

SURVEY OF 1994 DEVELOPMENTS IN THE LAW OF PROFESSIONAL RESPONSIBILITY

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INTRODUCTION

The law of professional responsibility underwent a remarkable modification during 1994. In years past, changes or refinements in the law governing lawyers came primarily through the vehicle of opinions from disciplinary cases handed down by the Indiana Supreme Court. During 1994, however, the court spoke on a broad number of topics through the use of its rule-making power. This Survey examines important developments both in the case law and the regulatory landscape governing members of the profession.

On the regulatory side, the bar paid great attention during 1994 to the promulgation process and the first year of operation of the Indiana Rules of Evidence. These rules are a synthesis of the Uniform Rules of Evidence, the Federal Rules of Evidence, case law and the thoughts of Indiana's bench and bar. For the first time, the state has a single body of rules to consult for guidance on evidentiary questions before and during litigation in all of the state's fora.

January 1994 also began the first year of operation for a new chapter in the Rules of Professional Conduct. Now, questions about the use of legal assistants can be analyzed under "guidelines" promulgated by the court. These guidelines unequivocally place the burden of supervision on the lawyer who employs the legal assistant.

Late in 1994, the supreme court also released a series of rule changes, with an effective date of February 1, 1995, which made significant changes in the law of professional responsibility. This Article will examine some of the rules that have a direct impact on the ethical environment in which attorneys practice. Although these latest rule changes deal with a variety of bodies of law, this Survey will examine only those that are likely to have a pronounced impact on the bar.

Important cases affecting lawyers are also covered in this Article. During this period, the court had occasion to opine on the components of a "reasonable" fee. Discussion follows about the regulatory landscape with respect to fees and the court's latest pronouncement on an unreasonable fee. Clearly, lawyers are not free to charge whatever they want and some examination will be given herein to the constraints placed on legal fees by the Rules of Professional Conduct and related law.

Finally, the Indiana Supreme Court has had an unfortunate number of opportunities in the recent past to discipline attorneys under Rule 8.2 of the Rules of Professional Conduct. This rule prohibits a lawyer from attacking members of the judiciary where the lawyer knows his comments are false. In addition, Rule 8.2 allows a lawyer to be

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sanctioned when he speaks with reckless disregard for the truth of his statements about judges. The use of this "reckless disregard" standard will be examined along with a review of the justifications used by many jurisdictions in upholding this formulation of the rule. This perceived limitation on a lawyer's right to free speech has been the subject of considerable analysis by several state high courts and the United States Supreme Court. These cases demand review by Indiana lawyers who practice in court or before any tribunal, even on a limited basis.

I. CHANGES IN THE REGULATORY LANDSCAPE

A. *The Indiana Rules of Evidence*

The "new" Indiana Rules of Evidence (IREs) became effective on January 1, 1994.¹ The IREs were drafted by a committee appointed by the supreme court. They are based on a mixture of the Uniform Rules of Evidence, the Federal Rules of Evidence and existing Indiana law. The committee submitted the rules to the court with extensive commentary to explain the history of the rules and the committee's position with respect to its proposals. However, the court did not adopt these commentaries in its final version of the rules.²

As a general observation, the IREs neither create nor aggravate any particular ethical dilemma. However, they demand increased scholarship and trial preparation by counsel and continuous communication between opposing lawyers during discovery and pretrial procedure.³

The IREs do not alter the impact of the state's version of the Rules of Professional Conduct. For example, Rule 3.3(a) imposes four duties on the advocate practicing before a tribunal.⁴ The last of these, Rule 3.3(a)(4), prohibits the lawyer from offering false evidence and, in the event material evidence is offered that the lawyer knows to be false,

1. By order of the Supreme Court found at 615 N.E.2d 33 (Indiana Case Edition 1993).

2. *Id.*

3. For example, under IND. R. EVID. 609(b), a lawyer who intends to impeach the credibility of a witness by proving the witness's prior conviction of a crime *more than ten years past* must advise the opposing lawyer *in writing* in advance of its use. The rule apparently contemplates that this notice will come well in advance of trial so that a hearing on its admissibility can be held.

In addition, with respect to certain hearsay exceptions governed by IND. R. EVID. 803, some "self-authenticating" documents must be provided to the opponent sufficiently in advance of trial to allow the opponent to form and present any objections prior to the document's introduction. *See generally* IND. R. EVID. 901.

4. The full text of INDIANA RULES OF PROFESSIONAL CONDUCT Rule 3.3(a) (1987) provides:

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act against a tribunal by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or,

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

imposes a duty on the lawyer to take remedial measures. Specific examples of appropriate corrective measures for dealing with false evidence are suggested in the comment to the rule.⁵

The IREs, then, do not appreciably change the ethical landscape. They do, however, provide a more ordered analytical framework in which ethical questions can be evaluated.

B. Use of Legal Assistants

The supreme court added a new chapter to the Rules of Professional Conduct on January 1, 1994, which speaks to the lawyer's use of legal assistants.⁶ Guidelines 9.1 through 9.10 outline the court's expectations on the use of non-lawyers doing legal work.

One significant item in the Indiana version of these guidelines is not present in the American Bar Association's proposal. The supreme court added a preamble, which simply provides: "Subject to the provisions in Rule 5.3,⁷ all lawyers may use legal assistants in accordance with the following guidelines." The use of this language directly ties these guidelines to the Rules of Professional Conduct and, thereby, makes their terms an integral part of this body of law.

5. In addition to the rule's comment, an extensive, and illuminating, discussion of this problem can be found in 1 GEOFFREY HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* §§ 3.3:201-220 (1991 Supp.). This discussion includes analysis of the sometimes troubling question involving the distinction between what a lawyer knows versus what the lawyer may believe about the evidence in question. The authors also examine the topic in relation to the lawyer's duty of confidentiality under Rule 1.6 of the RULES OF PROFESSIONAL CONDUCT and under constitutional law.

6. The Indiana formulation of these guidelines does not define the term "legal assistant." However, the American Bar Association's MODEL GUIDELINES FOR THE UTILIZATION OF LEGAL ASSISTANT SERVICES (1991) notes that the ABA's Board of Governors approved the following definition in 1986:

A legal assistant is a person, qualified through education, training, or work experience, who is employed or retained by a lawyer, law office, governmental agency, or other entity in a capacity or function which involves the performance, under the ultimate supervision of an attorney, of specifically delegated substantive legal work, which work, for the most part, requires a sufficient knowledge of legal concepts that, absent such assistant, the attorney would perform the task.

7. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 5.3 (1987) provides:

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) A lawyer shall be responsible for conduct of such a person that would be a violation of the rules of professional conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the law firm in which the person employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

In addition, the Indiana version of Guideline 9.1 contains language intended to ensure that the legal assistant is working for a lawyer admitted to practice in Indiana.⁸ This language also prohibits the use of "independent legal assistants" to prevent the possibility of unregulated or unqualified individuals opening their own storefront operations and providing legal services.⁹ These concerns are not without foundation. Through the years, the supreme court has been called upon repeatedly to deal with questions surrounding the unauthorized practice of law. In *Professional Adjusters, Inc. v. Tandon*,¹⁰ Professional Adjusters, Inc. negotiated a settlement on behalf of the Tandons with their insurer after the Tandons' home burned. In so doing, Professional Adjusters was relying on an act of the Indiana General Assembly that, in essence, allowed them to set up independent shops to serve as lay representatives using the title "Certified Public Adjuster."¹¹ On transfer, the Indiana Supreme Court held that the acts of the General Assembly were unconstitutional under the separation of powers doctrine.¹² Under the Indiana Constitution, the Indiana Supreme Court is the only entity in the state that can admit attorneys to practice and discipline them for their misdeeds.¹³ Relying on Indiana common law going back to the 1890s, the court observed:

The practice of law is restricted to natural persons who have been licensed upon the basis of established character and competence as a protection to the public against lack of knowledge, skill, integrity and fidelity. Disbarment procedure is available in the case of those who do not conform to proper practice.¹⁴

The new guidelines for the use of legal assistants are closely tailored to prevent the unauthorized practice of law by non-lawyers, even when they are employed by lawyers.

8. The added language provides:

A legal assistant shall perform services only under the direct supervision of a lawyer authorized to practice in the State of Indiana and in the employ of the lawyer or the lawyer's employer. Independent legal assistants, to-wit, those not employed by a specific firm or specific lawyers are prohibited.

INDIANA RULES OF PROFESSIONAL CONDUCT Guideline 9.1 (1994).

9. *Id.*

10. 433 N.E.2d 779 (Ind. 1982).

11. See IND. CODE ANN. § 27-1-24-1 to -9 (West 1981) (repealed).

12. *Professional Adjusters, Inc.*, 433 N.E.2d at 783.

