

SURVEY OF 1996 DEVELOPMENTS IN THE LAW OF PROFESSIONAL RESPONSIBILITY

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INTRODUCTION

During 1996, the law of professional responsibility in Indiana developed significantly on two fronts; through reported decisions from Indiana courts and through amendments to the written rules governing both lawyers and disciplinary action. This evolution affects every practicing member of the Indiana bar to some degree and forces increased attention on ethics issues in daily practice. At the same time, the shifting landscape of the law, with expected developments in 1997, will again cause lawyers to devote even more energy on both legal duties and professional responsibility issues.

As in prior years, a steady flow of opinions from the Indiana Supreme Court further defined the boundaries of wrongful conduct and fleshed out Indiana's *Rules of Professional Conduct for Attorneys at Law*. This Article will highlight many of those decisions in an attempt to explain their role in the context of Indiana lawyer discipline. These decisions cover such diverse topics as jurisdiction in pro hac vice admissions, the reasonableness of fees, and lawyer solicitation. Comprehensive treatment of all the reported decisions involving ethics issues of interest to lawyers would be too large for any survey work to treat adequately. Representative cases, therefore, have been selected to illustrate changes to the law or reaffirmation of existing principles.

On another front, rules controlling some aspects of law office management and the disciplinary process have been changed by the Indiana Supreme Court to reflect new thinking regarding the practice of law. For example, the disciplinary process is now more open than ever before, with the lay public becoming increasingly involved. Regulation of client trust accounts was also changed to require greater attention by both the lawyers who maintain these accounts and the Indiana Supreme Court Disciplinary Commission. These regulatory changes herald even more changes on the horizon. To the extent practicable, this survey attempts to explain the significance of these changes and their scope as future changes take place. The groundwork is in place for dramatic changes in the way lawyers account for their stewardship of others' property.

The one observation which might serve as the leitmotif for any examination of this past year is that the Indiana Supreme Court is spending considerable time and energy dealing with professional responsibility issues. More accurately, the court is very active in developing ways to raise, as a whole, the ethics level of the bar. Although this same observation could be made for the high courts of other states, the reader would be well advised to note that Indiana's Supreme Court is

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comparatively very active in its modernization of this body of law.

I. SYNOPSIS OF LAWYER DISCIPLINE CASES

A. *Neglect of Client Matters*

Far and away, the most common misconduct dealt with in disciplinary actions is a lawyer's failure to exercise reasonable diligence in pursuing matters with which clients entrust them.¹ This lack of diligence is usually accompanied by a breakdown in communication between the lawyer and the client. This occurs even though the lawyer has a duty to keep the client informed.² In addition, there are a smattering of other rule violations often associated with these cases of neglect. For example, the respondent lawyers in some cases misrepresent the status of matters to their clients in an attempt to buy additional time to conceal their neglect.³ A neglected matter pending in court can also cause needless court involvement through additional proceedings. This usually results from an opponent's attempt to either process the case or dispose of it.⁴ The end result is something akin to a "death spiral." The spiral can be described as starting with inattention to the file, followed by a refusal to talk with the client, followed by misrepresentations to the client about the status of the case and ending with some permanent injury to the client's rights. Almost invariably, neglect cases involve prejudice to the rights of multiple clients and end in lengthy disciplinary opinions by the Indiana Supreme Court. Problems in the lawyer's personal life is another recurring theme in these cases.⁵ The following cases illustrate the need for lawyers to either prosecute their client's claims or, discontinue the representation.

The case of *In re Weybright*⁶ originally began with a complaint from the Disciplinary Commission in eleven counts. Ultimately, the Indiana Supreme Court found that Weybright committed the misconduct charged in ten of the eleven counts.⁷ Each count shared the essential common characteristic wherein the lawyer undertook representations for clients in family law related matters.

1. "A lawyer shall act with reasonable diligence and promptness in representing a client." IND. R. PROF. COND. 1.3.

2.

"(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

IND. R. PROF. COND. 1.4.

3. "It is professional misconduct for a lawyer to: . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . ." IND. R. PROF. COND. 8.4(c).

4. "It is professional misconduct for a lawyer to: . . . engage in conduct that is prejudicial to the administration of justice . . ." IND. R. PROF. COND. 8.4(d).

5. See *In re Schreiber*, 632 N.E.2d 362, 364-65 (Ind. 1994).

6. 656 N.E.2d 1142 (Ind. 1995).

7. *Id.* at 1143-44.

