

# Survey of Recent Developments in Professional Responsibility

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## I. INTRODUCTION

Several cases during the survey period are noteworthy. Some are of interest because they address issues under the Indiana Rules of Professional Conduct<sup>1</sup> ("Rules"), rather than the former Indiana Code of Professional Responsibility<sup>2</sup> ("Code"). Others deserve attention because they represent refinements of earlier cases or somewhat unique facts.

## II. DISCUSSION

### A. *Ex Parte* Contact

Rule 3.5 of the Indiana Rules of Professional Conduct speaks to permitted communications between a lawyer and a judge. Its operative terms are that a lawyer shall not "[c]ommunicate *ex parte* with [a judge] except as permitted by law."<sup>3</sup>

The Comment to Rule 3.5 emphasizes that a lawyer should be familiar with the Code of Judicial Conduct, which specifies other additional improper means of influencing a tribunal.<sup>4</sup> A lawyer, as also noted in the Comment, is "required to avoid contributing to a violation of [the Code of Judicial Conduct]."<sup>5</sup> Canon 3 of the Indiana Code of Judicial Conduct similarly provides that a judge, "except as authorized by law," may "neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding."<sup>6</sup>

Although referencing Rules 1-102 (A)(1) and (5) of the former Indiana Code of Professional Responsibility and Canons 1, 2(A) and (B), and 3(A)(4) of the Indiana Code of Judicial Conduct, the Indiana Supreme

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1. INDIANA RULES OF PROFESSIONAL CONDUCT (1987) [hereinafter RULES OF PROF. CONDUCT].

2. INDIANA CODE OF PROFESSIONAL RESPONSIBILITY (1986).

3. RULES OF PROF. CONDUCT Rule 3.5.

4. *Id.* comment.

5. *Id.*

6. INDIANA CODE OF JUDICIAL CONDUCT Canon 3(A)(4) (1987).

Court's language in *In re Lewis*<sup>7</sup> is useful in understanding Rule 3.5 of the current Indiana Rules of Professional Conduct. In *Lewis*, the respondent discussed the merits of various criminal cases in his chambers *ex parte*.<sup>8</sup> The discussions generally were with friends or relatives of criminal defendants, and the conversations lent themselves to the suggestion that friends of the judge were favored in judicial proceedings.<sup>9</sup>

The court acknowledged *sub silentio* that *ex parte* contact is not flatly prohibited. When the line is crossed between procedure and merit, however, ethical concerns arise. The court suggested that the merits of a controversy might be discussed *ex parte* in justifiable circumstances.<sup>10</sup> The Rules and the Code clearly allow *ex parte* contact when permitted by law,<sup>11</sup> but one can expect in future cases that this will not be the only exception recognized as "justifiable" by the court.

In any event, the respondent's conduct in *In re Lewis* obviously was without justification. The court's language in describing the test for permissible *ex parte* conduct and in applying the ethical concerns to the facts of this case, are illuminating:

Respondent's conduct was not limited to casual discourse with individuals concerned with matters then pending before Respondent. The Respondent freely and openly discussed the merits of the controversy in an atmosphere which is without justification in the professional resolution of disputes. Respondent was not an attorney serving as a judge, but conducted his judicial duties as a broker of favor.<sup>12</sup>

Former Disciplinary Rule 7-110(B) of the Code similarly provided that an attorney could not communicate, or cause another to communicate, regarding the merits of a case, with a judge, except in specific situations.<sup>13</sup> Those situations included communication during an official proceeding; in writing (if a copy was promptly delivered to the adversary); orally (upon adequate notice to the adversary); or, as otherwise permitted by law or the Code of Judicial conduct.<sup>14</sup>

Under the Code, the term "merits" "has often been interpreted broadly to include matters that might *indirectly* affect how the judge

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7. 535 N.E.2d 127 (Ind. 1989).

8. *Id.* at 128.

9. *Id.* at 128-29.

10. *Id.* at 129.

11. *See, e.g.*, IND. R. TR. P. 65(b) (1987) (which provides for the issuance of a temporary restraining order without notice).

12. *Lewis*, 535 N.E.2d at 129.

