executive Secretary to the grievant. The fact that an attorney has received a private administrative admonition shall be a public record, which shall be filed with the Clerk of this Court and shall be kept by the Executive Secretary.

(c) In the event the Commission determines that the misconduct, if proven, would warrant disciplinary action and should not be disposed of by way of an administrative admonition, the Executive Secretary shall prepare a verified complaint which sets forth the misconduct with which the respondent is charged and shall prosecute the case.

(d) The complaint shall be entitled "In the Matter of," naming the respondent. Six (6) copies shall be filed with this Court. The complaint may be verified on the basis of information and belief.

(e) Contemporaneously with the filing of the complaint, the Commission shall promptly prepare and furnish to the clerk as many copies of the complaint and summons as are necessary. The clerk shall examine, date, sign and affix his/her seal to the summons and thereupon issue and deliver the papers to the appropriate person for service. Separate or additional summons shall be issued by the clerk at any time upon proper request by the Commission.

(f) The summons shall contain:

(1) The name and address of the person on whom the service is to be effected;

(2) The Supreme Court cause number assigned to the case;

(3) The title of the case as shown by the complaint;

(4) The name, address, and telephone number of the Disciplinary Commission;

(5) The time within which this rule requires the person being served to respond, and a clear statement that in case of his or her failure to do so, the allegations in the complaint shall be taken as true.

The summons may also contain any additional information that will facilitate proper service.

~~(e)~~ (g) Upon the filing of such complaint, ~~a copy of the summons and complaint~~ shall be served upon the respondent by delivering a copy of ~~the complaint~~ them to the respondent personally or by sending a copy of ~~the complaint~~ them by registered or certified mail with return receipt requested and returned showing the receipt of the letter.

In the event the personal service or service by registered or certified mail cannot be obtained upon any respondent attorney, said summons and complaint shall be served on the Clerk of this Court as set forth below.

~~(f)~~ (h) Each attorney admitted to practice law in this State shall be deemed to have appointed the Clerk of this Court as his or her agent to receive service of any and all papers, processes or notices which may be called for by any provision of this rule. Such papers, process or notice may be served by filing the same with the Clerk of this Court as the agent for said attorney, together with an affidavit setting forth the facts necessitating this method of service. Upon receipt of such

papers, process or notice together with such affidavit, the Clerk of this Court shall immediately mail such papers, process or notice to such attorney at the attorney's address as shown upon the records of the Clerk of this Court, and the Clerk shall make an affidavit showing the mailing of such papers, process or notice to said attorney. Upon the completion of this procedure, said attorney shall be deemed to have been served with such papers, process or notice.

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#### **Section 14. Proceedings Before the Hearing Officer**

(a) The rules of pleading and practice in civil cases shall not apply. No motion to dismiss or dilatory motions shall be entertained. The case shall be heard on the complaint and an answer which ~~may~~ shall be filed by the respondent within thirty (30) days after ~~notice of the filing service of the summons and complaint, or such additional time as may be allowed upon written application to the hearing officer that sets forth good cause.~~ A written application for enlargement of time to answer shall be automatically allowed for an additional thirty (30) days from the original due date without a written order of the Hearing Officer. Any motion for automatic enlargement of time filed pursuant to this rule shall state the date when such answer is due and the date to which time is enlarged. The motion must be filed on or before the original due date or this provision shall be inapplicable. All subsequent motions shall be so designated and shall be granted by the hearing officer only for good cause shown. An answer, ~~if filed, may~~ shall assert any legal defense. Six (6) copies of such answer shall be filed with the Court. ~~An answer need not be filed, in which case the complaint shall be taken as denied.~~ A respondent may on a showing of good cause petition for a change of hearing officer within ten (10) days after the appointment of such hearing officer.