13. IND. CONST. art. 7, § 4 provides:

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 other courts of the State; and issuance of writs necessary or appropriate in aid of its jurisdiction. The Supreme Court shall exercise appellate jurisdiction under such terms and conditions as specified by rules except that appeals from a judgment imposing a sentence of death, life imprisonment or imprisonment for a term greater than fifty years shall be taken directly to the Supreme Court. The Supreme Court shall have, in all appeals of criminal cases, the power to review all questions of law and to review and revise the sentence imposed.

14. *Professional Adjusters, Inc.*, 433 N.E.2d at 783.

Assuming the legal assistant works within the constraints spelled out by the court, the new guidelines allow for a vast delegation of tasks as long as the work is supervised by a member of the bar. The scope of this delegation of responsibilities is spelled out in guideline 9.2.¹⁵ It permits the delegation of virtually any legal task to the legal assistant as long as the delegation is not explicitly forbidden by another source of law. Guideline 9.3, meanwhile, identifies three areas of responsibility that may not be delegated to a legal assistant.¹⁶ The lawyer must maintain responsibility for the establishment of both the attorney-client relationship and the amount of the fee to be charged. There are legal considerations associated with these tasks that properly, and exclusively, belong to the lawyer.¹⁷ The third nondelegable task is the “*responsibility* for a legal opinion rendered to a client.”¹⁸ Indiana case law has long recognized that the core element of the practice of law is the giving of legal advice.¹⁹ The guidelines do not suggest that legal assistants cannot do research at a lawyer’s direction, nor do they prohibit the legal assistant from communicating the lawyer’s advice to the client. However, the guidelines, when coupled with Rule 5.3, make clear that the responsibility for the advice must be borne by the supervising lawyer.²⁰

The balance of the guidelines serve as a sort of abbreviated ethics code for legal assistants. The feature that most impacts the bar, however, is the requirement of direct supervision by a lawyer in the legal assistant’s day-to-day execution of law-related tasks.

15. INDIANA RULES OF PROFESSIONAL CONDUCT Guideline 9.2 (1993 Amendments) states:

Provided the lawyer maintains responsibility for the work product, a lawyer may delegate to a legal assistant any task normally performed by the lawyer, however, any task prohibited by statute, court rule, administrative rule or regulation, controlling authority, [or the] Indiana Rules of Professional Conduct may not be assigned to a non-lawyer.

16. INDIANA RULES OF PROFESSIONAL CONDUCT Guideline 9.3 (1993 Amendments) states: “A lawyer may not delegate to a legal assistant: (a) responsibility for establishing an attorney-client relationship; (b) responsibility for establishing the amount of a fee to be charged for a legal service; or, (c) responsibility for a legal opinion rendered to a client.”

17. Consider, for example, INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.8(h) (1994), which allows a lawyer to prospectively limit his malpractice liability, subject to certain conditions precedent, including advising the client to obtain independent representation before retaining the lawyer. A good illustration of the use of this rule is found in HAZARD & HODES, *supra* note 5, § 1.8:901. The authors posit that the use of this tool might be appropriate where the prospective client’s case is so fraught with risk that they might not find a lawyer to advocate their case without the limitation. These ultimate determinations must be left for the lawyer.

18. INDIANA RULES OF PROFESSIONAL CONDUCT Guideline 9.3 (1993 Amendment) (emphasis added).

19. See, e.g., *State ex rel. Disciplinary Comm’n v. Owen*, 486 N.E.2d 1012 (Ind. 1986). See also *In re Perrello*, 386 N.E.2d 174 (Ind. 1979); *Fink v. Peden*, 17 N.E.2d 95 (Ind. 1938); *Ely v. Miller*, 34 N.E. 836 (Ind. 1893).

20. Although the addition of these guidelines to the INDIANA RULES OF PROFESSIONAL CONDUCT (1993) is without comment, the American Bar Association’s MODEL GUIDELINES FOR THE UTILIZATION OF LEGAL ASSISTANT SERVICES (1991) contained extensive commentary on these points with references to authority from various states.

C. Certification and Marketing of Specialty Practice

The marketing of "specialty" practice by lawyers has been a goal of many in the bar for a considerable period of time.²¹ To that end, practitioners around the state have been working to create the mechanism for making the advertising of a particular lawyer's specialty a permissible marketing tool. Near the end of 1994, the supreme court, using its rule-making authority, took a significant step toward permitting advertising of a lawyer's "specialty."

Historically, lawyers who actively marketed their services were viewed as unethical by other members of the bar and subjected to disciplinary action.²² However, the United States Supreme Court, in *Bates v. State Bar of Arizona*,²³ found that commercial speech, even by lawyers, received limited protection under the First and Fourteenth Amendments to the Constitution. A string of decisions following *Bates*, has widened the scope of constitutionally permissible advertising by lawyers.

However, the Court did not address the notion of "specialization" by lawyers until its 1990 opinion in *Peel v. Attorney Registration and Disciplinary Commission of Illinois*.²⁴ In *Peel*, the lawyer was disciplined solely for stating on his professional letterhead that he was a "Certified Civil Trial Specialist" by the National Board of Trial Advocacy. Such a representation, although accurate, was prohibited under Illinois law. The Court, in a five-four decision, concluded that the representation was neither actually nor inherently misleading and that the State's interest in preventing possible deceptive advertising did not "rebut the constitutional presumption favoring disclosure over concealment."²⁵

Thus, the door was opened for states to create a regulatory scheme to allow qualified lawyers to market their skills as specialists.²⁶ The *Peel* decision itself led to an amendment to Rule 7.4 of Indiana's version of the Rules of Professional Conduct to permit a representation similar to the one at issue in the *Peel* case. However, Rule 7.4(a)(3) requires that any lawyer who qualifies for the use of the term "specialist" must also include with it the disclaimer that, "[t]he National Board of Trial Advocacy is a private organization not affiliated with or sanctioned by the State or Federal government."²⁷

21. For example, The ABA Comm. on Legal Ethics, Formal Op. 36 (1931) concluded, "An attorney's announcement card and professional card may not contain the information that the lawyer specializes in court work." This opinion interpreted CANONS OF PROFESSIONAL ETHICS Canon 27 (1908).

22. H. DRINKER, LEGAL ETHICS 211 (1953) summarizes the formerly prevailing attitude of the bar toward members who advertised ("A lawyer who advertises, solicits or steals another's clients is regarded by his brethren at the bar as one with whom it is not pleasant to associate on the terms of cordial intimacy characteristic of the relationship of lawyers to one another.").

23. 433 U.S. 350 (1977).

24. 496 U.S. 91 (1990).

25. *Id.* at 111.

26. See, John A. Payton, *Certification of Specialization: Another Limit on Attorney Advertising is Peeled Away*, 25 IND. L. REV. 589 (1991). This article contains an excellent description of the legal underpinnings that led to the Supreme Court's decision in *Peel* and the state of the law shortly thereafter.

27. The full text of INDIANA RULES OF PROFESSIONAL CONDUCT Rule 7.4(a) (1987) identifies the state's

The new pronouncements from the Indiana Supreme Court delete the entire existing language of Rule 7.4 and authorize the lawyer to advertise himself as a specialist, subject to the provisions of Admission and Discipline Rule 30. Admission and Discipline Rule 30 is a completely new creation by the court entitled "Indiana Certification Review Plan."²⁸

In essence, the new rules give authority to the Indiana Commission for Continuing Legal Education (CLE) to create a list of (presumably non-governmental) certifying organizations. Under the "Powers" section of the rule, "CLE shall review, approve and monitor organizations [ICOs] which issue certifications of specialization to lawyers practicing in the State of Indiana to assure that such organizations satisfy the standards for qualification set forth in this rule."²⁹

The Commission for CLE has the duty to make qualitative judgments about the standards established by the various independent certifying organizations (ICOs) and determine whether each one will be permitted to certify "specialist" practitioners in Indiana. As a practical matter, this power is analogous to the authority the Commission for CLE currently possesses to develop a body of approved educational providers for lawyers.³⁰

Generally, the rule requires the ICO to meet six standards in order to qualify for recognition by the Commission for CLE. They are:

traditional recognition of specialists along with the *Peel* exception and provides, in full:

(a) A lawyer shall not hold himself out publicly as, or imply that he is, a recognized or certified specialist, except as follows:

(1) A lawyer admitted to practice before the United States Patent and Trademark Office may use the designation "Patents", "Patent Attorney", or "Patent Lawyer", or any combination of those terms, on his letterhead and office sign. A "Trademark Attorney", or "Trademarks Lawyer", or any combination of those terms on his letterhead and office sign, and a lawyer engaged in the admiralty practice may use the designation "Admiralty", "Proctor in Admiralty", or "Admiralty Lawyer", or any combination of those terms, on his letterhead and office sign.

(2) A lawyer who practices in certain areas of law may hold himself out as practicing in those areas of law, but may not hold himself out as a specialist.