13. INDIANA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-110(B).

14. *Id.*

might ultimately rule.”<sup>15</sup> It should also be realized that Rule 3.5 of the Indiana Rules of Professional Conduct does not specifically limit the prohibition against communication *ex parte* with a judge to the merits of a case. Indeed, it has been said that “[u]nder the Model Rules, *ex parte* communications are barred even if it is not clear that the lawyer intended to influence the Judge.”<sup>16</sup>

How far the Indiana Supreme Court will go in restricting *ex parte* contact is yet to be seen, but it would not seem workable to prevent contact on procedural matters which do not give one side of a controversy a substantial advantage in the proceeding. *In re Lewis* does not answer such questions; yet, the case is significant in that it does seem to clarify that *ex parte* contact is prohibited even if the other party is a non-lawyer (in which case the judge commits a violation of the ethics rules), and that a lawyer is subject to Rule 3.5 even if he does not represent a party to the action. Other cases have reached similar results: “A lawyer need not represent a party to a case to be subject to the Rule 3.5(b) proscription against *ex parte* communication. . . .”<sup>17</sup> Nor need the lawyer make the improper communication directly as long as the lawyer instigates the communication.”<sup>18</sup>

Professors Geoffrey Hazard and William Hodes have perhaps best described the rationale for the prohibition of Rule 3.5(b), which they rightly see as basic to the adversary system of justice:

The adversary system is based on the assumption that equals will meet in a fair contest before a neutral tribunal. Unauthorized *ex parte* contacts directly undermine the system, for they deprive the opposing party of an opportunity to respond. This is true

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15. [1984] LAW. MANUAL OF PROFESSIONAL CONDUCT (ABA/BNA) 61:804 (emphasis added) [hereinafter *LAWYER'S MANUAL*].

16. *Id.*

17. *Id.* (citing *Florida Bar v. Saphirstein*, 376 So. 2d 7 (Fla. 1979) (lawyer who contacted referee in pending disciplinary matter involving another lawyer to influence referee's decision); *Florida Bar v. Meson*, 334 So. 2d 1 (Fla. 1976) (lawyer submitting *amicus* brief to supreme court improperly discussed case with justice during golf game and sent secret memorandum on main issue of case)).

18. *LAWYER'S MANUAL* at 61:804-05 (citing *People v. Hertz*, 638 P.2d 794 (Colo. 1982) (suggesting to principal witness in grievance proceeding that witness write letter to chief justice recanting testimony)). Compare *Professional Ethics Commission of the Maine Board of Overseers of the Bar, Opinion 88*, *LAWYER'S MANUAL*, *supra* note 15, at 901:4206 (Aug. 31, 1988) (no duty to inform opposing counsel that member of administrative tribunal sent unsolicited letter of support to client) with *In re Ragatz*, *LAWYER'S MANUAL*, *supra* note 15 (4 Current Reports 348) (Oct. 4, 1988) (60-day suspension for responding to conversation initiated by judge and replying by letter without providing a copy to opposing counsel).

even in the absence of bribery or other obviously improper conduct, which are prohibited. . . .<sup>19</sup>

One test for prohibited *ex parte* contact should be whether the contact likely prevented both parties from receiving neutral consideration on *significant* matters, whether procedural or substantive, and whether time constraints necessitated the *ex parte* contact. Any doubts should be resolved in favor of the unrepresented party. In *In re Lewis*, the respondent failed this test.

### *B. Criminal Acts, Conduct Prejudicial to the Administration of Justice and Disability*

*In re Roche*<sup>20</sup> is significant,<sup>21</sup> among other reasons, because the Indiana Supreme Court correctly noted that Rule 8.4(b) (committing a crime that reflects adversely on the honesty, trustworthiness or fitness as a lawyer in other respects) and 8.4(d) (engaging in conduct prejudicial to the administration of justice) "closely parallel the provisions of [former] Disciplinary Rule 1-102(A)(5) and (6) of the superseded *Code*."<sup>22</sup> Accordingly, "the analysis of the conduct and the bounds of the professional standards under the *Code* are fully applicable under the provisions of the *Rules of Professional Conduct*."<sup>23</sup>

Following the lead of *In re Jones*,<sup>24</sup> decided under the former Code, the court saw a nexus between the illegal possession of marijuana and fitness as an attorney. Thus, the *Roche* case presented a violation of Rule 8.4(b).<sup>25</sup> Following the lead of *In re Oliver*,<sup>26</sup> also decided under the former Code, the court observed that the arrest and conviction for illegal possession of marijuana while the respondent in *Roche* served as county prosecutor, constituted conduct prejudicial to the administration of justice, a violation of Rule 8.4(d).<sup>27</sup>

The court underscored that, but for the "numerous mitigating circumstances,"<sup>28</sup> it would be inclined to impose a far more serious sanction

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19. G. HAZARD & W. HODES, *THE LAW OF LAWYERING* 389-90 (1985 & Supp. 1989) [hereinafter *THE LAW OF LAWYERING*].