(b) The answer shall admit or controvert the averments set forth in the complaint by specifically denying designated averments or paragraphs or generally denying all averments except such designated averments or paragraphs as the respondent expressly admits. If the respondent lacks knowledge or information sufficient to form a belief as to the truth of an averment, he or she shall so state and his statement shall be considered a denial. If in good faith the respondent intends to deny only a part of an averment, he or she shall specify so much of it as is true and material and deny the remainder. All denials shall fairly meet the substance of the averments denied. Averments in a complaint are admitted when not denied in the answer. ~~An~~ The answer, ~~if filed, may~~ shall assert any legal defense. Six (6) copies of such answer shall be filed with the Court. ~~An answer need not be filed, in which case the complaint shall be taken as denied.~~ A respondent may on a showing of good cause petition for a change of hearing officer within ten (10) days after the appointment of such hearing officer.

(c) When a respondent has failed to answer a complaint as required by this section and that fact is made to appear by affidavit and an application for

judgment on the complaint, the allegations set forth in the complaint shall be taken as true. If a respondent who has failed to answer has appeared in the action, he or she (or, if appearing by counsel, his or her counsel) shall be served with written notice of the application for judgment on the complaint at least seven (7) days prior to the hearing on such application. Upon application for judgment on the complaint and in the absence of any answer by the respondent, the hearing officer shall take the facts alleged in the complaint as true and promptly tender a report to the Supreme Court in conformity with subsection (h). If a hearing officer has not been appointed by the time an application for judgment on the complaint is filed and no appearance has been filed by or on behalf of the respondent, the Supreme Court shall act directly on the application for judgment on the complaint.

~~(b) (d) Either the Executive Secretary or the respondent may file with the hearing officer a motion to take depositions or a motion to produce certain documents or records, setting forth the reasons why such depositions should be taken or such records should be produced. The hearing officer may permit the taking of such depositions or may require the production of documents or records under such terms and conditions as the hearing officer may deem proper. Discovery shall be available to the parties on such terms and conditions shall that, as nearly as practicable, follow the Indiana Rules of Civil Procedure pertaining to discovery proceedings.~~

~~(c) (e) At the discretion of the hearing officer, or upon the request of either party, a pre-hearing conference may shall be ordered for the purpose of obtaining admissions, narrowing the issues presented by the pleadings, requiring an exchange of the names and addresses of prospective witnesses and the general nature of their expected testimony, considering the necessity or desirability of amendments to the verified complaint and answer thereto, and such other matters as may aid in the disposition of the action.~~

~~(d) (f) The grievant, the respondent, and the Commission shall be given not less than fifteen (15) days written notice of the hearing date. The respondent shall have the right to attend the hearing in person, to be represented by counsel, to cross-examine the witnesses testifying against him or her and to produce at the hearing and require the production of evidence and witnesses in his or her own behalf at the hearing, as in civil proceedings. All notices connected with processing of such complaint shall be issued only under the direction of the hearing officer or hearing officers, and no other court or judicial officer of this State shall have jurisdiction to issue any orders or processes in connection with a disciplinary complaint. Upon request of a party, the hearing officer may issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it or his or her attorney, who shall fill it in before service. The hearing officer may also authorize an attorney admitted to practice law in this state who has appeared for a party, as an officer of the court, to issue and sign such subpoena. Subpoenas for the attendance of witnesses and production of documentary evidence shall conform~~

to the provisions of Trial Rule 45. The hearing officer or officers shall have authority to enforce, quash or modify subpoenas upon proper application by an interested party or witness.

(e) (g) The proceedings may be summary in form and shall be without the intervention of a jury and shall be reported.

(f) (h) Within thirty (30) days after the conclusion of the hearing, the hearing officer shall determine whether misconduct has been proven by clear and convincing evidence and shall submit to the Supreme Court written findings of fact. Either party may request or the hearing officer at his or her own motion may make a recommendation concerning the disposition of the case and the discipline to be imposed. Such recommendation is not binding on the Supreme Court. A copy of said findings and any recommendations shall be served by the hearing officer on the respondent and the Executive Secretary of the Disciplinary Commission at the time of filing same with the Supreme Court.