(3) A lawyer certified by the National Board of Trial Advocacy may include such certification on a letterhead or other communication so long as the following appears immediately thereafter: "The National Board of Trial Advocacy is a private organization not affiliated with or sanctioned by the State or Federal government."

28. The full texts of the new Rule 7.4 of the RULES OF PROFESSIONAL CONDUCT and Rule 30 of the INDIANA RULES FOR ADMISSION TO THE BAR AND THE DISCIPLINE OF ATTORNEYS follow this article as appendices A and B, respectively.

29. INDIANA RULES FOR ADMISSION TO THE BAR AND DISCIPLINE OF ATTORNEYS Rule 30 § 2 (1994). See Appendix B.

30. INDIANA RULES FOR ADMISSION TO THE BAR AND DISCIPLINE OF ATTORNEYS Rule 29 § 6 (1993), which refers to the powers of the Commission, provides, in pertinent part that the Commission may: "(a) [a]pprove all or portions of individual educational activities which satisfy the legal education requirements of this Rule; (b) [a]pprove sponsors whose educational activities satisfy the legal education requirements of this Rule."

(a) The ICO shall encompass a comprehensive field or closely related group of fields of law so delineated and identified (1) that the field of certification furthers the purpose of the rule; and (2) that lawyers can, through intensive training, education and work concentration, attain extraordinary competence and efficiency in the delivery of legal services within the field or group.

(b) The ICO shall be a non-profit entity whose objectives and programs foster the purpose of this rule and which is governed by lawyers who, in the judgment of CLE, are experts in the field of certification.

(c) The ICO shall have a substantial continuing existence and demonstrable administrative capacity to perform the tasks assigned to it by this rule and the rules and policies of CLE.

(d) The ICO shall adopt, publish and enforce open membership and certifications standards and procedures which do not unfairly discriminate against members of the Bar of Indiana individually or collectively.

(e) The ICO shall provide the following assurance to the continuing satisfaction of CLE with respect to its certified members:

(1) that members have extraordinary competence and efficiency in the field of certification that is

(i) comprehensive;

(ii) objectively demonstrated;

(iii) peer recognized; and

(iv) reevaluated at appropriate intervals;

(2) that members actively and effectively pursue the field of certification as demonstrated by continuing education and substantial involvement; and

(f) The ICO shall cooperate at all times with CLE and perform such tasks and duties as CLE may require to implement, enforce and assure compliance with and effective administration of this rule.³¹

It is apparent from the face of the rule that the ICO cannot simply pop into existence and promulgate standards for any purported specialization. The ICO itself must have a non-profit status and a substantial continuing existence. Obviously, from the structure of the rule, the supreme court intends for the certification of "specialists" to be more than a mere pro forma matter. Therefore, full operation of the rule, from the approval of ICOs to the actual certification of specialties and, ultimately, certification of lawyers, may take a significant amount of time.

The reformulation of Rule 7.4 of the Rules of Professional Conduct, meanwhile, will effectively do away with the required disclaimer contained in the prior language.³² Many

31. INDIANA RULES FOR ADMISSION TO THE BAR AND DISCIPLINE OF ATTORNEYS Rule 30, § 4 (1994 Amendments). *See* Appendix B.

32. *See supra* note 27.

states require lawyers to recite disclaimers in their advertising to temper sales pitches that might otherwise seem too enthusiastic about the quality of the lawyer's services.³³ The new configuration of Rule 7.4 apparently will do away with the existing disclaimer as the process of certifying specialties takes shape.

D. Contingent Fee Agreements

Another recent development worthy of note is a change to Rule 1.5(d) of the Rules of Professional Conduct, which will permit lawyers to charge on a contingency fee basis for some limited work in post-dissolution domestic relations cases. Under the former Code of Professional Responsibility,³⁴ contingent fee arrangements in domestic relations cases were frowned upon and heretofore, under the Rules of Professional Conduct,³⁵ these kinds of fee arrangements were forbidden. For the most part, contingent fee arrangements are still prohibited in domestic cases, but under the amended version of Rule 1.5(d),³⁶ the law now provides:

(d) A lawyer shall not enter into an arrangement for, charge or collect:

(1) any fee in a domestic relations matter, the payment of which is contingent upon the securing of a dissolution, obtaining the custody of a child, the amount of support, or the measure of property settlement; or

(2) a contingent fee for representing a defendant in a criminal case.

This provision does not preclude a contract for a contingent fee for legal representation in a domestic relations post-judgment collection action, provided the attorney clearly advises his or her client in writing of the alternative measures available for the collection of such debt and, in all other particulars, complies with Rule of Professional Conduct 1.5(c).³⁷

33. Disclaimers have been a fairly popular mechanism for "warning" potential clients who have been solicited by lawyers. South Carolina, for example, requires lawyers to include a long litany of warnings when they directly solicit a prospective client in need of legal services. In addition to the litany, when the advertisement is written, the following language must also appear in the solicitation: "ANY COMPLAINTS ABOUT THIS LETTER (OR RECORDING) OR THE REPRESENTATION OF ANY LAWYER MAY BE DIRECTED TO THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE, POST OFFICE BOX 11330, COLUMBIA, SOUTH CAROLINA, 29211-TELEPHONE NUMBER 803-734-1150. SOUTH CAROLINA APPELLATE COURT RULES Rule 7.3(c) (1993)."

Meanwhile, FLORIDA RULES OF PROFESSIONAL CONDUCT Rule 4-7.2 (West 1994) requires every lawyer advertisement to bear the legend: "The hiring of a lawyer is an important decision that should not be based solely upon advertisements. Before you decide, ask us to send you free written information about our qualifications and experience."

34. This body of law was repealed in 1987. Ethical Consideration 2-20 admonished the lawyer, "Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relations cases are rarely justified." INDIANA CODE OF PROFESSIONAL RESPONSIBILITY EC 2-20 (West 1984).

35. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.5(d) (1987).

36. Effective February 1, 1995.

37. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.5(d) (1994), referring to Rule 1.5(c) (1994),

The result of this amendment is that lawyers may now find it economically sound to charge contingent fees in the collection of child support arrearage cases. The amendment, however, unequivocally states that the contingent fee representation must relate solely to a *post-judgment* collection matter. Obviously, the final order in the dissolution case must be entered before the lawyer undertakes any sort of collection matter on a contingency basis. The rule also mandates that the lawyer advise the client that "alternative measures" are available to collect the arrearages. Undoubtedly, these alternative measures encompass the child support collection process through the offices of the county prosecuting attorneys.

Finally, the rule does not require that a lawyer who undertakes a representation for this sort of collection matter charge on the basis of a contingent fee. In many cases, lawyers may determine that collection of a support arrearage will be more economically viable if done on the traditional basis of an hourly rate. Nothing in the amendment appears to either encourage or dissuade lawyers from undertaking a collection matter on a fee agreement based on the lawyer's billable hours.

II. INDIANA CASES OF NOTE

A. *Disciplinary Cases Arising out of Fees Charged*

1. *Background*.—Both the former Code of Professional Responsibility³⁸ and the current Rules of Professional Conduct³⁹ impose limits on the fees charged by lawyers for their services. The Indiana Supreme Court has issued few decisions that thoroughly analyze the disciplinary implications of the fees charged by attorneys.⁴⁰

However, during 1994, the Indiana Supreme Court decided two cases involving the issue of the reasonableness of fees charged to clients. The first, *In re Gerard*,⁴¹ addressed the issue in the context of a contingency fee arrangement, while the second, *In re Putsey*,⁴² required the court to apply Rule 1.5(a)⁴³ to a fixed fee arrangement.⁴⁴

2. *The Cases*.—In *In re Gerard*,⁴⁵ William Gerard, an attorney licensed to practice in Indiana, Illinois, Wisconsin and Missouri, was charged with violations of the Code of Professional Responsibility in regard to his representation of an elderly Illinois woman in 1985. As a result of his conduct, Gerard was suspended from the practice of law for

requires all contingent fee contracts to be in writing, and include an explicit description of the fee structure and a written statement at the end of the representation describing how monies collected are paid out.

38. INDIANA CODE OF PROFESSIONAL RESPONSIBILITY (repealed 1986).

39. INDIANA RULES OF PROFESSIONAL CONDUCT (1987).

40. See *In re Jarrett*, 602 N.E.2d 131 (Ind. 1992); *In re Smith*, 572 N.E.2d 1280 (Ind. 1991); *In re Brown*, 511 N.E.2d 1032 (Ind. 1987); *In re Stanton*, 492 N.E.2d 1056 (Ind. 1986).

41. 634 N.E.2d 51 (Ind. 1994).

42. 634 N.E.2d 497 (Ind. 1994).

43. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.5(a) (West 1994).

44. Putsey was also accused and found guilty of violating INDIANA RULES OF PROFESSIONAL CONDUCT Rules 1.3 & 1.4(a) (1987). *In re Putsey*, 634 N.E.2d at 499.