20. 540 N.E.2d 36 (Ind. 1989).

21. The author represented the respondent before the Indiana Supreme Court in *Roche*.

22. *Roche*, 540 N.E.2d at 38.

23. *Id.*

24. 515 N.E.2d 855 (Ind. 1987).

25. 540 N.E.2d at 38.

26. 493 N.E.2d 1237 (Ind. 1986).

27. 540 N.E.2d at 38.

28. *Id.*

than the agreed public reprimand.<sup>29</sup> Among the mitigating circumstances referenced by the court were exemplary conduct in that the respondent was a war hero; he had to undergo counseling in dealing with the trauma of war; he recently lost a child; he devoted extensive time to *pro bono* work; he devoted more time than expected to prosecutorial duties; he had enjoyed an excellent relationship with law enforcement personnel; he had never before been disciplined; he unhesitatingly cooperated with the disciplinary investigation; he accepted responsibility for the misconduct, and; he was genuinely remorseful.<sup>30</sup> The sanction imposed in this case should not be viewed as a departure from the rule of law previously announced by the court. Rather, *Roche* should be seen as a rejection of rigid sanctions and an acceptance of flexible sanctions based upon the totality of mitigating and other circumstances.

*In re Hudgins*<sup>31</sup> dealt with disciplinary charges brought following an attorney's conviction for child molesting. The hearing officer, however, found that the misconduct did not involve an attorney-client relationship and that the respondent had effectively represented clients.<sup>32</sup> Based upon psychiatric testimony, the hearing officer further concluded that the respondent engaged in misconduct, yet was not a danger to the public, courts or the profession.<sup>33</sup>

The court noted a pattern of repeated molestation and easily found a violation of former Disciplinary Rule 1-102(A)(3) (commission of an act involving moral turpitude).<sup>34</sup> The only remaining issue was the appropriate sanction.

The court acknowledged that some jurisdictions have been somewhat lenient in imposing discipline, while others have imposed severe sanctions.<sup>35</sup> For example, in *In re Safran*,<sup>36</sup> and *In re Kimmel*,<sup>37</sup> attorneys were placed on disciplinary probation for sexual misconduct when there was a showing that repeated incidents were unlikely. The court rejected that approach and placed Indiana squarely within the group of courts imposing severe sanctions. Reminding that danger to the public is only one factor to consider in determining the appropriate sanction,<sup>38</sup> and over the dissents of Chief Justice Shephard and Associate Justice DeBruler,

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29. *Id.*

30. *Id.* at 37.

31. 540 N.E.2d 1200 (1989).

32. *Id.* at 1201.

33. *Id.* at 1202.

34. See also RULES OF PROF. CONDUCT Rule 8.4(b) (1987).

35. *Hudgins*, 540 N.E.2d at 1201 (citing 43 A.L.R. 4th 1062 (1983)).

36. 18 Cal. 3d 134, 554 P.2d 329, 133 Cal. Rptr. 9 (1976).

37. 322 N.W.2d 224 (Minn. 1982).

38. 540 N.E.2d at 1202-03.

who would have imposed a lesser sanction, the respondent was disbarred.<sup>39</sup>

Whether the result in this case would have differed under the Indiana Rules of Professional Conduct seems doubtful, but the court is in a period of transition, with new members joining the court. Different facts could see a different result. It should also be noted that the "moral turpitude" standard has been heavily criticized, and the standard of Rule 8.4(b) has been seen by some as a more lenient standard:

Commentators have also criticized the Model Code's reference to "moral turpitude" as inviting subjective judgments of diverse lifestyles instead of measuring a lawyer's ability and fitness to practice law. . . . Model Rule 8.4(b), by contrast, only reaches instances of criminal sexual misconduct or sexual exploitation of a nature indicating that the lawyer is unworthy of the confidence reposed in him or her.<sup>40</sup>

In connection with disability, the majority pointed out that Section 25 of Admission and Discipline Rule 23 could not be invoked because the respondent did not suffer from "any disability by reason of mental illness or infirmity, or because of the use of or addiction to intoxicants or drugs. . . ."<sup>41</sup> Instead, expert testimony was to the effect that the respondent was aware of the nature and quality of his conduct and, moreover, it could not be guaranteed that he would not again molest children. Beyond this, disbarment was seen as necessary, in the majority's view, because of the impact such conduct would have on the public's perception of the respondent's fitness to practice law.<sup>42</sup>

Similarly, in terms of the disability issue, in *In re Powell*,<sup>43</sup> a pivotal factor was that the attorney did know right from wrong.<sup>44</sup> There, the attorney misrepresented the status of cases, required releases exonerating him from malpractice liability and converted client funds for personal use. In defense, it was claimed that the respondent was depressed and,

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39. *Id.* at 1203.