Thereafter, she failed to take action on behalf of her clients and did not respond to their inquiries. As a result of her inaction, her clients' interests were prejudiced. The supreme court found that Weybright failed to act diligently⁸ in violation of Indiana Rule of Professional Conduct 1.3.⁹ Furthermore, the court ruled that Weybright violated Indiana Rule of Professional Conduct 1.4¹⁰ by failing to respond to reasonable requests for information or to explain the matter in such a way as to permit the client to make informed decisions.¹¹ The court also found that Weybright failed to protect her clients' interests upon termination of the representation¹² in violation of Indiana Rule of Professional Conduct 1.16(d).¹³ Weybright received a three-year suspension for neglect of multiple client matters and related charges.¹⁴

In another case, a six count complaint was filed against a lawyer who, in essence, abandoned her practice without making any alternate provisions for her clients.¹⁵ The Indiana Supreme Court found various violations of Professional Conduct Rules 1.1¹⁶ (not acting with competence),¹⁷ 1.2(a)¹⁸ (failing to abide by the client's decisions concerning the objectives of the representation),¹⁹ 1.3²⁰

8. *Id.* at 1145.

9. *See supra* note 1.

10. *See supra* note 2.

11. *Weybright*, 656 N.E.2d at 1144-45.

12. *Id.* at 1145.

13.

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

IND. R. PROF. COND. 1.16(d).

14. *Weybright*, 656 N.E.2d at 1145.

15. *In re Cox*, 662 N.E.2d 635 (Ind. 1996).

16. "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." IND. R. PROF. COND. 1.1.

17. *Cox*, 662 N.E.2d at 636.

18.

A lawyer shall abide by a client's decision concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

IND. R. PROF. COND. 1.2(a).

19. *Cox*, 662 N.E.2d at 637.

20. *See supra* note 1.

(failing to act diligently),²¹ 1.4²² (failing to keep her clients informed),²³ and 8.4(c)²⁴ (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation).²⁵ For her misconduct, the lawyer was suspended for twelve months.²⁶

The Indiana Supreme Court also dealt with a four count disciplinary action in the case of *In re Kelly*.²⁷ In each count, the lawyer was charged with violating the rule governing neglect of an entrusted matter.²⁸ In three of the four counts, he was also charged with failure to communicate with his clients and a failure to respond to reasonable requests for information.²⁹ This opinion provides a good illustration of a general neglect case. The neglected matters involved (1) an "on-the-job" injury claim, (2) a guardianship matter, (3) a marriage dissolution action and (4) a medical malpractice action pending before the Indiana Department of Insurance. In the medical malpractice action, after several failures to timely comply with discovery, the defendants filed a motion that resulted in dismissal of the plaintiff's case with prejudice.³⁰ The respondent lawyer refused to communicate with the client and the client, through independent investigation, discovered the dismissal.³¹ For misconduct as to all four counts, the respondent lawyer was suspended for eighteen months.³²

These are, by no means, the only cases of this type. During the survey period, more than a dozen opinions³³ involving neglect were handed down by the Indiana Supreme Court. The court is particularly sensitive to this issue and is cognizant of the Comment to the Rule:

Perhaps no professional shortcoming is more widely resented than procrastination. A client's interest often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may

21. *Cox*, 662 N.E.2d at 635-38 (five counts).

22. *See supra* note 2.

23. *Cox*, 662 N.E.2d at 635-38 (all six counts).

24. *See supra* note 3.

25. *Cox*, 662 N.E.2d at 636.

26. *Id.* at 638.

27. 655 N.E.2d 1220 (Ind. 1995).

28. *See supra* note 1.

29. *See supra* note 2.

30. *See Kelly*, 655 N.E.2d at 1222-23.

31. *Id.* at 1223.

32. *See id.*

33. Some representative cases include: *In re Sexson*, 666 N.E.2d 402 (Ind. 1996) (neglect of a capital case resulted in a six month suspension); *In re Clifford*, 665 N.E.2d 907 (Ind. 1996) (four year neglect of an estate resulted in a thirty day suspension); *In re Woods*, 660 N.E.2d 340 (Ind. 1996) (four neglected matters, coupled with prior disciplinary action, resulted in an eighteen month suspension); *In re Kern*, 655 N.E.2d 339 (Ind. 1995) (six month delay in making a lien payment out of personal injury settlement proceeds resulted in a public reprimand).

be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.³⁴

B. Conflicts of Interest

Conflict of interest cases are often difficult to identify and analyze for both the practicing lawyer and disciplinary counsel. Several provisions in the Indiana Rules of Professional Conduct address many different situations in which conflicts can arise.³⁵ The conflict of interest rules appearing most often are Rules 1.7³⁶ and 1.9.³⁷ These rules prohibit a lawyer's representation of a client if that representation would conflict with the interests of another client (Rule 1.7(a)), the lawyer's interests (Rule 1.7(b)) or the interests of former clients (Rule 1.9). During the survey period, the Indiana Supreme Court handed down opinions in disciplinary actions which provide good examples of prohibited conduct in

34. IND. R. PROF. COND. 1.3 cmt.

35. IND. R. PROF. COND. 1.7 (the general rule); 1.8 (identifying specific prohibited transactions between lawyer and client); 1.9 (conflicts involving former clients); 1.10 (imputed disqualification of other members of a law firm when a conflict of interest arises); 1.11 and 1.12 (regarding former government lawyers, judges and arbitrators); 1.13 (governing situations in which an organization is a client); 2.2 (the lawyer as an intermediary between clients); and 2.3 (situations in which the lawyer makes an evaluation for third persons that may affect a client's interests).