45. *In re Gerard*, 548 N.E.2d 1051 (Ill. 1989).

one year by the Illinois Supreme Court,⁴⁶ and was also disciplined by the Supreme Courts of Missouri and Wisconsin.⁴⁷

Respondent Gerard was hired in August 1985 by Ruth Randolph ("Randolph") who, at the age of eighty-four, was hospitalized and wanted respondent to recover several certificates of deposit that she believed had been either lost or stolen. After respondent explained that Randolph could be charged either an hourly rate or on a contingency fee basis, Randolph agreed to a contingency fee arrangement whereby respondent was to receive one-third of all assets recovered.

During the next month, respondent contacted the lending institutions Randolph believed had issued the certificates of deposits to her, and discovered twenty-three certificates with a total value of \$453,443.37. Respondent cashed thirteen of the certificates and transferred the proceeds to a pour-over trust. He also cashed the other ten certificates of deposit and kept the proceeds of \$159,648.60 as his fee. Respondent claimed that he spent one hundred and sixty hours in these efforts.

The Indiana Supreme Court found that respondent violated Disciplinary Rule 2-105(A), which provides that a lawyer "shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee."⁴⁸ The court acknowledged that while no precise definition of an excessive fee exists, a fee is clearly excessive if a lawyer "of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee."⁴⁹ The court considered the factors enumerated in Disciplinary Rule 2-105(B) in reaching its decision:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly.
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
- (3) The fee customarily charged in the locality for similar legal services.
- (4) The amount involved and the results obtained.
- (5) The time limitations imposed by the client or by the circumstances.
- (6) The nature and length of the professional relationship with the client.
- (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
- (8) Whether the fee is fixed or contingent.⁵⁰

In reaching its decision to impose a one-year suspension, the court considered that excessive cost deters the public from using the legal system⁵¹ and also looked to the evidence that related to some of the factors in Disciplinary Rule 2-105(B). The court

46. *Id.*

47. *In re Gerard*, 634 N.E.2d 51 (Ind. 1994). By virtue of being disciplined in another state, respondent was subject to discipline in Indiana. INDIANA RULES FOR ADMISSION AND DISCIPLINE OF ATTORNEYS Rule 23, § (2)(b) (1994).

48. *In re Gerard*, 634 N.E.2d at 52 (citing INDIANA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-105(A) (repealed 1986)).

49. *Id.* (citing INDIANA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-105(B) (repealed 1986)).

50. *Id.* at 52-53.

51. *Id.* at 53 (citing *In re Smith*, 572 N.E.2d 1280, 1288 (Ind. 1991)).

concluded that locating and collecting the certificates of deposit did not take significant time or labor, presented no novel legal issue, took no real legal skill, and did not preclude respondent from taking on other legal matters.⁵²

Of particular note was the court's conclusion, contrary to that of the hearing officer, that an independent violation of Disciplinary Rule 1-102(A)(4),⁵³ which prohibits respondent from engaging in conduct involving fraud, deceit or misrepresentation, had occurred. While the hearing officer found no evidence that the respondent knew at the outset of the representation that it would be a simple matter, the court determined that the respondent's failure to renegotiate his fee was a fraudulent act after he realized that his client's entitlement to the certificates was undisputed.⁵⁴

The Indiana Supreme Court dealt with a recurring, fee-related issue in *In re Putsey*.⁵⁵ On May 7, 1992, respondent, Albert Putsey, met with Doris Weaver ("Weaver") to discuss respondent's representation of Weaver in a bankruptcy petition. Weaver was familiar with the bankruptcy process and brought with her all the information necessary to prepare the petition. Respondent was hired and was paid a partial payment of \$240 toward a total fee of \$550. Despite numerous requests to prepare the bankruptcy petition, respondent refused to take action. In July, creditors continued to harass her at work, and her automobile was repossessed.

By February 1993, within days of learning about Weaver's grievance filed with the Disciplinary Commission, respondent personally appeared at Weaver's apartment and again obtained the information necessary to file the bankruptcy petition. He promised he would have the materials ready for Weaver to sign by the following week. However, respondent never prepared the petition. Eventually, Weaver hired other counsel to file the bankruptcy. The week before his disciplinary hearing, Putsey returned the \$240 advance.

While finding that respondent was not diligent and that he failed to keep his client reasonably informed, the court determined that he did not charge an unreasonable fee in violation of Rule 1.4(a). The court explained:

Respondent failed to act with reasonable diligence and failed to keep his client reasonably informed about the status of the case, but such misconduct does not establish that the fee initially assessed was inappropriate. The issues of diligence and response are questions of performance. The [criteria] to determine the reasonableness of a fee for legal services . . . measure the value of the service. Here, the fee assessed by Respondent and agreed to by his client was an appropriate measure of the value of the anticipated services.⁵⁶

52. *Id.*

53. INDIANA CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(4) (repealed 1986) provided that it was professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. This language tracks with the more recent INDIANA RULES OF PROFESSIONAL CONDUCT Rule 8.4(c) (1987).

54. *In re Gerard*, 634 N.E.2d at 53.

55. 634 N.E.2d 497 (Ind. 1994).

56. *Id.* at 498-99.

3. *Analysis.*—Historically, contingency fee contracts like the one used in *In re Gerard* were illegal in Indiana.⁵⁷ These early cases held that contingency fee agreements were void for being champertous as the contract provided for the attorney to receive a part of the recovery for his fee. Entering into a champertous agreement was a common law crime.⁵⁸ However, in *Draper v. Zebec*,⁵⁹ the Indiana Supreme Court conclusively accepted the more modern view, recognizing that contingency fee contracts were an important avenue for citizens to obtain access to legal services because “persons who have rights, but no means to pursue them, are obliged to resort to this means of procuring legal redress.”⁶⁰

Of course, this general acceptance of contingency fee contracts was not a recognition that all contingency fee contracts are valid. Along with fees that are clearly excessive⁶¹ or unreasonable,⁶² agreements contingent on securing a divorce,⁶³ or obtaining a particular outcome in a criminal matter⁶⁴ are prohibited. In addition, a fee can be illegal by its very nature.⁶⁵

In *In re Gerard*, there was no allegation that the contract itself was illegal. The court looked to the self-explanatory factors enumerated in Disciplinary Rule 2-105⁶⁶ and applied those factors to the contingency fee contract. While it is not clear from *In re Gerard* which factor or factors played the more dominant role, the court was most concerned with the simple nature of Gerard’s task and the relatively short amount of time he needed to complete it. No real legal skill was required in finding and gathering the assets.⁶⁷ These facts made respondent’s effective rate of \$997 per hour offensive to the court and a violation of the Code.⁶⁸

57. See *Scobey v. Ross*, 13 Ind. 117 (Ind. 1859). See also *French v. Cunningham*, 149 Ind. 632 (Ind. 1898).

58. In *Barelli v. Levin*, 247 N.E.2d 847 (Ind. App. 1969), the court explained the difference between a truly champertous contract and a permissible contingency fee contract. While an agreement that provided for a percentage of the recovery was illegal, a contingency fee providing for a *sum equal to* a percentage of the recovery was not considered champertous. *Id.*

59. 37 N.E.2d 952 (1941), *overruled on other grounds*, *O'Donnell v. Krneta*, 154 N.E.2d 45 (1958).

60. *Id.* at 957.

61. INDIANA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-105 (repealed 1986).

62. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.5(a) (1987).

63. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.5(d)(1) (1987). See also *Mason v. Mason*, 561 N.E.2d 809 (Ind. App. 1990).

64. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.8(g) & 1.5(d)(2) (1987).

65. See *In re Payne*, 494 N.E.2d 1283 (Ind. 1986) (holding that receiving cocaine as partial payment for legal services violates INDIANA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-105(A)).

66. There is little difference between INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.5(a) (1987) and INDIANA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-105(A) & (B) (repealed 1986). As other commentators have noted, the Code provided that the factors helped answer the question of whether a “lawyer of ordinary prudence” would definitely believe that the fee was unreasonable or excessive. The INDIANA RULES OF PROFESSIONAL CONDUCT consider similar factors as more objective criterion. HAZARD, *supra* note 5, § 1.5:201.

67. *In re Gerard*, 634 N.E.2d 51, 53 (Ind. 1994). See *supra* notes 45-54 and accompanying text.

68. This amount is derived from dividing respondent’s fee of \$159,648 by his claim that he spent 160

Most significant is the fact that the court, contrary to the hearing officer's findings,⁶⁹ determined that an independent violation of Disciplinary Rule 1-102(A)(4) had occurred.⁷⁰ The court found respondent's acts to be fraudulent because respondent did not renegotiate the fee after realizing that his client's access and rights to the certificates were not in doubt. Instead, after learning that the matter would be a simple, uncontested matter, he accepted an inflated fee and did not return any of the fee until after a lawsuit was filed against him to obtain a partial refund.