40. *LAWYER'S MANUAL*, *supra* note 15, at 101:303-04. After this article was written, the Indiana Supreme Court handed down its decision in *In re Kern*, 551 N.E.2d 457 (Ind. 1990), in which the Respondent was given a two-year suspension following his plea of guilty to child molesting under IND. CODE § 35-50-2-7(b), involving the fondling of a girl 15 years and 11 months old. The Court effectively announced that child molesting *per se* constitutes unfitness to practice law under Rule 8.4(b) and warrants suspension or disbarment. Suspension, rather than disbarment, was evident in view of the fact that the child's age was unknown to the Respondent, while he did know that she was the mother of a child more than one year old.

41. *Hudgins*, 540 N.E.2d at 1202-03.

42. *Id.* at 1202.

43. 526 N.E.2d 971 (Ind. 1988).

44. *Id.* at 973.

therefore, disabled. Rejecting that contention, it was concluded that the respondent was not disabled at the time of the misconduct.<sup>45</sup> The court consciously sidestepped the issue of whether a serious disability would serve as a complete defense or as a mitigating factor and found that the respondent violated Indiana Code section 35-43-4-3, and Disciplinary Rules 1-102(A)(4), (5) and (6); 6-102(A); 7-101(A)(3); and, 9-102(A) and (B)(1), and disbarred the respondent.<sup>46</sup> Such conduct might now be seen as a violation of current Rules 1.4, 1.5, 1.8, 1.15 and 8.4.

### C. *Permissive Withdrawal of Representation*

Two cases during the survey period addressed the issue of under what circumstances an attorney may voluntarily withdraw his representation of a client.

In *Conn v. State*,<sup>47</sup> the Indiana Supreme Court entertained an appeal from a defendant convicted of dealing in a controlled substance. One week before trial, the trial court conducted a hearing upon a request by one of the appellant's lawyers to withdraw from the case. The request was based upon the fact that counsel was himself a party to a dissolution action set for hearing in another court on the same day as his client's scheduled trial date.<sup>48</sup>

The court heard from counsel that each was prepared and heard from the appellant that he objected, wanting both to appear. When pressed by the court to articulate a more specific reason for his objection, the appellant stated that he needed time to inform the counsel who would stay on the case about some matters previously disclosed only to the counsel who would withdraw. The court noted the opportunity remaining to the defense to complete further preparation for trial and granted counsel leave to withdraw.<sup>49</sup>

In ruling on the propriety of the trial court's granting of leave to withdraw, the court considered the applicability of Disciplinary Rule 2-110.<sup>50</sup> In upholding the trial court's granting of the motion to withdraw, the court noted that co-counsel was already in a state of readiness, with an additional week left for further preparation, and that co-counsel had in fact conducted himself at trial in a skilled and active fashion.<sup>51</sup> The court held that the appellant's right to legal representation was fully

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45. *Id.*

46. *Id.* at 973-74.

47. 535 N.E.2d 1176 (Ind. 1989).

48. *Id.* at 1181.

49. *Id.*

50. *Id.*

51. *Id.*

protected, and the cause given by counsel in support of his request to withdraw satisfied Disciplinary Rule 2-110(C)(4), allowing withdrawal where a physical or mental condition makes it difficult to effectively represent a client, and Indiana Code section 35-36-8-2(b)(5), which sanctions withdrawal upon manifest necessity.<sup>52</sup>

As previously noted, Disciplinary Rule 2-110(C)(4) is no longer applicable; while there is no precise corollary rule to Disciplinary Rule 2-110, the applicable rule under the factual situation of *Conn* would appear to be Rule 1.16(b)(6).<sup>53</sup> This rule provides that a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client *or* if "other good cause for withdrawal exists."<sup>54</sup> Presumably, a conflicting trial date under the circumstances set forth in *Conn* would constitute sufficient good cause for purposes of Rule 1.16. An attorney, even then, must exercise sound judgment in determining in which case he should seek leave to withdraw.

Client consent is not expressly required, but the attorney is subject to Rule 1.16(c), which provides that a tribunal may order continued representation notwithstanding good cause for terminating the representation.<sup>55</sup> In addition, caution is urged in withdrawing because Rule 1.16(b)(6) does not permit withdrawal when the client will be materially and adversely affected except upon a showing of "good cause."