36.

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

- (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
- (2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

IND. R. PROF. COND. 1.7.

37.

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or

(b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client or when the information has become generally known.

IND. R. PROF. COND. 1.9.

relation to each of these rules.

The lawyer in the case of *In re Horine*³⁸ represented a client in a bankruptcy proceeding. During the course of this representation, Horine entered into a contract with the client wherein the client agreed to purchase a car from him. In reality, the lawyer did not own the car but was selling it on behalf of an undisclosed client. After the emergence of a dispute, the true nature of the transaction became known. The lawyer was held to have violated Rule 1.7,³⁹ because he simultaneously represented two clients having adverse interests.⁴⁰ The court found that he also violated Rule 1.8(a),⁴¹ because he entered into a business transaction with a client without advising the client to seek independent legal advice or getting the client's consent to the conflict of interest in writing.⁴² As a result of these violations, the lawyer received a public reprimand.⁴³

Two separate disciplinary actions were reported under the decision of *In re Anonymous*.⁴⁴ In the first action, a company retained the respondent lawyer to represent it in connection with certain labor union grievances. A key witness to the dispute was a union officer who had negotiated the collective bargaining agreement between the union and the company. He gave testimony adverse to the union's position and thereafter lost his union office. The witness then met with a second attorney in the respondent lawyer's law firm to discuss representation in a suit against the union. The witness was referred to the respondent lawyer to discuss aspects of the pending dispute between the company and the union. They also discussed the witness' termination from his union office and possible legal claims the witness might have against the union.

At the second lawyer's direction, the firm opened a client file in the witness' name. Thereafter, there were meetings and letters between the respondent lawyer and the witness. Some of these communications related to the witness' discharge from his union office. The second lawyer and the witness never agreed on a plan of action against the union for the witness' loss of office. Moreover, the lawyer's firm never billed the witness for legal fees. Thereafter, the respondent lawyer

38. 661 N.E.2d 1206 (Ind. 1996).

39. See *supra* note 36.

40. *Horine*, 661 N.E.2d at 1207.

41.

A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction, and

(3) the client consents in writing thereto.

IND. R. PROF. COND. 1.8(a).

42. *Horine*, 661 N.E.2d at 1207.

43. *Id.* at 1208.

44. 655 N.E.2d 67 (Ind. 1995).

changed law firms and represented the company in a fraud action against several individuals, including the witness. The fraud action was directly related to the subject matter of the earlier dispute between the company and the union.

The primary issue before the supreme court in the disciplinary action was whether an attorney-client relationship had been formed between the respondent and the witness. The lawyer maintained that his relationship to the witness was only as a witness to the dispute between the company and the union. The court found that an attorney-client relationship can be implied by the conduct of the parties in the absence of an express agreement.⁴⁵ “An important factor is the putative client’s subjective belief that he is consulting a lawyer in his professional capacity and on his intent to seek professional advice.”⁴⁶

In the second action, the respondent lawyer represented a client briefly in a personal injury matter. After an initial consultation with the client and before the lawyer took further action on behalf of the client, the client discharged the lawyer and hired new counsel. Four years later, the client sued the successor lawyer for malpractice. The successor counsel’s insurance carrier retained the respondent lawyer to defend against the malpractice claim. Although the respondent lawyer disclosed his prior representation of the client and obtained consent from the successor counsel, he did not seek similar consent from his former client. The Indiana Supreme Court concluded that both lawyers violated Rule 1.9(a)⁴⁷ by undertaking representations adverse to the interests of former clients in the same or a substantially related matter.⁴⁸ Each of the lawyers received private reprimands.⁴⁹

C. *The Jurisdiction of the Supreme Court*

The extent of the supreme court’s original jurisdiction is spelled out in the Indianas Constitution.⁵⁰ The first two powers granted the court are the ability to admit and discipline attorneys. The court has undertaken these tasks for more than

45. *Id.* at 70.

46. *Id.*

47. *See supra* note 37.

48. *Anonymous*, 655 N.E.2d at 72.

49. *Id.*

50. The Indiana Supreme Court is a court of limited original jurisdiction:

The Supreme Court shall have no original jurisdiction except in admission to the practice of law; discipline or disbarment of those admitted; the unauthorized practice of law; discipline, removal and retirement of justices and judges; supervision of the exercise of jurisdiction by the other courts of the State; and issuance of writs necessary or appropriate in aid of its jurisdiction. 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.

a century,⁵¹ and its powers in this area are plenary.⁵² In addition to its constitutional grant, the court has, through the years, created, promulgated and amended the Indiana Rules for Admission to the Bar and the Discipline of Attorneys. These rules assist the Indiana Supreme Court in the exercise of its jurisdictional grant under Indiana's constitution. The rules create a variety of agencies, including the State Board of Law Examiners, the Disciplinary Commission of the Supreme Court of Indiana and the Indiana Commission for Continuing Legal Education. Virtually all facets regarding the admission of lawyers to the bar, standards of practice for lawyers and judges and disciplinary actions associated therewith are governed under these rules.