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### **Section 17. Resignations and Admission of Misconduct**

(a) An attorney who is the subject of an investigation into, or a pending proceeding involving, allegations of misconduct may resign as a member of the bar of this Court, or may consent to discipline, but only by delivering to the Court an affidavit stating that the respondent desires to resign or to consent to discipline and that:

(1) The respondent's consent is freely and voluntarily rendered; he or she is not being subjected to coercion or duress; he or she is fully aware of the implications of submitting his or her consent;

(2) The respondent is aware that there is a presently pending investigation into, or proceeding involving, allegations that there exist grounds for his or her discipline the nature of which shall be specifically set forth;

(3) The respondent acknowledges that the material facts so alleged are true; and

(4) The respondent submits his or her resignation or consent because the respondent knows that if charges were predicated upon the matters under investigation, or if the proceeding were prosecuted, he or she could not successfully defend himself or herself.

(b) Upon receipt of the required affidavit, this Court ~~shall~~ may enter an order approving the resignation or imposing a disciplinary sanction on consent.

(c) Such order shall be a matter of public record. However, the affidavit required under the provisions of (a) above shall not be publicly disclosed or made available for use in any other proceeding except upon order of this Court.

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### **Section 17.1. Termination of Probation**

Unless otherwise provided in the order of probation, an attorney on probation at any time after 10 days prior to expiration of the period of probation may serve on the Executive Secretary (i) an affidavit showing successful compliance with all terms of probation, and (ii) an application for termination of probation. The Executive Secretary shall have ten (10) days after receipt to serve written objections on the attorney. Upon service of any objection the probation shall continue until further ordered by the Court. If no objection has been served, termination shall be effective ten (10) days (or thirteen (13) days if the application is served by mail) after receipt by the Executive Secretary.

### **Section 17.2. Revocation of Probation**

(a) Motion to Revoke. If the Executive Secretary receives information that an attorney on probation may have violated any condition of probation, the Executive Secretary may file a verified motion to revoke probation with the Court, setting forth specific facts in support of the motion. A motion for revocation of an attorney's probation shall not preclude the Commission from filing independent disciplinary charges based on the same conduct alleged in the motion.

(b) Response to Motion. Within ten (10) days after service of a petition under subparagraph (a), the attorney shall file an answer under penalties of perjury admitting or controverting each of the allegations contained in the revocation motion. A general denial shall not be allowed and, if filed, will be taken as a failure to answer. The attorney's failure to answer timely will be deemed to be an admission to the averments in the motion to revoke probation, unless the Court in its discretion elects to give consideration to any answer that is filed before the Court acts on the revocation motion.

(c) Burden of Proof and Matters Considered. The Executive Secretary has the burden of establishing by a preponderance of the evidence any violations of conditions of probation. Any reliable evidence of probative value may be considered regardless of its admissibility under rules of evidence so long as the opposing party is accorded a fair opportunity to controvert it.

(d) Disposition. After the time for filing an answer has expired, the Court may dispose of the matter on the pleadings and supportive materials or, in the event there are material factual disputes, may refer it to a hearing officer who

shall hold a hearing on the revocation motion within fourteen (14) days of the date the hearing officer is appointed. The hearing officer shall file with the Clerk of the Court findings and a recommendation within ten (10) days of the hearing. Following receipt of the hearing officer's findings and recommendation, the Court shall enter an order granting or denying the revocation motion and entering an appropriate disposition consistent with the Court's ruling in the matter.

### **Section 17.3. Service, Filing and Time Calculation**

(a) Service. Service upon the attorney and the Executive Secretary shall be by personal service or by certified mail return receipt requested. Service shall be complete and sufficient upon mailing when served upon the attorney at his current address of record on the roll of attorneys, regardless of whether the attorney claims the mail.

(b) Filing. All papers served shall be filed with the Clerk of the Court.

c) Time Calculation. If service is made by mail, an additional three (3) days shall be allowed for service of any responsive document under Section 17.1 or 17.2.

### **Section 17.4. Interim Suspension**

In addition to a motion for revocation of probation, the Executive Secretary may also file a verified motion setting forth good cause for the immediate interim suspension of the attorney's license to practice. Upon a showing of good cause, the Court may order the attorney's license suspended on an interim basis until such time as the revocation motion has been determined.