In *Flowers v. State*,<sup>56</sup> the appellant sought to withdraw his guilty plea at the sentencing hearing, at which time his counsel moved to withdraw from the case pursuant to Disciplinary Rule 2-110 due to a conflict of interest. The trial court did not permit counsel to withdraw, and the Indiana Supreme Court upheld the trial court's denial of the attorney's motion to withdraw, apparently based upon the conclusion that such a withdrawal would result in a delay of the administration of justice.<sup>57</sup> Unfortunately, the case does not divulge the nature of the alleged conflict of interest.

In upholding the trial court's denial of counsel's motion to withdraw, the court stated merely that whether to allow counsel to withdraw is a matter of trial court discretion.<sup>58</sup> Of course, counsel is obliged to continue representation under Rule 1.16(c) when so ordered by a trial court.

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52. *Id.* at 1182.

53. RULES OF PROF. CONDUCT Rule 1.16(b) (1987).

54. *Id.*

55. See LAWYER'S MANUAL, *supra* note 15, at 31:1101.

56. 528 N.E.2d 57 (Ind. 1988).

57. *Id.* at 59.

58. *Id.*

#### D. *Misappropriation of Client Funds*

In *Matter of Bryant*,<sup>59</sup> a client was forced to sue his attorney for the purpose of recovering a settlement fee which had been obtained by the attorney and deposited by the attorney in his own bank account. The respondent did eventually pay his client the recovered amount, but only after the client had obtained a judgment against the respondent nearly one year after the negotiation of the settlement.

The Indiana Supreme Court determined that the respondent engaged in conduct involving deceit and misrepresentation, which adversely reflected on his fitness to practice law, in violation of Disciplinary Rule 1-102(A)(3) (providing that a lawyer shall not engage in illegal conduct involving moral turpitude), Disciplinary Rule 1-102(A)(4) (which prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation), and Disciplinary Rule 1-102(A)(6) (prohibiting a lawyer from engaging in any other conduct that adversely reflects on his fitness to practice law).<sup>60</sup> The court further found that the failure to render and appropriately account or promptly pay over to the client the funds, as requested by the client, violated Disciplinary Rule 9-102 (B)(3) and (4), which require an attorney to maintain complete records of all client funds and to promptly pay to the client, as requested by the client, the funds which the client is entitled to receive.<sup>61</sup> Rules currently implicated would include Rules 1.4, 1.5, 1.15, 4.1 and 8.4.

#### E. *Frivolous Causes of Action*

A recent Indiana case will undoubtedly have an impact on attorneys who bring frivolous or groundless causes of action. In *Kahn v. Cundiff*,<sup>62</sup> the attorney was required by the Court of Appeals for the First District of Indiana to pay the attorney fees incurred by one of the original defendants in the action who was dismissed from the action immediately prior to trial.

A brief review of the facts surrounding the initial complaint filed by Kahn is helpful in ascertaining the significance of the imposition of attorney fees against him. On September 19, 1985, Rachel Cundiff was driving a vehicle owned by her husband, Larry Cundiff. Rachel collided with another vehicle and injured its passengers, Paulette Brown and Terry Willis.

On December 1, 1986, the attorney filed a complaint on behalf of Brown and Willis against both Rachel and Larry. The complaint alleged

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59. 524 N.E.2d 1288 (Ind. 1988).

60. *Id.* at 1290.

61. *Id.*

62. 533 N.E.2d 164 (Ind. 1989).

that Rachel negligently operated a vehicle owned by Larry and caused injury to Brown and Willis. The theory of Larry's liability put forth by the attorney was apparently based upon either negligent entrustment or vicarious liability.<sup>63</sup>

On June 16, 1987, prior to selection of the jury, the attorney for Brown and Willis admitted that he had no facts to support a claim against Larry; accordingly, the trial court dismissed Larry from the case.<sup>64</sup> Thereafter, Larry filed a request for attorney fees pursuant to Indiana Code section 34-1-32-1, providing for the award of attorney fees to defendants who are made the subject of a frivolous, unreasonable or groundless cause of action.<sup>65</sup> Subsequently, the trial court granted Larry's request for attorney fees and ordered Brown and Willis' attorney to pay Larry \$8,246.65 in attorney fees and \$411.11 for jury costs in connection with the filing of an action which was frivolous, unreasonable or groundless.<sup>66</sup>