Admission and Discipline Rule 3 governs the admission of non-Indiana (or "foreign") attorneys on a pro hac vice basis.⁵³ Admission of out-of-state lawyers on a pro hac vice basis is commonly viewed as a process dealt with exclusively at the trial court level. However, during the survey period, the Indiana Supreme Court addressed a disciplinary action brought against a lawyer admitted on a pro hac vice basis. In the case of *In re Fletcher*,⁵⁴ the respondent lawyer's regular practice was located in Illinois, where he was admitted to practice law. Fletcher participated, however, in the trial of an Indiana case and practiced before an Indiana court on a pro hac vice basis. The Disciplinary Commission filed an action charging the lawyer with knowingly making false statements of material fact to the trial court. Claiming the Indiana Supreme Court lacked jurisdiction over him, Fletcher moved to dismiss the disciplinary action. The court, relying on

51. See *McCracken v. State*, 27 Ind. 491 (Ind. 1867) (court upheld law prohibiting county recorders from practicing law). "There are burdens that could not be imposed by [state] law even on an officer [of the court], but the one in question does not belong to that class." *Id.* at 492.

52. See *State ex rel. Western Parks, Inc. v. Bartholomew County Court*, 383 N.E.2d 290 (Ind. 1978). The court, commenting on its authority under the state constitution, held:

The Indiana Constitution gives this Court original jurisdiction to determine the qualifications for admissions and practice of law. This function is judicial and separate from the legislative or executive domain. Pursuant to the grant of jurisdiction, this Court has promulgated numerous rules which govern the qualifications and conditions precedent to the practice of law in the Indiana courts. To the extent that any legislative enactment conflicts with these rules, the rules must take precedence and the conflicting phrases within that statute must be deemed without force or effect.

Id. at 292 (citations omitted).

53. In relevant part, IND. ADMIS. DISC. R. 3 provides:

A member of the Bar of another state or territory of the United States, or District of Columbia, may appear, in the trial court's sole discretion, in Indiana trial courts in any particular proceeding for temporary period so long as said attorney appears with local Indiana counsel after petitioning the trial court for the courtesy and disclosing in said petition all pending causes in Indiana in which said attorney has been permitted to appear. Local counsel shall sign all briefs, papers and pleadings in such cause and shall be jointly responsible therefor.

54. 655 N.E.2d 58 (Ind. 1995).

article 7, section 4 of the Indiana Constitution,⁵⁵ held that it is within the province of the supreme court to regulate the practice of law in Indiana.⁵⁶ The court further concluded that a pro hac vice admission “bears with it the obligation to subject oneself to the full panoply of Indiana court rules, including those involving professional conduct and discipline.”⁵⁷ The court acknowledged that some of the usual sanctions in lawyer discipline cases were not appropriate for an out-of-state lawyer.⁵⁸ The court went on to suggest that other sanctions may be appropriate, including “vacating existing pro hac vice admissions, prohibiting future pro hac vice admissions, injunctive relief under Admis.Disc.R. 24,⁵⁹ and costs.”⁶⁰ The *Fletcher* case serves as a good example of the broad scope of the Indiana Supreme Court’s jurisdiction in regulating the practice of law and, simultaneously, the court’s ability to regulate the unauthorized practice of law.

D. Attorney Fees

In 1996, the Indiana Supreme Court decided several cases involving attorney fees. Most notably, the court addressed the following issues: 1) whether the fee charged was reasonable under the circumstances, 2) how lawyers should bill against monies denominated as a “retainer,” 3) calculating fees where the recovery proceeds are paid over a period of time, and 4) contingent fee contracts where the amount of fees are fixed by statute.

The case of *In re Sexson*⁶¹ involves a lawyer who served as appointed counsel at trial and on appeal in a death penalty case. After multiple delays, the respondent lawyer filed a twenty page appellate brief that was deemed “woefully inadequate” by the Indiana Supreme Court.⁶² The lawyer billed the county for 558.8 hours in connection with the appeal and was paid \$40,743.50 for services rendered. In addition, he billed the county an additional \$13,097 for 187.1 hours of work on the appeal for which he had not been paid. The court found the lawyer violated Rule 1.5(a).⁶³ For this and other violations, the respondent lawyer was

55. See *supra* note 50.

56. *Fletcher*, 655 N.E.2d at 59-60.

57. *Id.* at 60.

58. *Id.* at 61.