In reaching the conclusion that this failure to act constituted fraud, the court explained that disciplinary proceedings are neither civil nor criminal and that civil or criminal definitions of fraud do not apply in the disciplinary context.⁷¹ Implicit in respondent's retention of the fee was a false representation that the service he provided to his client corresponded to the amount of compensation he was owed.⁷²

Thus, the importance of *In re Gerard*, aside from its application of the factors in Disciplinary Rule 2-105, is its warning to lawyers that an affirmative duty exists to refund excessive fees obtained from an otherwise valid contingency fee contract.⁷³ Rather than being a new and unexpected development in the law, this decision merely flows from the common law developed before the Code of Professional Responsibility took effect that a lawyer could be sued for grossly excessive fees.⁷⁴ As a result, lawyers should be cautious about holding onto windfalls obtained during a contingency fee representation.

In *In re Putsey*, the court did not find it necessary to apply any of the factors present in Rule 1.5(a) because the court found that "the fee assessed by [r]espondent and agreed to by his client was an appropriate measure of the value of the anticipated professional services."⁷⁵ Thus, it appears that the court could determine that charging a fee and not doing any work does not violate Rule 1.5(a)'s prohibition against charging an unreasonable fee.

The difficulty with the decision is that it conflicts with two other disciplinary cases that address the same issue. The first, *In re Shaul*,⁷⁶ involved an attorney's representation of an estate. Shaul was hired to represent the estate of Erma Hill and her husband Herbert. Despite reasonable requests for information, Shaul did not diligently proceed with the estates nor provide information about them to the heirs. Furthermore, while he did not provide an accounting of the estates, he nonetheless paid himself attorney's fees

hours in the case. The court also seemed to question Gerard's claim that he spent 160 hours on the case. *In re Gerard*, 634 N.E.2d at 53.

69. *Id.*

70. INDIANA CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(4) (repealed 1986) provides that it is misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. There is a parallel provision in the INDIANA RULES OF PROFESSIONAL CONDUCT Rule 8.4(c) (1987).

71. *In re Gerard*, 634 N.E.2d at 53 (citing *In re Roberts*, 442 N.E.2d 986 (Ind. 1983)).

72. *Id.*

73. For the other limitations imposed upon contingency fee agreements, see the text of INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.5 (1987).

74. HAZARD & HODES, *supra* note 5, § 1.5:201.

75. *In re Putsey*, 634 N.E.2d 497, 499 (Ind. 1994).

76. 592 N.E.2d 687 (Ind. 1992).

totaling \$3100.⁷⁷ The supreme court determined that “[i]n light of the fact that he failed to complete the services for which he was hired, the respondent’s fee was clearly excessive and in violation of [Disciplinary Rule] 2-105(A).”⁷⁸

*In re Jarrett*⁷⁹ applied similar reasoning to an alleged violation of Rule 1.5. In *In re Jarrett*, respondent was accused of taking an advance of \$1500 to prosecute a wrongful termination action against his client’s employer.⁸⁰ The court found that Jarrett collected an unreasonable fee when he received the \$1500 and performed virtually no services.⁸¹

In re Jarrett and *In re Shaul* clearly differ from the result reached in *In re Putsey*. By holding that collection of a fee while providing no services violated the prohibition against charging an unreasonable fee, Rule 1.5 was expanded in *In re Jarrett* and *In re Shaul* to include conduct that is already covered by other rules. This was illustrated in *In re Jarrett* where the respondent was also found to have violated Rule 1.3, by not acting diligently, Rule 1.4, by not providing his client with sufficient information, and Rule 3.2, by failing to expedite the litigation. Those rules are sufficient to reach Jarrett’s conduct, just as the violation of those same rules by Putsey was sufficient to discipline him and suspend him for six months. Further clarification from the Indiana Supreme Court is necessary to resolve this conflict in the cases and to determine the actual scope of Rule 1.5 as it applies to fees collected in cases where little or no work is performed by the lawyer.

B. Attorney Criticism of the Judiciary

1. *Background.*—In 1994, the Indiana Supreme Court addressed the issue of attorney speech to and about the judiciary on no less than three occasions. In *In re Garringer*,⁸² *In re Turner*,⁸³ and *In re Atanga*,⁸⁴ attorneys made statements directed to or about a tribunal that were later determined to undermine the integrity of the judicial system. In two of the three cases, the attorneys were charged with violating, among other rules, Rule of Professional Conduct 8.2(a) for making statements about judges with reckless disregard for the truth or falsity of those statements.⁸⁵ It is unusual that the supreme court would

77. *Id.* at 688-89.

78. *Id.* at 689.

79. 602 N.E.2d 131 (Ind. 1992).

80. The verified complaint filed against Jarrett had seven separate counts. The conduct addressed here is only that which relates to Count I. While Count III also contained allegations that Jarrett violated INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.5 (1987), the court specifically found that the amount of fees collected during the course of the estate administration was unreasonable in light of the simplicity of the issues involved. *In re Jarrett*, 602 N.E.2d at 134. Thus, the court appears to be giving particular weight to that factor of INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.5 that considers the length and difficulty of the issues involved in the case.

81. *In re Jarrett*, 602 N.E.2d at 133.

82. 626 N.E.2d 809 (Ind. 1994), *cert. denied*, 115 S. Ct. 93 (1994).

83. 631 N.E.2d 918 (Ind. 1994).

84. 636 N.E.2d 1253 (Ind. 1994).

85. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 8.2(a) (1987) provides:

A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal

have three opportunities in the space of one year to opine on the issue of attorney speech and how far an attorney may go in speaking about, or to, a tribunal before that speech is considered misconduct.⁸⁶ Members of the Bar must now study these opinions and apply them to their own daily practice, both in and out of the courtroom. The distinctions between these cases and their impact on practicing attorneys will be examined in this subpart.

2. *Facts.*—The earliest of the three 1994 decisions was *In re Garringer*.⁸⁷ In *In re Garringer*, the respondent lawyer was counsel for a couple seeking relief under the bankruptcy code. At some point, Garringer distributed an “open statement” charging officials in both the United States Bankruptcy Court and the Federal District Court for the Southern District of Indiana with misconduct. The statement charged that members of the judiciary, bankruptcy trustees, United States Attorneys and others participated in a conspiracy to “loot” bankruptcy estates. The statement was distributed to the President of the United States and other federal and state officials with the explanation that Garringer had exhausted all forms of relief available to him to expose this conspiracy, to no avail.

Garringer was charged with violating Rule 8.2(a) of the Rules of Professional Conduct along with two other violations.⁸⁸ The Hearing Officer appointed to the case found that Garringer violated Rule 8.2(a) by making statements regarding the integrity of judges and other adjudicatory officers with reckless disregard as to the statements’ truth or falsity.⁸⁹ The lawyer challenged the Hearing Officer’s findings, asserting that no evidence presented at trial proved that he made the statement public, and that he had done

office.

86. The timing is particularly unusual when considered in light of the fact that in September 1993, the court decided *In re Becker*, 620 N.E.2d 691 (Ind. 1993). In *In re Becker*, a lawyer was accused of violating INDIANA RULES OF PROFESSIONAL CONDUCT Rule 8.2(a) among other violations. The charges stemmed from Becker’s role as counsel in an adoption matter in which competing adoption petitions had been filed. During a hearing on the petitions, it was discovered that one witness’s testimony had not been tape recorded as had the rest of the proceedings. Neither party elected to recall the witness to have the testimony recorded, although the judge offered to allow the parties to do so. Becker’s client’s petition was later denied by the judge, and Becker filed an appellate brief in the Indiana Court of Appeals in which Becker accused the trial judge of misconduct in handling the matter. The appeal was dismissed. Shortly thereafter, in a newspaper interview, Becker questioned the objectivity of the court of appeals. The supreme court found that Becker had made statements in the brief and to the newspaper questioning the integrity of a judge which he knew to be false or with reckless disregard for their truth or falsity in violation of INDIANA RULES OF PROFESSIONAL CONDUCT Rule 8.2(a). The court issued a thirty-day suspension. *In re Becker*, 620 N.E.2d at 693. It also found that Becker pursued a claim of judicial misconduct improperly, stating that when an attorney faces what appears to be judicial misconduct, the appropriate course of action is to report such conduct to the Judicial Qualifications Commission. *Id.* at 694. Thus, in the span of ten months, the supreme court actually issued four opinions that touched upon the issue of attorney speech to, or about, a member of the judiciary.

87. *In re Garringer*, 626 N.E.2d 809, 810 (Ind. 1994).

88. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 8.2(a) (1987). Garringer was also charged with violating INDIANA RULES OF PROFESSIONAL CONDUCT Rules 3.5(c) & 8.4(d) (1987). These violations will not be considered in this discussion.