In upholding the trial court's award of attorney fees to Larry (although the appellate court reversed the trial court's award of attorney fees with regard to the amount and remanded the case for a hearing as to reasonable attorney fees), the appellate court emphasized the trial court's finding that at no time during the entire lawsuit was the attorney ever able to produce *any* evidence that Larry should be a party to the lawsuit.<sup>67</sup>

Indiana Code section 34-1-32-1 provides in relevant part:

(b) In any civil action, the court may award attorney's fees as part of the cost to the prevailing party, if it finds that either party:

- (1) *brought the action* or defense on a claim or defense that is *frivolous, unreasonable, or groundless*;
- (2) *continued to litigate* the action or defense after the party's claim or defense clearly became frivolous, unreasonable, or groundless; or
- (3) litigated the action in bad faith . . . .<sup>68</sup>

In determining the propriety of the award of attorney fees under Indiana Code section 34-1-32-1, the court attempted to define the statutory terms "frivolous, unreasonable or groundless."<sup>69</sup> In so doing, the

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63. *Id.* at 168.

64. *Id.* at 166.

65. *Id.*

66. *Id.*

67. *Id.* at 167.

68. IND. CODE § 34-1-32-1 (1988) (emphasis added).

69. *Kahn*, 533 N.E.2d at 170.

court looked to Rule 3.1 of the Indiana Rules of Professional Conduct for guidance in defining the term "frivolous."<sup>70</sup> Rule 3.1 provides in relevant part: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."<sup>71</sup> Based on the comments to Rule 3.1 and an examination of case law from other jurisdictions, the court concluded that a claim or defense is "frivolous"

(a) if it is taken primarily for the purpose of harassing or maliciously injuring a person, or (b) if the lawyer is unable to make a good faith and rational argument on the merits of the action, or (c) if the lawyer is unable to support the action taken by a good faith and rational argument for an extension, modification, or reversal of existing law.<sup>72</sup>

The court went on to hold that "a claim or defense is unreasonable if, based on a totality of the circumstances, including the law and facts known at the time of the filing, no reasonable attorney would consider that the claim or defense was worthy of litigation or justified."<sup>73</sup> Finally, the court held that "a claim or defense is groundless if no facts exist which support the legal claim relied on and presented by the losing party."<sup>74</sup>

The absence of facts to support the attorney's claims of negligent entrustment and vicarious liability, combined with the court's stated definitions of "frivolous, unreasonable and groundless," led the appellate court to agree with the trial court's legal conclusion that Kahn's claim was frivolous, unreasonable or groundless.<sup>75</sup>

*Kahn* is of particular interest in that in order to determine the definition of "frivolous" for purposes of Indiana Code section 34-1-32-1, the court looked to Rule 3.1 of the Indiana Rules of Professional Conduct for guidance. Rule 3.1 also provides guidance as to what is *not* "frivolous." The comments to Rule 3.1 state that an action "is not frivolous merely because the facts have not been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail."<sup>76</sup> The action is frivolous,

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70. *Id.*

71. RULES OF PROF. CONDUCT Rule 3.1 (1987).

72. *Kahn*, 533 N.E.2d at 170.

73. *Id.* at 170-71.

74. *Id.* at 171.

75. *Id.*

76. RULES OF PROF. CONDUCT Rule 3.1 comment (1987).

according to the comment, if taken primarily to harass or maliciously injure or if the attorney cannot make a good faith argument for extension, modification or reversal of existing law.<sup>77</sup>

A brief history of the adoption of Rule 3.1 perhaps places these decisions in context and makes clear that Rule 3.1 changes the guidelines under the former Code of Professional Responsibility to require a reasonable basis for the action, with an objective standard, but with an exception in criminal cases whereby the prosecution may be put to its proof regardless of whether there is a reasonable basis for the defense:

When it drafted Model Rule 3.1, the ABA Commission on Evaluation of Professional Standards explained the relationship of the proposed rule to the Code's disciplinary rules that it replaced:

Rule 3.1 is to the same general effect as DR 7-102(A)(1), with three qualifications. First, the test of improper conduct is changed from 'merely to harass or maliciously injure another' to the requirement that there be 'reasonable basis for' the litigation measure involved. This includes the concept stated in DR 1-102(A)(2) that a lawyer may advance a claim or defense unwarranted by existing law if 'it can be supported by good faith argument for an extension, modification, or reversal of existing law.' Second, the test in Rule 3.1 is an objective test, whereas DR 7-102(A)(1) applies only if the lawyer 'knows or when it is obvious' that the litigation is frivolous. Third, Rule 3.1 has an exception that in a criminal case, or a case in which incarceration of the client may result (for example, certain juvenile proceedings), the lawyer may put the prosecution to its proof even if there is no 'reasonable basis' for defense." ABA, Proposed Final Draft, Model Rules of Professional Conduct at 121 (1981). The reporter for the commission noted at the ABA's 1983 midyear meeting that "[a] 'not frivolous' standard was adopted rather than one based on the concepts 'harass' or 'maliciously injure,' to track the standard generally used and defined in the law of procedure." ABA, *The Legislative History of the Model Rules of Professional Conduct: Their Development in the ABA House of Delegates* at 119 (1987). The ABA House of Delegates adopted the proposed rule without change.<sup>78</sup>