59. IND. ADMIS. DISC. R. 24. This particular rule has essentially remained in its original form as adopted in 1952. The full text of the rule is somewhat lengthy, but it establishes that the preferred remedy under the rule is injunctive relief. The rule also identifies the entities having concurrent jurisdiction to initiate and prosecute a claim for the unauthorized practice of law.

60. *Fletcher*, 655 N.E.2d at 61 (footnotes omitted).

61. 666 N.E.2d 402 (Ind. 1996).

62. *Id.* at 403.

63. *Id.*

A lawyer’s fee shall be reasonable. The factors to be considered in determining the reasonableness of the fee include the following:

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

suspended for six months with automatic reinstatement of his license.⁶⁴

Another lawyer received a thirty day suspension for charging an unreasonable fee in the case of *In re Comstock*.⁶⁵ In the underlying representation, the client paid the lawyer a retainer of \$7500 because the client was afraid he was about to become the subject of a criminal prosecution. The client also hired the lawyer to represent his interests in a civil matter pending at that time. The lawyer was to bill against the retainer at a rate of \$100 per hour. In this case, the lawyer made two telephone calls to verify that no criminal charges were contemplated against his client. The length of the calls totaled four tenths of an hour.

After putting in some time on the client's civil matter, the respondent lawyer traveled to California on personal business. While in California, the lawyer billed against the retainer for traveling six hours on each of three days to a law library. He claimed research was done attributable to his client's case. While the lawyer was in California, the client wrote both to the lawyer's Indiana law office and to the lawyer personally in California. The purpose of the letters was to discharge the respondent. Even after notice of the discharge was received, the lawyer continued to do work and bill against the retainer. When the lawyer issued his final bill, he deemed the \$7500 retainer as having been earned in its entirety simply in verifying that his client was facing no criminal charges. As with the *Sexson* matter, the court found that this lawyer's fee was unreasonable.⁶⁶ The supreme court also found the respondent lawyer in *Comstock* to have violated Rule 1.16(d)⁶⁷ by failing to return an unearned fee upon termination of the representation.⁶⁸

A somewhat more unusual fee problem is presented in the case of *In re Myers*.⁶⁹ In this case, several members of a family hired the respondent lawyer to represent them in an attempt to recover money they paid into a questionable investment scheme. The lawyer and his clients entered into a contingency fee agreement in which the lawyer would be paid ten percent of the gross recovery of his clients' investment. The case was promptly settled with the investment

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

IND. R. PROF. COND. 1.5(a).

64. *Sexson*, 666 N.E.2d at 404.

65. 664 N.E.2d 1165 (Ind. 1996).

66. *Id.* at 1168. See also *supra* note 63.

67. See *supra* note 13.

68. *Comstock*, 664 N.E.2d at 1168.

69. 663 N.E.2d 771 (Ind. 1996).

company for a refund of the original investment plus interest. The settlement was structured so that the first two payments were for \$50,000 each and thirty subsequent payments of \$15,000 each. This led to a total settlement payout of \$550,000.

The respondent lawyer took his fee of \$50,000 out of the first two payments. Thereafter, the principal of the investment company defaulted after paying only \$160,000. The clients received a total of \$110,000 which left an uncollectible balance of \$390,000 on the settlement. The clients filed a complaint with their local bar association's fee dispute committee. That body issued a non-binding decision that, pursuant to their contingent fee agreement, the lawyer was only entitled to ten percent of the monies recovered. The bar association urged the lawyer to return \$35,500 to the clients, which he declined to do.

The Indiana Supreme Court imposed a public reprimand on the lawyer and found that he had violated Rule 1.5(a)⁷⁰ by taking an unreasonable fee.⁷¹ The court also agreed with the tendered stipulation of the parties that the term "recovery," as used in the fee agreement, meant the actual receipt of funds.⁷² Furthermore, the court acknowledged precedent from other jurisdictions holding that any ambiguities in a contingency fee agreement should be construed against the lawyer.⁷³ The court also found the lawyer violated Rule 1.5(c)⁷⁴ regarding the formalities associated with settling a contingent fee representation.⁷⁵ In this violation, the lawyer neglected to provide a written settlement statement to his client at the time of settlement.

The Indiana Supreme Court further addressed the subject of contingent fee representations in the case of *In re Anonymous*.⁷⁶ The respondent lawyer in the

70. See *supra* note 63.

71. *Myers*, 663 N.E.2d at 774.

72. *Id.*

73. *Id.* at 774 n.5. The court observed, in pertinent part, "Where there is not an explicit agreement governing contingencies (such as default) arising in relation to structured settlement agreements, other jurisdictions have construed ambiguities in concomitant contingency fee agreement against the attorney." *Id.*

74.

A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

IND. R. PROF. COND. 1.5(c).

75. *Myers*, 663 N.E.2d at 774.