89. *In re Garringer*, 626 N.E.2d at 811-12.

nothing more than report the alleged misconduct to the proper authorities. Garringer reasoned that reporting misconduct to the authorities did not serve to undermine the public's confidence in the judiciary.⁹⁰ The court found that the language of the rule does not require that a statement be made to the public at large in order to be considered "public" but only that the statement be made to another individual.⁹¹ In addition, the court found that distribution of the statement to a number of individuals, including the President of United States and the Director of the FBI, constituted the making of a public statement under the terms of Rule 8.2(a).⁹²

Garringer further challenged the conclusion that he violated Rule 8.2(a). He asserted he was deprived of proper notice of the charges when the Disciplinary Commission's complaint was impliedly amended. Garringer alleged that this occurred when the Hearing Officer struck language in the Complaint that charged him with violating Rule 8.2(a) for making statements with knowledge of their falsity concerning the integrity of a judge and other judicial officers. Garringer contended he was prepared to offer evidence of the truth of the allegations contained in his open statement, and, when the verified complaint was amended, he was denied notice of the fact that the Disciplinary Commission intended to present proof that he made the statements with reckless disregard to their truth or falsity. The supreme court found this argument to be without merit, noting that the verified complaint contained language regarding reckless disregard both before and after the Hearing Officer amended the verified complaint.⁹³

Garringer alleged that he was denied due process because he was not allowed to present proof concerning the truth of the information in the open statement. He maintained that because the information was true, he was duty bound to report the conduct of the judges and other officials to the proper authorities. The supreme court agreed with the Hearing Officer's finding that, because there was absolutely no factual basis or reliable evidence presented by Garringer to support his conspiracy theory, he made the statements with reckless disregard for their truth or falsity. Therefore, the procedural deficiencies argument that Garringer asserted had no merit.⁹⁴

The supreme court found Garringer had, in fact, violated the Rules of Professional Conduct. It determined that he violated his duty as an attorney to refrain from acting in a way that damaged the integrity of the judicial system.⁹⁵ The court also found that although Garringer's conduct did no harm to any particular client, it did threaten to undermine the general public's confidence in the administration of justice.⁹⁶ The court imposed a sixty-day suspension, stating that a short period of suspension adequately addressed the severity of the misconduct and also served as a message to the Bar generally

90. *Id.* at 812.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 813.

95. *Id.*

96. *Id.* The court relied on *In Re Terry*, 394 N.E.2d 94 (Ind. 1979), for the proposition that when an attorney makes an unsubstantiated public suggestion that a judge or a judicial officer is motivated by improper influences, it weakens the public's confidence in the impartiality of the judicial process.

that the court would not tolerate its members making unsubstantiated claims about the judiciary.⁹⁷

In March 1994, the supreme court decided *In re Turner*.⁹⁸ *In re Turner* can be differentiated from the other cases reviewed in that the lawyer did not make statements about a member of the judiciary; he made statements to a member of the judiciary that directly resulted in charges of misconduct by the Disciplinary Commission. The incident grew out of Turner's appearance in a matter pending in a Marion County small claims court. A default judgment was entered prior to the time Turner undertook the representation. Upon entering his appearance, Turner filed a motion to vacate the default judgment and a hearing was scheduled on the matter.

On the hearing date, Turner and his client arrived and discovered that a judge pro tempore was presiding. The attorney representing the plaintiff in Turner's case, an apartment complex, also had numerous other cases on the docket. When that attorney arrived, he began calling individual defendants into a room to discuss settlement of their cases, in accordance with that court's policy that settlement be discussed in all such matters prior to trial.

After waiting a period of time, Turner asked when his case would be heard and if he could speak to the judge. Turner was told he would have to speak with opposing counsel before the matter could be heard. Some time later, when opposing counsel came into the reception area where Turner and his client were waiting, Turner objected to the amount of time he had been waiting and to the amount of control the other attorney exerted over the proceedings. Turner then referred to the court as a "Mickey Mouse Court." Turner and his client left the court prior to their case being heard. His motion to vacate the default judgment was denied based upon pleadings previously submitted.

A subsequent hearing was held, at which the same judge pro tempore presided. While the judge was issuing her ruling, Turner got up, approached the bench, and objected to the judge's ruling. Turner called the judge's ruling "ridiculous" and objected to her further involvement in the matter in light of the fact that she had been named in a grievance filed by Turner.

The supreme court, in a three-two decision, found Turner had committed misconduct by violating Rules of Professional Conduct 3.5(c) and 8.4(d).⁹⁹ The majority determined that, while it may be appropriate for settlement to be promoted in a court prior to undertaking a contested hearing, the most important consideration is that a judge maintain absolute control over the court and the proceedings at all times to avoid the appearance of partiality toward any attorney.¹⁰⁰ Although the majority determined that the judge pro tempore failed to exercise proper control over the court, it further held that such a lapse did not excuse the lawyer's behavior toward the court.¹⁰¹ The court determined that Turner owed a duty to preserve the integrity of the profession and the courts regardless of his opinion of a particular court or judge; he could have served his client's interests and

97. *In re Garringer*, 626 N.E.2d at 812.

98. 631 N.E.2d 918 (Ind. 1994).

99. *Id.* at 919. The majority consisted of Justices Dickson, Givan and DeBruler, while the two dissenting opinions were issued by Chief Justice Shepard and Justice Sullivan.

100. *Id.*

101. *Id.*

protested the procedures he observed no less effectively by patient firmness than by belligerence and theatrics.¹⁰²

The dissenting opinions by Chief Justice Shepard and Justice Sullivan recommended that no misconduct be found. They stated that the atmosphere leading to Turner's outburst was created by the court and the other attorney, neither of whom was disciplined.¹⁰³

The most recent Indiana case that considers the issue of attorney speech regarding a member of the judiciary is *In re Atanga*.¹⁰⁴ Atanga, a lawyer, represented a criminal defendant in Tippecanoe County. In 1991, the defendant had two criminal cases pending; one case dealt with an alleged probation violation and attempted revocation, and the second case involved drug-related charges that had not yet been brought to trial. Atanga appeared during the pendency of both cases. At a bond reduction hearing he told the judge that he had a scheduling conflict on the date of the probation revocation hearing, and asked that the date be moved. The judge then reset the probation revocation hearing to accommodate Atanga.

Thereafter, a Tippecanoe County Deputy Prosecutor appeared before the judge without prior notice to Atanga and made an oral motion to reset the probation revocation hearing back to its original date. The reason offered was that the state's expert witness previously had been subpoenaed to appear and could not be present on the new date. The judge granted the state's motion, and prepared an order to that effect. One day prior to the probation revocation hearing, Atanga submitted a motion to continue the probation revocation hearing. During a telephone conversation between the judge and lawyer that same day, Atanga told the judge that he would not be present at the probation revocation hearing because of his previously identified scheduling conflict. The judge informed Atanga that if he was not present in court the next day, he would be held in contempt of court.

On the date of the probation hearing Atanga did not appear. At the conclusion of the hearing, the judge ordered that Atanga appear at a show cause hearing to offer reasons as to why he should not be held in contempt. Notice of the judge's order was sent to Atanga at his office by certified mail; however, he failed to appear at the show cause hearing. As a result of this second failure to appear, the judge issued a body attachment for Atanga. Thereafter, Atanga was taken into custody and placed in the county jail to await his hearing. Both Atanga and his client were brought before the judge in a courtroom inside the jail, and Atanga was found to be in contempt of court for his previous failure to appear.

In the January 1992 edition of a small Lafayette news publication, Atanga gave an interview about his experience.¹⁰⁵ He was quoted as stating that he thought the judge was "ignorant, insecure and a racist. He is motivated by political ambition."¹⁰⁶ Atanga also

102. *Id.*, (citing INDIANA RULES OF PROFESSIONAL CONDUCT Rule 3.5 (Comment) (1987)).

103. *Id.* at 920.

104. 636 N.E.2d 1253 (Ind. 1994).

105. *Id.* at 1256.