#### *F. Disclosure and Candor to Tribunals, Dishonesty, Deceit and Misrepresentation*

Several recent Indiana decisions have focused on an attorney's duty of candor and disclosure to tribunals, as well as a general duty to refrain from misrepresenting facts and the law to the court.

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77. *Id.*

78. LAWYER'S MANUAL, *supra* note 15, at 61:104.

In *In re Rajan*,<sup>79</sup> the Indiana Supreme Court held that a deliberate misrepresentation of certain matters to a government agency in connection with an application submitted for employment with the Pension Benefit Guaranty Corporation ("PBGC"), warranted a one year suspension from the practice of law.<sup>80</sup> In this case, the respondent submitted an application with PBGC that falsified his date of birth and the period during which he attended undergraduate and graduate school, both in India and the United States.<sup>81</sup> Each of the misrepresentations of fact was submitted willfully to PBGC, with knowledge of its falsity and with the intent to deceive that agency as to his true age, which was five years older than the representation on the application.<sup>82</sup> These acts constituted a violation of United States Code section 1001, which makes it a violation to make misrepresentations with regard to any matter within the jurisdiction of any department or agency of the United States.

The court concluded that the respondent engaged in illegal conduct involving moral turpitude; conduct involving dishonesty, fraud, deceit or misrepresentation; and, conduct which adversely reflected on his fitness to practice in violation of Disciplinary Rules 1-102(A)(3), (4) and (6) of the Code of Professional Responsibility.<sup>83</sup> Current rules implicated would include Rules 4.1 and 8.4.

In *Nehi Beverage Co. v. Petri*,<sup>84</sup> a beverage company sought to appeal a judgment entered against it in an action to recover the value of services and goods received. However, while the appeal was pending, Nehi filed a petition in bankruptcy, thereby precluding consideration of any issues as they related to Nehi pursuant to the automatic stay provision of Title 11 of the United States Code, section 362(a)(1).<sup>85</sup> Only after significant prodding by the court (in the course of its review of the record, the court stumbled across facts suggesting that a bankruptcy petition had indeed been filed by Nehi) did counsel for Nehi inform the court of the bankruptcy petition. The court noted that regardless of whether such failure was deliberate or merely the result of negligence, counsel had breached his professional responsibility to the court.<sup>86</sup>

His inaction in this regard required us to assume the role of judicial "detective" to ferret out the truth of this matter, expending in the process an enormous amount of judicial time in

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79. 526 N.E.2d 1185 (Ind. 1988).

80. *Id.* at 1186.

81. *Id.*

82. *Id.*

83. *Id.*

84. 537 N.E.2d 78 (Ind. 1988).

85. *Id.* at 80 n.1.

86. *Id.*

that pursuit to the detriment of litigants whose appeals also pend here. We direct Richards' attention to the provisions of Rules of Professional Conduct, Rule 3.1, Meritorious Claims and Contentions, Rule 3.3, Candor Toward the Tribunal, and Rule 3.5, Impartiality and Decorum of the Tribunal, subsection (c).<sup>87</sup>

While conceding Richards may not have violated the letter of these rules so as to warrant disciplinary proceedings, the court stated that Richards had unquestionably violated their spirit by his inaction in disclosing the filed bankruptcy petition.<sup>88</sup>

However, in *In re Paternity of K.G.*,<sup>89</sup> a paternity action brought by the state against one "R.A.F." for the purpose of determining the father of one "K.G.," the Indiana Court of Appeals recognized limits on a defense attorney's duty to clarify the record for the state. During the deposition of one Dr. Sand on direct examination, the state asked Sand if he delivered a child bearing a name different from K.G.; that is, the question was whether he delivered "C.G.," not K.G. As a result, the court reversed the trial court's denial of R.A.F.'s motion to strike the testimony as it related to the birth of C.G. on the grounds that it was irrelevant for purposes of determining the paternity of K.G.<sup>90</sup> In holding that the motion to strike was timely made, the court noted that R.A.F.'s counsel was under no duty to prove the state's case, citing Rules 3.1 and 3.3 of the Rules of Professional Conduct in support of its position.<sup>91</sup>