76. 667 N.E.2d 394 (Ind. 1995).

case represented a client in a worker's compensation matter. Even though the lawyer made efforts to explain his fee to his client, he failed to set forth the terms of the agreement in writing. Fees in worker's compensation matters are regulated specifically by statute⁷⁷ and are contingent on the outcome of the case. The supreme court held that fee agreements in these matters must be in writing, and, because there was no writing in the instant case, the lawyer violated Rule 1.5(c).⁷⁸ The court explained,

Written contingent fee agreements increase the client's awareness of what the final bill for legal services will be. It has been stated that a client's consent to pay a specified fee can only be considered voluntary where the lawyer has communicated a fair estimate of the likely total fee to the client in advance.⁷⁹

During the survey period, therefore, the court provided important guidance to the bar regarding legal fees and their reasonableness. Lawyers would be well advised to go the extra mile in making sure the client's understanding of the agreement is clear and unequivocal. This is especially true if the fee agreement is contingent or the method by which fees will be calculated may change during the course of the attorney client relationship.

II. RECENT RULE CHANGES FOR THE BAR

Admission and disciplinary matters within the bar have a constantly changing regulatory landscape. As noted earlier, the Indiana Supreme Court's jurisdiction is limited by the state constitution.⁸⁰ Within the court's jurisdictional ambit, however, it has plenary authority to change its rules for admission to, and the operation of, the Indiana bar. During the prior survey period, for example, the court created rules governing the operation and record keeping requirements associated with trust accounts.⁸¹ The follow up to that rule change, along with several other additions and modifications to the operation of the bar, were promulgated through orders of the Indiana Supreme Court issued in late December 1996.

A. Rules Affecting The Disciplinary Process

1. *Trust Accounts*.—Perhaps the most anticipated rules in this area were the procedural rules which would implement the late 1995 creation of rule 23, section 29 of the Indiana Rules for Admission and Discipline of Attorneys. In short, the 1995 amendments require lawyers to keep certain records (specified in the rule)

77. See IND. ADMIN. CODE tit. 631, r. 1-1-24 (1996).

78. *Anonymous*, 667 N.E.2d at 395; see also *supra* note 74.

79. *Anonymous*, 667 N.E.2d at 394 n.3 (citations omitted).

80. See *supra* note 50.

81. See Kevin P. McGoff, *Survey of 1995 Developments in the Law of Professional Responsibility*, 29 IND. L. REV. 1005, 1006-08 (1996) (discussing IND. ADMIS. DISC. R. 23, § 29).

associated with maintaining a trust account.⁸² In addition, the rule mandated that lawyers could only keep trust accounts at financial institutions that are on an “approved” list maintained by the Indiana Supreme Court Disciplinary Commission.⁸³ The primary burden on an “approved” financial institution was a requirement that the institution agree to notify the Disciplinary Commission of all overdrafts on lawyers’ trust accounts.⁸⁴ As a practical matter, these rule changes meant that the commission would have to contact virtually every financial institution in the state in order to afford them an opportunity to become an “approved” institution.

Structurally, the Indiana Supreme Court Disciplinary Commission Rules Governing Attorney Trust Account Overdraft Reporting are divided into six parts: Rule 1—Definitions; Rule 2—Approval of Financial Institutions; Rule 3—Disapproval and Revocation of Approval of Financial Institutions; Rule 4—Duty to Notify Financial Institutions of Trust Accounts; Rule 5—Processing of Overdraft Reports by the Commission; and Rule 6—Miscellaneous Matters.

The definitions sections of Disciplinary Commission Rule 1 are self explanatory and identify the terms “Financial institution,” “Trust account” and “Properly payable.”⁸⁵ Disciplinary Commission Rule 2 describes the approval process for financial institutions. The written agreement between the financial institution and the commission is contained in the rules.⁸⁶ Of particular significance to the practicing bar, the rule requires that a listing of the approved financial institutions be published in *Res Gestae*, the official publication of the Indiana State Bar Association, each year in December.⁸⁷ Otherwise, the names of approved financial institutions will be available through written or telephone inquiries to the commission.⁸⁸

Disciplinary Commission Rule 3 specifies the procedure and causes why a financial institution might be denied approval or why existing approval under the rule might be revoked. In particular, an institution might have its approval

82.

Every attorney shall maintain and preserve for a period of at least five (5) years, after final disposition of the underlying matter, the records of trust accounts, including checkbooks, canceled checks, check stubs, written withdrawal authorizations, vouchers, ledgers, journals, closing statements, accounting or other statements of disbursements rendered to clients or other parties with regard to trust funds or similar equivalent records clearly and expressly reflecting the date, amount, source, and explanation for all receipts, withdrawals, deliveries and disbursements of the funds or other property held in trust.

IND. ADMIS. DISC. R. 23, § 29(a)(2) .

83. *Id.* § 29(a)(1).

84. *Id.* § 29(b)-(c).

85. IND. SUP. CT. DISCIPLINARY COMM’N R. GOVERNING ATT’Y TRUST ACCT. OVERDRAFT REPORTING 1 [hereinafter DISC. COMM’N R.].