106. *Id.*

stated that he considered "the errors and omissions in the record to be part of a systematic effort to confuse the defense and cover up the Judge's actions."¹⁰⁷

In a three-two decision, the respondent lawyer was found by the Indiana Supreme Court to have violated, *inter alia*, Rule of Professional Conduct 8.2(a) and was suspended from the practice of law for thirty days.¹⁰⁸ Although the court discussed other rule violations, the opinion focused primarily on the violation of Rule 8.2(a) as it related to Atanga's commentary in the newspaper. The court determined that the Disciplinary Commission had not attempted to demonstrate that Atanga intentionally had made a statement known to be false, but instead had shown that his statements were made with reckless disregard to their truth or falsity.¹⁰⁹ The court determined that the "reckless disregard" language of the rule was the focus of the Disciplinary Commission's case. Therefore, the Hearing Officer's decision to exclude, on relevancy grounds, Atanga's evidence regarding the truth of his commentary was proper.¹¹⁰ The majority also found that Atanga had reason to complain about the administration of the underlying criminal matter and about his treatment at the jail; however, such treatment did not justify criticism of the court and the judge as an institution.¹¹¹ The court concluded that had Atanga confined his comments directly to the criminal case and the events that had occurred, no finding of misconduct could have been made under the rule. However, when he made statements in the newspaper that drew disfavor on the integrity of the court, there was no basis to conclude that his comments were anything but reckless.¹¹² The majority determined that Atanga's misconduct was directed toward the administration of justice, and concluded that courts cannot function properly if the attorneys who come before them have the option of denying their authority.¹¹³

Chief Justice Shepard and Justice Sullivan dissented. The Chief Justice found that while he agreed with the majority that misconduct occurred, the thirty-day suspension imposed was "more than the facts warrant[ed]."¹¹⁴ Justice Sullivan opined that, not only was the sanction grossly disproportionate to the alleged misconduct, there was no demonstration that the Disciplinary Commission had met its burden of proof.¹¹⁵ Justice Sullivan further determined that, even assuming Atanga did violate Rule 8.2(a), his conduct had caused no actual injury and the majority had not taken into consideration any mitigating factors in determining an appropriate sanction.¹¹⁶

After the supreme court issued its opinion in this matter, Atanga filed a petition for rehearing with the court. In another three-two decision, the court denied the respondent's petition.

107. *Id.*

108. *Id.* at 1258.

109. *Id.* at 1257.

110. *Id.*

111. *Id.* at 1258.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 1260.

116. *Id.*

3. *Analysis.*—Although these decisions do not deal exclusively with violations of Rule 8.2(a), they all reach the issue of how freely an attorney may speak to, or about, the courts and judges. These decisions have a potential impact on the practice of every attorney who works before a tribunal. These cases, particularly *In re Atanga*, have been the topic of much discussion among lawyers since their publication. The primary questions associated with these cases are: (1) Was any new pronouncement made or was the court simply reiterating an established rule of law governing an attorney's right to speak? (2) What practical effect do these decisions have on an attorney's right to speak freely to or about a member of the judiciary? and (3) Is an attorney's right to speak significantly more limited than that of the lay public?

Substantial precedent exists regarding limitations on an attorney's right to free speech. In 1959, the United States Supreme Court commented in *In re Sawyer*¹¹⁷ on an attorney's right to unfettered free speech regarding the judiciary. In *In re Sawyer*, an attorney involved in defending a Smith Act case made a public comment criticizing the course that Smith Act cases had generally followed. She stated that there was no such thing as a fair trial in a Smith Act case, that the rules of evidence must be abandoned, and that some "rather shocking and horrible things . . . go on at the trial." She was sanctioned for her comments, and appealed to the United States Supreme Court. The Court stated that "lawyers are free to criticize the state of the law" and that such criticism is not the same as an attack on the motivation, integrity or competence of a judge personally.¹¹⁸ The Court also held that "[t]o say that 'the law is a[n] ass, a[n] idiot' is not to impugn the character of those who must administer it."¹¹⁹ The Court also stated that a lawyer's statement indicating that a judge is wrong is not considered improper because appellate courts and law reviews say such things on a daily basis; only when an attorney goes beyond that, to a commentary of a personal nature, is there cause for disciplinary action.¹²⁰

Traditionally, two bases are offered for the regulation of an attorney's First Amendment right to free speech regarding members of the judiciary. The first reason is the need to maintain public confidence in the judiciary. In 1979, the Indiana Supreme Court, in *In re Terry*,¹²¹ adopted this line of thought. In *In re Terry*, the respondent lawyer was charged with making false statements about a judge in correspondence directed to various public officials throughout Indiana. He defended his assertions, stating that he reasonably suspected that a conspiracy had been formed, and that his comments were permitted under the First Amendment. The court rejected this argument, and determined that "[u]nwarranted public suggestion by an attorney that a judicial officer is motivated by criminal purposes and considerations does nothing but weaken and erode the public's confidence in an impartial adjudicatory process."¹²² The court also found that professional misconduct, although affecting individuals, is not sanctioned for the benefit of those individuals; instead, the violation committed is a violation against society, and the judicial

117. 360 U.S. 622 (1959).

118. *Id.* at 631-32.

119. *Id.* at 634.

120. *Id.* at 636.

121. 394 N.E.2d 94 (Ind. 1979).

122. *Id.* at 96.

system as a whole.¹²³ In *In re Terry*, the comments made by the respondent both to and about the judiciary were determined by the court to weaken public confidence in the judicial system in general. The court indicated that the state's interest in protecting and defending its public officials and maintaining the integrity of the judicial system overrides an attorney's unrestricted right of free speech regarding judicial officers.¹²⁴

A second basis offered for regulation of attorney speech is that, as an officer of the court, a lawyer relinquishes some aspects of his right to unrestricted free speech upon entering the profession. This position is supported by the language of the 1991 case of *Gentile v. State Bar of Nevada*.¹²⁵ In *Gentile*, Justice Sandra Day O'Connor joined in a portion of Chief Justice William Rehnquist's dissent, to create a majority of the Court supporting the view that: "Lawyers are officers of the courts and, as such, may legitimately be subject to ethical precepts that keep them from engaging in what otherwise might be constitutionally protected speech. This does not mean, of course, that lawyers forfeit their First Amendment rights, only that a less demanding standard applies."¹²⁶ In other words, a lawyer's speech can be restricted if the state can show that a legitimate interest exists upon which to base the restrictions.

Gentile and its progeny provide that there are legitimate state interests that constitutionally permit some limitation on a lawyer's right to free speech. The state interest in question is the necessity of maintaining public confidence in the judicial system and protecting it from reckless or unfounded charges. This protection is maintained because the justice system is the ultimate protector of constitutional rights. Attorneys, as officers of the courts, have a unique point of view of how the judicial system works and where its deficiencies lie. However, lawyers are also unique in that they have taken an oath, a social contract of sorts, in which they agree to uphold and maintain the respect due to courts and judicial officers. The *Gentile* Court's view seems to be that no one is compelled to become a lawyer, but when a person takes the oath to become an attorney, he or she gives up a measure of the rights afforded to a layperson.¹²⁷

The Nevada Supreme Court provided a good discussion of the state's interest in *In re Raggio*.¹²⁸ In *In re Raggio*, the court determined that the right of free speech does not give a lawyer the right to openly denigrate the court in the eyes of the public.¹²⁹ As justification for this determination, the court discussed the role of the courts and the judicial system in our society, stating that, "[t]he controlling authority of law must be recognized if we are to endure as a nation. The courts are the symbolic representatives of law and must be allowed to do their duty."¹³⁰ The court further held that:

Every licensed attorney knows that he belongs to a profession with inherited standards of propriety and honor which experience has shown necessary in a

123. *Id.* at 95.

124. *Id.* at 96.

125. 501 U.S. 1030 (1991).

126. *Id.* at 1081-82 (O'Connor, J., concurring).

127. *Id.* at 1081.

128. 487 P.2d 499 (Nev. 1971).

129. *Id.* at 500.

130. *Id.* at 499.

calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards. The responsibility for the ultimate enforcement of those standards reposes in the courts since the government of the legal profession is a judicial function. Among other matters, these standards of propriety and honor require the lawyer to protect the rights of litigants in pending cases and to uphold the respect due courts of justice. Aside from this, simple regard for efficient and economical operation of our judicial system demands that all counsel refrain from needlessly creating possible impediments to obtaining a fair trial, with resulting litigation that delays rather than furthers the purpose of our courts.¹³¹

The *In re Raggio* court also noted that, “[t]he freedom to express oneself does not carry implications that nullify the guarantees of impartial trials. The processing of a case by those charged with the responsibility is not to be diverted from established protections and placed in the primitive melee of passion and prejudice.”¹³²

Although the judicial system has some means available to enforce compliance with court orders, those measures are not contemplated for use on a widespread scale. The primary means are deference and respect for the decisions rendered within the system. Decisions made within the judicial system are meaningless if no one feels compelled to follow them out of respect for the decision-making power of the courts. Thus, in order for the system to function properly, “justice must satisfy the appearance of justice.”¹³³

The Rules of Professional Conduct are drafted in part to protect the judicial system and the public’s confidence therein, but will not be interpreted to silence all lawyer criticism of the judicial system. The Indiana Supreme Court has determined that, in order to be reasonable in light of all of the circumstances, an attorney must present evidence that he can show is true, or that he conducted a credible inquiry prior to speaking. The Rules of Professional Conduct do not stand for the proposition that an attorney may be sanctioned for any statement criticizing the courts. In reaching this decision, the Indiana Supreme Court has determined that several factors must be taken into consideration, including what the attorney knew at the time he spoke, whether the attorney had a basis upon which to make statements concerning the court or the judge, whether those statements challenge the qualifications or integrity of the judge and the court, and whether the statement was reckless in light of the attorney’s knowledge and experience. An attorney risks violating the rules only when statements are false or are made with reckless disregard for their truth or falsity and such statements may have a tendency to lessen the public’s confidence in the integrity of the courts. Attorneys can, and should, point out deficiencies in the system, so long as those statements do not constitute unsupported attacks on the dignity and integrity of the courts.