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### **Section 21. Annual registration fee**

Funds necessary to enable the Commission to carry out its functions, obligations and duties under this rule shall be provided as follows:

(a) Except as provided in subsection (b), each attorney who is a member of the bar of this Court on August 1, 1978, ~~and~~ each attorney who is a member on August 1 of each year thereafter, and each attorney admitted *pro hac vice* pursuant to Admission and Discipline rule 3, Section 2, shall so long as the attorney is a member of the Bar of this Court, pay a registration fee of ~~seventy dollars (\$70)~~ eighty dollars (\$80.00) a year on or before October 1 of such year. For each day after October 1 of a year that an attorney's registration fee is unpaid, an additional delinquent fee shall be added to the registration fee in the amount of \$5.00 for each day of delinquency, not to exceed \$100.00.

Any attorney admitted to practice law in this State on a date subsequent to

August 1 of each year shall, within ten (10) days of the date of his or her admission to the bar of the Court, or by October 1 of said year, whichever date is later, pay a registration fee of ~~\$70.00~~ eighty dollars (\$80.00). The Clerk of this Court shall furnish to the Commission the names and addresses of all persons admitted to practice subsequent to August 1 of each year as said persons are admitted.

(b) No registration fee shall be required of an attorney who files with the Clerk, on or before the date the registration fee would otherwise be due, an affidavit that he or she neither holds judicial office nor is engaged in the practice of law in this State. An attorney who is sixty-five (65) years old or older and files such an exemption affidavit may designate his or her exemption affidavit as a Retirement Affidavit. Such an affidavit once filed shall be effective for each succeeding year. An exempt or retired attorney shall promptly notify the Clerk of a desire to return to active status, and pay the applicable registration fee for the current year, prior to any act of practicing law.

(c) On or before August 1, 1975, and the first day of August in each subsequent year, the Clerk of this Court shall mail to each attorney then admitted to the bar of this Court or practicing law in this state, a notice that the registration fee must be paid or an exemption affidavit filed with the clerk on or before the first day of October. The clerk shall also send a copy of such notice to each clerk for each circuit and superior court in this State for posting in a prominent place in the courthouse and to the Indiana State Bar Association, the Bobbs-Merrill Publishing Company and the West Publishing Company for publication in their respective magazine and advance sheets. Provided, however, the failure of the Clerk to send such notice shall not mitigate the duty to pay the required fee.

(d) Any attorney who fails to pay the registration fee or file the exemption affidavit referred to in subsections (a) and (b) shall be subject to an order of suspension from the practice of law in this State and shall be subject to the sanctions for contempt of this Court in the event he or she thereafter engages in the practice of law in this State. In the event there is no other basis for the continued suspension of the attorney's license to practice law, such an attorney's privilege to practice law shall be reinstated upon submission to the Clerk of a written application for reinstatement and payment of:

- (1) the unpaid registration fee for the year of suspension;
- (2) any delinquent fees for the year of suspension due pursuant to subsection (a);
- (3) the unpaid registration fee for the year of reinstatement, if different from the year of suspension; and
- (4) an administrative reinstatement fee of two hundred dollars (\$200.00).

The Clerk shall distribute the administrative reinstatement fee referred to in ~~paragraph~~subsection (d)(4) in equal shares to the Disciplinary Commission Fund and the Continuing Legal Education Fund.

(e) The Clerk of this Court shall issue a certificate of good standing approved by this Court to an attorney upon the receipt of the annual registration fee.

(f) All funds collected by the Clerk of this Court on behalf of the Disciplinary Commission shall be deposited in a special account to be maintained by the Clerk and designated "Clerk of the Courts-Annual Fees." As collected, the Clerk shall thereafter issue those funds to the Disciplinary Commission, and the Executive Secretary shall cause the same to be deposited into a special account designated "Supreme Court Disciplinary Commission Fund." Disbursements from the fund shall be made solely upon vouchers signed by or pursuant to the direction of the Chief Justice of this Court. All salaries to be paid shall be specifically ordered and approved by this Court.

***These amendments shall take effect on January 1, 2001.***

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