86. DISC. COMM’N R. Exh. A.

87. DISC. COMM’N R. 2C.

88. DISC. COMM’N R. 2C.

revoked “if it engages in a pattern of neglect or acts in bad faith in not complying with its obligations under the written agreement.”⁸⁹ The commission’s refusal to give approval to an institution who refuses to submit an executed written agreement is not appealable or subject to challenge.⁹⁰ An institution whose approval has been revoked or withheld can, however, submit a petition including a plan for curing the deficiencies which caused the adverse finding in the first instance.⁹¹

Disciplinary Commission Rule 4 requires the lawyer or law firm to explicitly identify for the financial institution which of the firm’s accounts is a trust account.⁹² Under the rule, the approved institution obviously has no duty to report to the commission for overdrafts on accounts that have not been identified as trust accounts.⁹³ The rule does, however, impose a duty on every member of a firm to insure that the financial institution has notice of each account that is a firm trust account.⁹⁴

The commission, meanwhile, has a duty to notify the lawyer/account holder whenever it receives notice of a trust account overdraft from a financial institution.⁹⁵ In this notification, the commission must give the lawyer ten business days to explain the overdraft.⁹⁶ As with complaints received by the commission, the request is actually a demand for information. Under the terms of the rule, failure to comply with the commission’s request could be viewed as a refusal to cooperate with a disciplinary matter as prohibited by Professional Conduct Rule 8.1(b).⁹⁷ If the circumstances warrant, the Executive Secretary of the Disciplinary Commission can bring the matter to the attention of the full commission to consider whether a grievance should be issued against the attorney/account holder.⁹⁸

89. DISC. COMM’N R. 3B.

90. *See* DISC. COMM’N R. 3A.

91. *See* DISC. COMM’N R. 3D.

92. DISC. COMM’N R. 4A.

93. DISC. COMM’N R. 4C.

94. DISC. COMM’N R. 4B.

95. DISC. COMM’N R. 5A.

96. DISC. COMM’N R. 5A.

97.

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

....

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6.

(emphasis added). IND. R. PROF. COND. 8.1.

98. DISC. COMM’N R. 5B.

The upshot is that the creation of these rules mandates uniformity in the way in which Indiana lawyers manage trust accounts. Irrespective of the area in which a lawyer or law firm concentrates its practice, the structure and maintenance of its trust accounts will be very similar to other trust accounts around the state. This uniformity will also aid in the regulation of the bar in that the Disciplinary Commission will be able to discover and react to trust account problems more promptly and with greater consistency of result.

2. *Disbarment.*—Before the end of 1996, the court produced a series of amendments to the relevant provisions of its rules. The changes made it clear that disbarment is, in the court's view, a permanent sanction. Specifically, the court amended rule 23, section 3 of Indiana Rule for Admission and the Discipline of Attorneys to change the language of the rule, which previously provided for "permanent disbarment from the practice of law subject to reinstatement hereafter provided,"⁹⁹ to delete all references to reinstatement.¹⁰⁰ The significance of these amendments provides that disbarment no longer carries with it any reference to reinstatement and, it appears, abrogates reinstatement as an option for disbarred lawyers. In theory, this change makes resignation from the bar a more attractive option for lawyers who have committed the most serious violations rather than gambling on a trial in hopes of a sanction less severe than disbarment.

3. *Public Representation in the Disciplinary Process.*—During the survey period, the structure of the Indiana Supreme Court Disciplinary Commission was altered to increase the number of members from seven to nine. The additional positions on the commission were created expressly for the purpose of adding non-lawyer members. By rule change effective February 1, 1996, the supreme court defined the new composition as follows:

(b) The Disciplinary Commission shall consist of nine (9) members appointed by the Supreme Court of Indiana, seven (7) of whom shall be admitted to the Bar of the Supreme Court and two (2) of whom shall be lay persons. Those who are not members of the Bar must take and subscribe to an oath of office which shall be filed and maintained by the Clerk of the Court. A reasonable effort shall be made to provide geographical representation of the State. The term of each member shall be for five (5) years. Provided, however, upon the effective date of this rule, two (2) members shall be appointed for a term of two (2) years, two (2) members for a term of three (3) years, two (2) members for a term of four (4) years and (1) member for a term of five (5) years. The initial term of the two additional members authorized by the amendment of this subsection effective February 1, 1996, shall be for two (2) and four (4) years, respectively. Thereafter, the terms of each appointee shall be for five (5) years, or in the case of an appointee to fill the vacancy of an unexpired term, until the end of such unexpired term. Any member may be terminated by the Court for a good cause.

99. IND. ADMIS. DISC. R. 23 § 3(a) (1996) (before amendment).

100. IND. ADMIS. DISC. R. 23 § 3(a).

Commission members who are not admitted to the Bar shall not be eligible for appointment as hearing officers under Section 18(b) of this rule.¹⁰¹

This is the first time in Indiana's regulation of the bar that lay representatives have had a voice in the disciplinary process.