Case law suggests that an attorney does not have the same rights of free speech as a lay person. In some situations, attorneys are held to a higher standard in order to protect the judicial system. There is no question that events that sometimes occur in a courtroom are worthy of criticism in the proper forum. However, such events do not serve as an

131. *Id.* at 499-500.

132. *Id.* at 500.

133. *Offut v. United States*, 348 U.S. 11, 13 (1954).

absolute defense to a charge of false or reckless criticism. Such is the state of the law, both in Indiana and other jurisdictions. Whether that law will be re-examined at some point in the future is an open question. Until it is, all members of the Bar must work within the confines set out by the cases discussed herein and elsewhere.

The judicial system is not without flaws, and open debate about these flaws should be readily encouraged. However, the Indiana Supreme Court, like many high courts, has determined that there is no place in the system for false or reckless allegations that undermine the integrity of the courts.

CONCLUSION

This body of law continues to develop and change. During 1994, courtroom practice changed with the advent of new evidence rules. The management of law office support staff members changed with the advent of new guidelines for legal assistants and clearer responsibility on the part of the supervising lawyer. Ethical scrutiny of legal fee arrangements was heightened while the scope of matters suitable for charging a contingent fee basis was broadened. Finally, the Indiana Supreme Court examined the constraints on lawyer speech that criticizes members of the judiciary.

In the near future, many of the topics covered herein will, almost certainly, ripen into issues needing further attention by the court. One common theme present in all of these developments is the obvious need for lawyers to heighten their attention to ethical traps and pitfalls. The stream of information on ethical and disciplinary problems is greater than it has been before. The changes discussed herein are, *en masse*, quite remarkable in their long term impact on the practice of law. Simple prudence dictates that an integral part of the lawyer's practice must include some regular scholarship and reflection on issues in professional responsibility.¹³⁴

134. Opinions expressed herein are solely those of the authors and, unless specifically attributed, should not be interpreted as those of the Indiana Supreme Court, the Indiana Supreme Court Disciplinary Commission nor the Office of the Attorney General.

APPENDIX A

RULES OF PROFESSIONAL CONDUCT

Rule 7.4. Communication of Specialty Practice.—When the communication otherwise meets the requirements of Rule 7.1, 7.2 and 7.3, a lawyer may:

- (a) Communicate the fact that the lawyer does or does not practice in particular fields of law, but may not express or imply any particular expertise except as otherwise provided in Rule 7.4(b);
- (b) Communicate that the lawyer is certified as a specialist in a field of practice when the certification and communication are authorized under Admission and Discipline Rule 30;
- (c) Until January 1, 1998, communicate or state that the lawyer is certified by the National Board of Trial Advocacy so long as the following appears immediately thereafter: “The National Board of Trial Advocacy is a private organization not affiliated with or sanctioned by the State or Federal government.” [As amended November 27, 1990, effective January 1, 1991; amended December 5, 1994 effective February 1, 1995.]

APPENDIX B

ADMISSION AND DISCIPLINE RULE 30

INDIANA CERTIFICATION REVIEW PLAN

Section 1. Purpose.

The purpose of this rule is to regulate the certification of lawyers as specialists by independent certifying organizations ("ICO's[?]") to:

- (a) Enhance public access to and promote efficient and economic delivery of appropriate legal services;
- (b) Assure that lawyers claiming special competence in a field of law have satisfied uniform criteria appropriate to the field;
- (c) Facilitate the education, training and certification of lawyers in limited fields of law;
- (d) Facilitate lawyer access to certifying organizations;
- (e) Expedite consultation and referral; and
- (f) Encourage lawyer self-regulation and organizational diversity in defining and implementing certification of lawyers in limited fields of law.

Section 2. Power of Indiana Commission for Continuing Legal Education (CLE).

CLE shall review, approve and monitor organizations (ICO's) which issue certifications of specialization to lawyers practicing in the State of Indiana to assure that such organizations satisfy the standards for qualification set forth in this rule.

Section 3. Authority of CLE.

In furtherance of the foregoing powers and subject to the supervision of and, where appropriate, appeal to the Supreme Court of Indiana, CLE shall have authority to:

- (a) Approve or conditionally approve appropriate organizations as qualified to certify lawyers as specialists in a particular field or closely related group of fields of law;
- (b) Adopt rules and policies reasonably needed to implement this rule and which are not inconsistent with its purpose;
- (c) Review and evaluate the programs of ICO's to assure continuing compliance with the purposes of this rule, the rules and policies of CLE, and the qualification standards set forth in Section 4;
- (d) Deny, suspend or revoke the approval of an ICO upon CLE's determination that the ICO has failed to comply with the qualification standards or rules and policies of CLE;
- (e) Keep appropriate records of those lawyers certified by ICO's approved under this rule;
- (f) Cooperate with other organizations, boards and agencies engaged in the field of lawyer certification;
- (g) Enlist the assistance of advisory committees to advise CLE; and
- (h) Make recommendations to the Indiana Supreme Court concerning:
 - (1) The need for and appointment of a Director and other staff, their remuneration and termination;

- (2) An annual budget;
- (3) Appropriate fees for applicant organizations, qualified organizations and certified specialists; and
- (4) Any other matter the Indiana Supreme Court requests.

Section 4. Qualification standards for independent certifying agencies.

(a) The ICO shall encompass a comprehensive field or closely related group of fields of law so delineated and identified (1) that the field of certification furthers the purpose of the rule; and (2) that lawyers can, through intensive training, education and work concentration, attain extraordinary competence and efficiency in the delivery of legal services within the field or group.

(b) The ICO shall be a non-profit entity whose objectives and programs foster the purpose of this rule and which is governed by lawyers who, in the judgment of CLE, are experts in the field of certification.

(c) The ICO shall have a substantial continuing existence and demonstrable administrative capacity to perform the tasks assigned it by this rule and the rules and policies of CLE.

(d) The ICO shall adopt, publish and enforce open membership and certification standards and procedures which do not unfairly discriminate against members of the Bar of Indiana individually or collectively.

(e) The ICO shall provide the following assurance to the continuing satisfaction of CLE with respect to its certified members:

(1) That members have extraordinary competence and efficiency in the field of certification that is

- (i) Comprehensive;
- (ii) Objectively demonstrated;
- (iii) Peer recognized; and
- (iv) Reevaluated at appropriate intervals;

(2) That members actively and effectively pursue the field of certification as demonstrated by continuing education and substantial involvement; and

(f) The ICO shall cooperate at all times with CLE and perform such tasks and duties as CLE may require to implement, enforce and assure compliance with and effective administration of this rule.

Section 5. Qualification standards for certification.

(a) To be recognized as certified in a field of law in the State of Indiana, the lawyer must be duly admitted to the bar of this state, in active status, and in good standing, throughout the period for which the certification is granted.

(b) The lawyer must be certified by an ICO approved by CLE, and must be in full compliance with the Indiana Bar Certification Review Plan, the rules and policies of the ICO and the rules and policies of CLE.

Section 6. Privileges conferred and limitations imposed.

(a) A lawyer who is certified under this rule may communicate the fact that the lawyer is certified by the ICO as a specialist in the area of law involved. The lawyer shall not represent, either expressly or impliedly, that the lawyer's certification has been individually recognized by the Indiana Supreme Court or CLE, or by an entity other than the ICO.

(b) Certification in one or more fields of law, shall not limit a lawyer's right to practice in other fields of law.

(c) Absence of certification in a field of law shall not limit the right of a lawyer to practice in that field or law. Participation in the Indiana Bar Certification Review Plan shall be on a voluntary basis.

(d) The number of certifications which a lawyer may hold shall be limited only by the practical limits of the qualification standards imposed by this rule and the rules and policies of the ICO.

(e) An ICO shall not be precluded from issuing certificates in more than one area of certification but in such event, the ICO's qualifications shall be judged and determined separately as to each such area of certification. To the extent consistent with the purpose of the Indiana Bar Certification Review Plan, any number of ICO's may be approved to issue certifications in the same or overlapping fields or groups of closely related fields of law.

Section 7. Fees.

To defray expenses of the Indiana Bar Certification Review program, the Indiana Supreme Court may establish and collect reasonable and periodic fees from the ICO's and from applicants and lawyers certified under the Indiana Bar Certification Review program.

Section 8. Appeal.

CLE action or inaction may be appealed as abuse of authority under the Rules of Procedure applicable to original actions in the Indiana Supreme Court. [Adopted December 5, 1994, effective February 1, 1995.]