In *In re Brown*,<sup>92</sup> the Indiana Supreme Court held that preparation and submission of knowingly false documents in an administrative proceeding before the Social Security Administration warranted a one year suspension from the practice of law. In this case the respondent was charged with knowingly using false evidence, knowingly making a false statement of law or fact, and participating in the creation or preservation of evidence she knew was false or evidence that was obviously false in violation of Disciplinary Rules 7-102(a)(4), (5), and (6); engaging in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Disciplinary Rule 1-102(A)(4); engaging in conduct that adversely reflected on her fitness to practice law in violation of Disciplinary Rule 1-102(A)(6), and finally; neglecting a legal matter entrusted to her in violation of Disciplinary Rule 6-101(A)(3).<sup>93</sup>

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87. *Id.*

88. *Id.*

89. 536 N.E.2d 1033 (Ind. Ct. App. 1989).

90. *Id.* at 1036-37.

91. *Id.* at 1036.

92. 524 N.E.2d 1291 (Ind. 1988).

93. *Id.* at 1291.

The alleged misconduct emanated from respondent's representation of individuals in proceedings before the United States Social Security Administration, Department of Health and Human Services ("HHS"). The respondent was employed to represent an individual on a request for reconsideration of disability benefits before the HHS, but the request for reconsideration was denied. A request for hearing was due to be filed on or before April 23, 1983, but the request was not filed. Thereafter, the respondent was advised that the request for hearing could be submitted on or before May 10, 1983. However, the respondent failed to meet this deadline as well.

On May 12, 1983, the respondent submitted to the HHS a request for hearing form which purportedly had been submitted on or about April 13, 1983, and officially acknowledged by HHS on that date. This acknowledgment was purportedly signed by "D. Redman," an HHS employee; yet, the request for hearing form had not been submitted, acknowledged or signed as represented by the respondent.<sup>94</sup> At the time the form was submitted, the respondent was fully aware of the misrepresentations.<sup>95</sup>

Based on these facts, the court concluded that the respondent violated the Code of Professional Responsibility as charged and imposed a sanction of suspension for one year.<sup>96</sup> The preparation and submission of knowingly false documents in an administrative proceeding before the HHS was held to constitute the use of false evidence, the making of a false statement and the creation of evidence known to be false:<sup>97</sup>

[T]his conduct violates Disciplinary Rules 7-102(A)(4), (5), and (6). This obvious misrepresentation also violates Disciplinary Rule 1-102(A)(4) and demonstrates conduct which adversely reflects on Respondent's fitness to practice law in violation of Disciplinary Rule 1-102(A)(6). The motivation for this misconduct was Respondent's failure to timely submit requisite pleadings on behalf of her clients. This failure to accomplish the ends of representation, accordingly, also demonstrates an underlying neglect which violates Disciplinary Rule 6-101(A)(3).<sup>98</sup>

Current ethics rules which might have been violated under these facts include Rules 1.3, 1.4, 3.1, 3.2, 3.3, 3.4, 4.1 and 8.4.

Finally, in *In re Sheaffer*,<sup>99</sup> the Indiana Supreme Court held that an attorney's seeking out of a material witness in a criminal investigation

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94. *Id.* at 1292.

95. *Id.*

96. *Id.* at 1292-93.

97. *Id.* at 1292.

98. *Id.*

99. 531 N.E.2d 495 (Ind. 1988).

against his client, and counseling him to conceal their interview from the investigating officer and alter statements he had already given the officer, warranted a suspension from the practice of law for a period of not less than two years.<sup>100</sup>

In this case, the court concluded that the respondent's attempt to alter the testimony of a material witness against his client constituted conduct which involved dishonesty, deceit and misrepresentation in violation of Disciplinary Rule 1-102(A)(4) of the Code of Professional Responsibility.<sup>101</sup> Further, by counseling the witness to lie about their meeting, and to change his statement to the investigating officer, the respondent participated in the creation and preservation of evidence when it was obvious that the evidence was false, in violation of Disciplinary Rule 7-102(A)(6).<sup>102</sup> Finally, the court concluded that such conduct was prejudicial to the administration of justice and adversely reflected on the respondent's fitness to practice law, in violation of Disciplinary Rule 1-102(A)(5) and (6).<sup>103</sup>

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100. *Id.* at 498.

101. *Id.* at 497.

102. *Id.* at 498.

103. *Id.*