B. Rules Changes Affecting Admission to the Bar

In the latest series of rule changes, the Indiana Supreme Court adopted new provisions and expanded several old provisions to clarify the process by which candidates are admitted to both Indiana's bar examination and to the bar itself. Of particular significance, the provisions dealing with the process of determining a candidate's character and fitness have been modified. Furthermore, the Board of Law Examiners now has some specific provisions identifying what specific information in its records are subject to disclosure.

Extensive changes have been made with respect to the "character and fitness" process.¹⁰² Although some of the amendments could fairly be termed as clean up provisions, this rule has been substantially reconstructed to give a more formal process for determining whether an applicant possesses the requisite character to be admitted to the Indiana bar. Some of the more important amendments are described below.

Section 5 permits the State Board of Law Examiners to require an applicant to appear before the full board and to submit additional proof for inquiry into an applicant's character and fitness.¹⁰³ The board's finding regarding the character and fitness of each applicant must be either: (1) eligible for admission to the bar;¹⁰⁴ (2) not eligible for admission, with or without permission to reapply;¹⁰⁵ or (3) due to concerns "based upon evidence of drug, alcohol, psychological or behavioral problems," admission is conditional¹⁰⁶ or withheld for up to two years to show rehabilitation,¹⁰⁷ or that the determination must be extended for up to a year.¹⁰⁸ If the board finds the applicant is not eligible for admission to the bar, the applicant has thirty days to file a written request for a hearing.¹⁰⁹ The board may dispense with the hearing and submit the matter, with their written findings, to the supreme court.¹¹⁰ A hearing of the board is before a panel of three of its

101. *Id.* § 6(b). Section 18(b), referred to in the rule, governs the procedure in license reinstatement matters.

102. IND. ADMIS. DISC. R. 12.

103. *Id.* § 5.

104. *Id.* § 6(a).

105. *Id.* § 6(b).

106. *Id.* § 6(c).

107. *See id.* § 6(d).

108. *See id.* § 6(e).

109. *See id.* § 7.

110. *See id.* § 8.

members.¹¹¹ Further provisions within the rule require specific notice of the hearing to the applicant, a record of proceedings and findings from the panel to the full board to permit it to make a decision.¹¹² One provision even permits the board to hire an outside lawyer to represent the state during the hearing.¹¹³ This new process also permits the board to recommend revocation of admission or conditional admission to the supreme court if the applicant has violated conditions of admission, falsified evidence or not fully disclosed evidence in regards to character and fitness.¹¹⁴

This formalization of the conditional admission process allows the State Board of Law Examiners considerably more flexibility in tailoring admission to fit both the concerns of the board in protecting the public and, at the same time, permitting admission to a broader array of candidates.

Also formalized in this round of rule amendments, the State Board of Law Examiners now has more specific rules regarding information which it can disclose.¹¹⁵ As with prior practice, information available to the general public is primarily limited to the names of applicants who have successfully passed the bar examination and the names of those who have been admitted to the practice of law.¹¹⁶ Other sections permit disclosure of limited information to national entities such as the National Conference of Bar Examiners and the Law School Admission Council Bar Passage Study.¹¹⁷ The disclosure provisions also permit some information to be obtained by the Supreme Court Disciplinary Commission in the course of disciplinary matters, provided that the disclosure is not prohibited by other law.¹¹⁸ The applicant can also obtain copies of materials submitted to the board or by the applicant, and if a hearing was held, the record of the hearing will be made available to the applicant.¹¹⁹

CONCLUSION

The contours of the professional responsibility landscape are changing dramatically for both current members of the bar and for those who hope to be admitted in the future. These changes occur through a variety of mechanisms including the development of case law associated with the Indiana Rules of Professional Conduct and the civil law developed from lawyer malpractice cases. These changes also occur through the creation of new rules and modification of existing rules. The gravamen of this work is to demonstrate that standards expected of the bar are rising in all areas and at all levels of practice.

111. *See id.* § 9(a).

112. *See id.* § 9(b)-(d).

113. *Id.* § 9(e).

114. *See id.* § 10.

115. *Id.* § 19.

116. *Id.* § 3(a)-(b).

117. *Id.* § 3(c)-(e).

118. *Id.* § 3(f).

119. *Id.* § 3(g).

A careful study of materials associated with professional responsibility issues will show the reader that the groundwork is in place for even more changes on the horizon. Future areas of change will probably include the interest on lawyers' trust accounts and a formalized scheme for fostering pro bono practice. This is an important time for the law of lawyering. Attorneys should make a commitment to develop their knowledge of professional responsibility issues on a routine timetable as they would with the substantive areas of law in which they normally practice. Failing to do so could have far reaching, and dire, consequences on the lawyer's continued practice of law.